



PARLIAMENT OF NEW SOUTH WALES

COMMITTEE ON THE OMBUDSMAN, THE  
POLICE INTEGRITY COMMISSION AND  
THE CRIME COMMISSION

REPORT 7/55 – OCTOBER 2013

2013 GENERAL MEETINGS WITH  
THE POLICE INTEGRITY COMMISSION  
THE INSPECTOR OF THE POLICE INTEGRITY COMMISSION  
THE NSW CRIME COMMISSION  
THE INFORMATION AND PRIVACY COMMISSION  
THE NSW OMBUDSMAN  
THE CHILD DEATH REVIEW TEAM



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The motto of the coat of arms for the state of New South Wales is "Orta recens quam pura nites". It is written in Latin and means "newly risen, how brightly you shine".

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# Membership

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# Terms of Reference

The Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission is a current joint statutory committee, established 4 Dec 1990, re-established 22 June 2011.

The Committee was established in 1990 by amendment to the *Ombudsman Act 1974* to monitor and review the functions of the Ombudsman's Office. The Committee's jurisdiction was extended under the *Police Integrity Commission Act 1996* to include oversight of the Police Integrity Commission and the Inspector of the Police Integrity Commission; under the *Government Information (Information Commissioner) Act 2009* to include oversight of the Information Commissioner; under the *Privacy and Personal Information Protection Act 1998* to include oversight of the Privacy Commissioner; and under the *Crime Commission Act 2012* to include oversight of the Crime Commission, the Inspector of the Crime Commission and the Management Committee of the Crime Commission.

The functions of the Joint Committee are set out in section 31B of the Ombudsman Act, section 95 of the Police Integrity Commission Act, section 44 of the Government Information (Information Commissioner) Act, section 44A of the Privacy and Personal Information Protection Act, sections 17 and 71 of the Crime Commission Act respectively. Section 34J(1) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* is also relevant to the work of the Committee in its oversight of the Ombudsman's role as Convenor of the Child Death Review Team.

It should be particularly noted that none of these sections authorises the Joint Committee:

- \* to investigate a matter relating to particular conduct; or
- \* to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, a particular matter or particular conduct; or
- \* to reconsider the findings, recommendations, determinations or other decisions of the Ombudsman, the Police Integrity Commission, the Inspector of the Police Integrity Commission, the Information Commissioner, the Privacy Commissioner or the Crime Commission in relation to a particular investigation, complaint or matter.

## Chair's Foreword

On 22 February 2013, the Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission held the Fourteenth General Meeting with the Police Integrity Commission; the Thirteenth General Meeting with the Inspector of the Police Integrity Commission; the First General Meeting with the NSW Crime Commission; the Second General Meeting with the Information and Privacy Commission; the Eighteenth General Meeting with the NSW Ombudsman; and the Second General Meeting with the Child Death Review Team.

Over the course of conducting these General Meetings, the Committee heard of issues common to several of the agencies it oversees, such as complaints handling, compliance obligations, relationship management between agencies, and technological and IT challenges. The Committee acknowledges the work that each of the agencies does in dealing with these complex overlapping issues as well as the specific operational issues particular to each agency's jurisdiction.

The Committee continuously reviews its effectiveness and this year has focused on how it can improve its own reporting to Parliament in discharging its statutory oversight responsibilities. Changes include consolidating six separate reports on the General Meetings into a single report, so that key themes and common issues can be flagged and commented upon. Also, for the first time, the Committee is reporting on individual and consolidated budget allocations across the agencies it oversees. Staffing profiles across agencies are also being reported. This year's report provides a benchmark for future years and will enable the Committee to monitor changes in financial resources and staffing over time.

The work of the agencies we oversee is crucial to the integrity of the NSW public sector as a whole. To ensure more meaningful recognition of their work, the Committee is working with agencies through its current Inquiry into Performance Measures and Accountability of Oversight Agencies to find new ways to inform Parliament of agencies' progress.

**The Hon. Catherine Cusack MLC**

Chair



# Executive Summary

The Committee held General Meetings on 22 February 2013 with the Police Integrity Commission, the Inspector of the Police Integrity Commission, the NSW Crime Commission, the Information and Privacy Commission, the Ombudsman and the Child Death Review Team. The Committee has decided to cover the evidence received from all agencies in a single report, so that thematic and overlapping issues are more easily identified.

Chapter One introduces some key themes and common challenges facing the agencies oversighted by the Committee. These include the compliance obligations of small agencies, examples of IT and database challenges, and general resourcing and staffing matters. The chapter also looks at an unresolved area of concern in relation to the management of complaints about the Crime Commission, which involves both the Police Integrity Commission and the new Inspector of the Crime Commission.

Chapter Two covers the Police Integrity Commission (PIC) and discusses critical incident investigations; handling and assessment of complaints; and relationships with other bodies (the Crime Commission, the Inspector of the PIC and Inspector of the Crime Commission).

Chapter Three looks at the work of the Inspector of the Police Integrity Commission, including the Taskforce Emblems matter; the relationship between the PIC and Inspector of the PIC; and communication with other agencies and key personnel.

Chapter Four covers evidence taken from the NSW Crime Commission, including overview of the new structure of the Commission under its modernised legislation; relationships with the Police Integrity Commission and the NSW Police Force; the Commission's involvement in investigations of recent shootings; audits; and confiscation work.

Chapter Five discusses the Information and Privacy Commission and covers issues including the experiences and challenges since the merger of the Information Commission and the Privacy Commission; relationships with external practitioners of information and privacy policy; challenges to privacy raised by technology; and issues experienced by local councils on privacy and information policy.

Chapter Six looks at the Ombudsman's Office and discusses Operation Prospect; oversight of custodial environments; the use of Tasers by the NSW Police Force; child protection issues; and the management of asbestos.

Chapter Seven covers the current work and future projects of the Child Death Review Team and includes a discussion of IT and database difficulties the Team has encountered.

Chapter Eight provides financial resourcing and staffing information for each agency over 2010-11 and 2011-12.

Chapter Nine looks at two oversight matters of continuing interest to the Committee—the issue of integrity checks on affidavits supporting warrants for the use of surveillance devices, and confidential settlements.

\* All references to Committee documents can be found on the Committee website at: <http://www.parliament.nsw.gov.au/ombudsmanpic>.

# List of Findings and Recommendations

RECOMMENDATION 1 \_\_\_\_\_ 5

The Committee recommends that the Police Integrity Commission and the Inspector of the Crime Commission develop protocols to ensure there is a clear understanding of lines of oversight and responsibility for the management of complaints made against the Crime Commission.

RECOMMENDATION 2 \_\_\_\_\_ 18

The Committee recommends that the Police Integrity Commission and the Crime Commission jointly develop formal protocols to be followed in the event of any future disagreements between the two agencies, with the objective of promoting alternatives to litigation.

RECOMMENDATION 3 \_\_\_\_\_ 18

The Committee recommends that, in light of the specific history of the Police Integrity Commission and the Crime Commission, the Premier review the *Premier’s Guidelines for Litigation Involving Government Authorities: M1997-26* with a view to providing clarity about how agencies considering litigation should proceed in future. Consideration could be given to developing a new guideline that meets the more complex circumstances of litigation associated with oversight agencies.

RECOMMENDATION 4 \_\_\_\_\_ 22

The Committee recommends that the Minister for Police introduce amendments to *Police Act 1990* to remove the scope for the Minister of Police to ask the Inspector of the Police Integrity Commission to review matters outside the Inspector’s statutory jurisdiction.

RECOMMENDATION 5 \_\_\_\_\_ 54

The Committee recommends that the Attorney General review the current system for granting surveillance device warrants, with the aim of strengthening integrity checks on affidavits submitted in support of warrants.

RECOMMENDATION 6 \_\_\_\_\_ 55

The Committee recommends that the Premier revise the *Premier’s Guidelines for Litigation Involving Government Authorities: M1997-26* to include guidance about the circumstances in which confidential court settlements may be entered into by NSW Government agencies.

# Glossary

ACWA	Association of Children’s Welfare Agencies
CAR Act	<i>Criminal Assets Recovery Act 1990</i>
CCYP	Commission for Children and Young People
CEO	Chief Executive Officer
CMS	Case management system
COPS	NSW Police Force Computer Operated Policing System
GIPA Act	<i>Government Information (Public Access) Act 2009</i>
IPC	Information and Privacy Commission
KiDS	Community Services Key Information Directory System
NPM	National Preventative Mechanism
NSWPF	New South Wales Police Force
OIC	Office of the Information Commissioner
OPC	Office of the Privacy Commissioner
OPCAT	Operational Protocol to the Convention Against Torture
PIC	Police Integrity Commission
PSC	NSW Police Force Professional Standards Command
SUDI	Sudden unexplained death in infancy
T&CG	Police Integrity Commission Tasking and Coordination Group



# Chapter One – Key themes and common challenges

- 1.1 The Committee held General Meetings on 22 February 2013 with the Police Integrity Commission (PIC), the Inspector of the Police Integrity Commission, the NSW Crime Commission, the Information and Privacy Commission, the Ombudsman and the Child Death Review Team. Some key themes emerged from the evidence provided by these agencies during the General Meetings, and also from the evidence given during the Committee's current Inquiry into Performance Measures and Accountability of Oversight Agencies.
- 1.2 This chapter introduces some of these common themes and challenges: the compliance obligations of small agencies, examples of IT and database challenges, and general resourcing and staffing matters. It also looks at an unresolved area of concern about the management of complaints about the Crime Commission, which involves both the Police Integrity Commission and the new Inspector of the Crime Commission.

## COMPLIANCE OBLIGATIONS OF SMALL AGENCIES

- 1.3 The agencies oversighted by the Committee are relatively small. Compliance obligations under relevant legislation can be particularly burdensome for agencies of this size.
- 1.4 During the current Inquiry into Performance Measures and Accountability of Oversight Agencies, the Committee heard from the Information and Privacy Commission (IPC) that 76 pieces of state and federal legislation apply to it, and are identified in its statutory compliance register. The IPC commented that such extensive requirements 'can be quite onerous for a small agency and take up time that could otherwise be spent on core functions and activities'.<sup>1</sup>
- 1.5 The Crime Commission drew a distinction between levels of scrutiny and reporting, noting that it is subject to more scrutiny and investigation than any other body in Australia, particularly in terms of the ratio of resources. The Assistant Commissioner made the following comments to illustrate this:
- ... we are subjected to more scrutiny and investigation than any other body in the country, particularly in terms of the ratio of resources. More money is spent on scrutinising each staff member than on paying the staff member; that is different from reporting.
- ... A crude estimate was conjured up last year some time that the cost of the scrutiny measures directed at the Crime Commission was probably something in the order of

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<sup>1</sup> Submission 3, Information and Privacy Commission, p 4, Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission, *Inquiry into Performance Measures and Accountability of Oversight Agencies*

\$110,000 per staff member, give or take a \$100,000 dollars, and that is more than we pay most of them.<sup>2</sup>

- 1.6 However, the Crime Commission noted that while it is subject to extensive auditing and reporting requirements, in view of its recent history there is some justification for this.<sup>3</sup>
- 1.7 The NSW Ombudsman noted that reporting on productivity, outcomes and effectiveness is challenging and made all the more difficult for his office as it has so many different functions and responsibilities under different legislation. He explained that in addition to all of the other matters the office is required to attend to, he is responsible for the preparation of 12 annual, biannual or biennial reports.<sup>4</sup>
- 1.8 The Committee's Inquiry into Performance Measures and Accountability of Oversight Agencies is continuing and the Committee's forthcoming report will explore the issues of compliance and reporting obligations in more depth.

## IT AND DATABASE CHALLENGES

- 1.9 During the General Meetings, the Committee heard evidence of the challenges that agencies face when the fulfilment of their legislative functions is impeded by outdated IT infrastructure. Both the IPC and the Child Death Review Team have faced serious challenges in these areas, with delays in securing funding for modern and functional databases that are critical to their core work. The Committee will remain watchful of future problems in these areas for all agencies it oversees, noting that such delays seriously undermine the important and innovative work of these agencies.
- 1.10 Database sharing is also a common issue across the agencies overseen by the Committee. To carry out their core functions, agencies need to be able to have shared access to databases. For example, the Inspector of the PIC has negotiated access to PIC databases to assist in his work.<sup>5</sup> The Child Death Review Team also referred to its direct access to particular NSW Police Force and Community Services databases to alleviate the need for record retrieval from these agencies.<sup>6</sup>
- 1.11 When agencies take on new projects they also need to set up new databases, which imposes additional expenses not previously anticipated. For example, when the Ombudsman was referred the Taskforce Emblems investigation from the Inspector of the PIC and set up Operation Prospect, this necessitated a purpose-built investigation database and a submission for additional funding.<sup>7</sup>

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<sup>2</sup> Mr Peter Singleton, Assistant Commissioner, NSW Crime Commission, *Transcript of evidence*, 11 April 2013, p 5

<sup>3</sup> Correspondence to the Committee from the Crime Commission dated 18 June 2013

<sup>4</sup> Mr Bruce Barbour, Ombudsman, *Inquiry into Performance Measures and Accountability of Oversight Agencies*, *Transcript of evidence*, 11 April 2013, p 6

<sup>5</sup> The Hon David Levine QC, Inspector of the Police Integrity Commission, *Transcript of evidence*, 22 February 2013, p 4

<sup>6</sup> Ombudsman (Child Death Review Team), *Answers to Further Questions on Notice*, 2013, p 2, question 1

<sup>7</sup> Mr Bruce Barbour, Ombudsman, *Transcript of evidence*, 22 February 2013, p 4

- 1.12 The adequacy of funding, the capacity of the software and the efficiency of the data-sharing arrangements between agencies are all issues which are critical to the agencies' performance and the Committee will maintain an interest in these matters in future.

## RESOURCING AND STAFFING

- 1.13 In Chapter Eight of the report, the Committee includes statistics for each agency showing financial resourcing and staffing profiles for the years 2010–2011 and 2011–12. Each year, the Committee intends to monitor changes in financial resourcing and staffing across all the agencies it oversees.

## MANAGEMENT OF COMPLAINTS ABOUT THE CRIME COMMISSION

- 1.14 During the Committee's General Meetings with the Police Integrity Commission (PIC), the Inspector of the PIC and the Crime Commission, it became apparent that an unresolved area of concern was the lack of a clear protocol in relation to the management of complaints made against the Crime Commission.
- 1.15 The need for such a protocol is particularly pressing, given that both the Police Integrity Commission and the newly created Inspectorate of the Crime Commission<sup>8</sup> have oversight responsibilities in relation to the Crime Commission.
- 1.16 The Committee was keen to understand how the Inspector of the Crime Commission and the Police Integrity Commission would handle complaints about the Crime Commission.
- 1.17 The Commissioner of the Police Integrity Commission acknowledged that the practicalities of the new oversight arrangements were still to be developed, and that this had been acknowledged in the Patten Report of the Special Commission of Inquiry into the NSW Crime Commission:
- As I understand his report, Mr Patten appreciated that difficulties could arise about the line of demarcation between the Police Integrity Commission and the inspector of the Crime Commission with respect to the Crime Commission. I understand Mr Patten to have said the Police Integrity Commission should concentrate on allegations of serious misconduct by Crime Commission employees but the inspector of the Crime Commission should have a fairly continuous role of monitoring almost the daily activities of the Crime Commission, and that is in his report. We have not yet had an opportunity to see how that will work out in practice because there has not been any inspector of the Crime Commission.<sup>9</sup>
- 1.18 The Inspector of the Police Integrity Commission also raised concerns about a lack of clarity under these new arrangements. He also pointed to the fact that his own Inspectorate was likely to be caught up in the 'circularity' of oversight arrangements between the Commissions and Inspectorates:

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<sup>8</sup> At the time of the General Meetings, the Inspector of the Crime Commission had not yet been appointed. In May 2013, the Hon Graham Barr QC was appointed to this new position.

<sup>9</sup> The Hon Bruce James QC, Commissioner, Police Integrity Commission, *Transcript of evidence*, 22 February 2013, p 10

... there is this circularity where I oversight the Police Integrity Commission, which can oversight the Crime Commission. So if I have to oversight the Police Integrity Commission's oversighting of the Crime Commission, where in all of that is the Inspector of the Crime Commission?<sup>10</sup>

- 1.19 The Inspector pointed out that if a complaint is made about the Crime Commission to the PIC, it was his role as Inspector to oversee how the PIC handles that complaint. He remarked that with the creation of the Inspector of the Crime Commission, 'a bipartite state of affairs has suddenly become a tripartite state of affairs'.<sup>11</sup>
- 1.20 The Commissioner of the PIC emphasised his desire for cooperation and consultation between himself and the new Inspector of the Crime Commission in order to establish clear procedures around these matters.<sup>12</sup>
- 1.21 The Crime Commissioner said he was open to discussing a protocol with the PIC to address these matters, noting that the Crime Commission had raised the idea of a memorandum of understanding in the past.<sup>13</sup>
- 1.22 The Crime Commissioner's view was that the primary responsibility for monitoring the Commission should lie with the Inspector of the Crime Commission. The Inspector would be able to call upon the investigative resources of the PIC if required. The Crime Commissioner acknowledged that under the new arrangements, the PIC is still able to act directly upon a complaint made about the Crime Commission. However, he argued that 'the better arrangement' would be for the Inspector to have the primary oversight responsibilities, and for the PIC not to be able to instigate its own investigations.<sup>14</sup>
- 1.23 The Crime Commissioner was of the opinion that any future complaints about the Crime Commission would be very few and that the new Inspector, in a part-time capacity, would be able to handle them:

There have been problems in the past of a major type but I am quite confident those problems have gone now. The whole organisation is alert to another Standen. My impression is that the staff of the commission are of a very high quality. There are two or three officers who are at risk because they deal with human sources primarily. We have lots of systems in place which will monitor their dealings with human sources; they know that. They are well aware of the risks and we are all tuned to governing them in a way that minimises any recurrence of the sort of Standen events.

... I am genuinely optimistic that the number of complaints to be made in the future will be very few indeed. I am not so naive that I am going to pretend that they will not happen but they will be of such a small number, I expect that it would be well

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<sup>10</sup> The Hon David Levine QC, *Transcript of evidence*, 22 February 2013, p 7

<sup>11</sup> The Hon David Levine QC, *Transcript of evidence*, 22 February 2013, p 8

<sup>12</sup> The Hon Bruce James QC, *Transcript of evidence*, 22 February 2013, p 10

<sup>13</sup> Mr Peter Hastings QC, Commissioner, NSW Crime Commission, *Transcript of evidence*, 22 February 2013, p 3

<sup>14</sup> Mr Peter Hastings QC, *Transcript of evidence*, 22 February 2013, p 4



within the capacity of the inspector, even within the limited time that he spends on the job, to deal with them comfortably.<sup>15</sup>

### Committee comment

- 1.24 The Committee recognises that with the recent establishment of new measures for the oversight of the Crime Commission, there is the potential for overlap between the two bodies now responsible for this oversight—the Police Integrity Commission and the Inspector of the Crime Commission. To ensure that lines of responsibility are clearly understood and respected, there is an urgent need for a protocol to be developed between the Police Integrity Commission and the Inspector of the Crime Commission in relation to managing complaints about Crime Commission.
- 1.25 It is important that clear lines of responsibility are articulated and agreed between the PIC and the Inspector of the Crime Commission. The Committee considers it would be helpful for protocols to define the type of complaints about the Crime Commission that each body should appropriately handle.
- 1.26 The Committee welcomes the indication from the PIC Commissioner that he will liaise and consult with the Inspector of the Crime Commission to address these matters.

### RECOMMENDATION 1

**The Committee recommends that the Police Integrity Commission and the Inspector of the Crime Commission develop protocols to ensure there is a clear understanding of lines of oversight and responsibility for the management of complaints made against the Crime Commission.**

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<sup>15</sup> Mr Peter Hastings QC, *Transcript of evidence*, 22 February 2013, p 5

## Chapter Two – Fourteenth General Meeting with the Police Integrity Commission

- 2.1 On 22 February 2013, the Committee conducted the Fourteenth General Meeting with the Police Integrity Commission. The Committee met the Hon Bruce James QC, Commissioner of the Police Integrity Commission (the PIC), Mr Roy Cottam, Acting Director, Operations, Mr Allan Kearney, Director of Prevention and Information, and Ms Michelle O'Brien, Commission Solicitor.
- 2.2 As part of the preparation for the General Meeting, the Committee sent the PIC a series of questions on notice about matters arising out of the PIC's 2011-12 Annual Report. The answers to these questions on notice can be found on the Committee's website.<sup>16</sup>
- 2.3 Evidence was taken at the General Meeting in relation to the PIC's Annual Report as well as other issues raised by the Committee. These included critical incident investigations; handling and assessment of complaints; relationships with other agencies (the Crime Commission, the Inspector of the PIC and Inspector of the Crime Commission); and resourcing and staffing matters. These issues are discussed in greater detail below.

### CRITICAL INCIDENTS

- 2.4 In the report on the last General Meeting, the Committee discussed the PIC's role in relation to police investigations into critical incidents (e.g. the homicide of a police officer or death or injury resulting from the discharge of a police firearm).<sup>17</sup> The Committee heard that the PIC does not have the resources or structure to enable it to investigate all critical incidents involving police. However, in line with the PIC's statutory functions, it may investigate critical incidents and investigations into critical incidents that involve serious police misconduct.
- 2.5 Mr Kearney explained to the Committee how the PIC may become involved in critical incident matters:

We may have a role when a complaint arises some time down the track. We also can conceivably have a role much earlier if substantial misconduct is alleged at the time. That may come about through material referred to us by NSW Police. They may lodge internal complaints themselves under the complaints management system. It may be material that is referred to in the media and in other forums. If there is something substantial in terms of misconduct, there is a capacity for us to become involved earlier. The Ombudsman has much more significant experience in overseeing critical incident investigations. You will have seen on a number of

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<sup>16</sup> See: <<http://www.parliament.nsw.gov.au/ombudsmanpic>>, viewed 25 September 2013

<sup>17</sup> Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission, *Report on the 13<sup>th</sup> General Meeting with the Police Integrity Commission*, Report 5/55, December 2012, p 3

occasions that they have become involved in a more detailed way in matters where there appears to be a public interest in doing so.<sup>18</sup>

- 2.6 The Commissioner foreshadowed that the PIC's report into Operation Calyx<sup>19</sup> would make comments on critical incident investigations and reviews of critical incident investigations. He also noted that 'there might be advantages in [the PIC] becoming involved at an earlier stage, but there are very serious problems of resourcing'.<sup>20</sup>

### Committee comment

- 2.7 The Committee notes that the Operation Calyx report was tabled in June 2013 and looks forward to exploring the PIC's views on critical incident investigations during the next General Meeting. The Committee also notes that in September 2013, the NSW Government announced an independent review of the investigation and oversight of police critical incidents.<sup>21</sup>

### The case of Roberto Laudisio-Curti

- 2.8 One critical incident that has attracted a high degree of public attention was the police tasing of a Brazilian student, Roberto Laudisio-Curti, in Sydney in March 2012.<sup>22</sup> A coronial inquest into Mr Laudisio-Curti's death handed down its findings in November 2012, recommending that the actions of police during the pursuit and restraint of Mr Laudisio-Curti be referred to the PIC.<sup>23</sup> In February 2013, the NSW Ombudsman tabled its own report on the police critical incident investigation, criticising the investigators for failing to adequately deal with the question of whether there was any police misconduct.<sup>24</sup>
- 2.9 The Committee requested an update from the PIC about its investigation into the pursuit and restraint of Mr Laudisio-Curti. The Commissioner responded:

We have received materials, very voluminous materials. They include the transcript of the hearing before the coroner, all the exhibits before the coroner and all the documents in the brief of the coronial inquest, not all of which were admitted into

<sup>18</sup> Mr Allan Kearney, Director of Prevention and Information, Police Integrity Commission, *Transcript of evidence*, 22 February 2013, p 4

<sup>19</sup> Operation Calyx is a PIC investigation into whether there was any police misconduct in the investigation by the NSW Police Force into the death of Adam Salter on 18 November 2009.

<sup>20</sup> The Hon Bruce James QC, Commissioner, Police Integrity Commission, *Transcript of evidence*, 22 February 2013, p 4

<sup>21</sup> The Hon Barry O'Farrell MP, Premier, 'Oversight of Police Critical Incidents', *Media Release*, <<http://www.premier.nsw.gov.au/sites/default/files/OVERSIGHT%20OF%20POLICE%20CRITICAL%20INCIDENTS.pdf>>, viewed 25 September 2013

<sup>22</sup> Glenda Kwek, 'Death after tasing: Brazilian who died in Sydney named', *Sydney Morning Herald*, 20 March 2012, <<http://www.smh.com.au/nsw/death-after-tasing-brazilian-who-died-in-sydney-named-20120320-1vh0o.html>> viewed 14 June 2013

<sup>23</sup> Magistrate Mary Jerram, NSW State Coroner, Report on Roberto Laudisio Curti, 14 November 2012, <[http://www.coroners.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/coroners/m40160114/curti%20decision%2014%20nov%202012.pdf](http://www.coroners.lawlink.nsw.gov.au/agdbasev7wr/_assets/coroners/m40160114/curti%20decision%2014%20nov%202012.pdf)>, viewed 14 June 2013

<sup>24</sup> NSW Ombudsman, 'Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti', *Media Release*, February 2013, <[http://www.ombo.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0015/8403/Media-release-Ombudsman-monitoring-of-the-police-investigation-into-the-death-of-Roberto-Laudisio-Curti-28-February-2013.pdf](http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0015/8403/Media-release-Ombudsman-monitoring-of-the-police-investigation-into-the-death-of-Roberto-Laudisio-Curti-28-February-2013.pdf)>, viewed 24 September 2013

evidence. I am informed by my officers that we are going through that material. There really is a very large amount. I do not anticipate we will be in a position to decide whether to hold any hearings on our part until April [2013]. I can inform the Committee we regard it as a high priority to keep the legal practitioners acting for the Curti family informed. I am informed that they have regularly been kept informed and so far the family seems appreciative that we are doing our best and grappling with a large amount of material, and I am not aware of any complaints made by them.<sup>25</sup>

- 2.10 The Chair of the Committee also asked whether the PIC had encountered any difficulty with gathering evidence in relation to the incident, given a considerable amount of time had elapsed before the PIC commenced its own investigation:

**CHAIR:** When a matter like this, which has already been through the coronial process and after the lapse of some period of time, comes to you, does that make it more difficult to investigate and is there a loss of opportunity to gather evidence which, had the Police Integrity Commission been engaged earlier it would have benefited the investigation?

**Mr JAMES:** It could. I have been asked, not necessarily before this Committee but elsewhere, about this matter. There is no doubt that if some incident occurs, the incident is much better investigated if investigators arrive at the scene of the incident as quickly as possible. By as quickly as possible I mean within minutes. It is highly important that evidence be preserved so that if an incident happens the scene of the incident be marked off and that trained people inspect the scene of the incident for the purpose of collecting evidence. This is something the police should do. I expressed the opinion elsewhere and I adhere to it, the Police Integrity Commission itself has not got the capacity and has not got the specialist capacity to do that sort of thing. The amount of manpower, and woman power, the police bring to bear is rather startling. An incident can occur and within a short time there could be a dozen police officers there, either uniformed or plainclothes. If we were to attempt to do that it would exhaust our resources.<sup>26</sup>

- 2.11 The Committee notes that in May 2013, the PIC released a media statement indicating that a brief of evidence had been delivered to the Office of the Director of Public Prosecutions, recommending that consideration be given to the prosecution of a number of police officers involved in the Laudisio-Curti case.<sup>27</sup>

### Police guidelines in relation to critical incidents

- 2.12 The Committee was interested to hear about the police guidelines for investigating critical incidents and whether the PIC had a role in the development of these protocols.
- 2.13 In the event a complaint is lodged with the PIC about a critical incident, action taken by the police in the initial investigation would have a significant bearing on what the PIC could do to progress the matter. The PIC was asked whether it had any role or input into the initial police protocols in handling critical incidents:

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<sup>25</sup> The Hon Bruce James QC, *Transcript of evidence*, 22 February 2013, p 2

<sup>26</sup> The Hon Bruce James QC, *Transcript of evidence*, 22 February 2013, pp 2–3

<sup>27</sup> Police Integrity Commission, *Media Release*, 28 May 2013, <<http://www.pic.nsw.gov.au/files/MediaReleases/Anafi%20media%20release%20May%202013.pdf>>, viewed 28 May 2013

**CHAIR:** I am wondering whether the Police Integrity Commission has any role in those protocols, because it can assist you if certain actions are taken in the initial investigation, and I understand the police are the ones who have the resources to do it?

**Mr JAMES:** We can express views to the Police Force about what should be the content of critical incident investigation guidelines but we do not have any coercive powers.<sup>28</sup>

### *Review of the guidelines*

2.14 The PIC informed the Committee that the NSW Police Force (NSWPF) Guidelines for the Management and Investigation of Critical Incidents have undergone a review process (coordinated by the Professional Standards Command) and that the PIC and the Ombudsman have had opportunities to individually and jointly express views about the draft guidelines. Mr Kearney assured the Committee that the PIC's key concerns had been addressed in the review process and noted that both the PIC and the Ombudsman had 'a fairly consistent view' about what needed to be addressed in the review of the guidelines.<sup>29</sup> The Commissioner added:

The draft critical investigation guidelines, which I have seen and which have been the subject of comment from the Police Integrity Commission and the Ombudsman, are quite lengthy and detailed. We have sought to make comments and endeavour to persuade the police force to adopt our comments. We have not had complete success but we have had some success.<sup>30</sup>

2.15 In answers to further questions on notice, the PIC provided details of the feedback provided to the NSWPF Professional Standards Command (PSC) in relation to four aspects of the guidelines. These issues, and the results of further consultations with the PSC, are set out below:

- a. The omission of public interest considerations from the definition of what constitutes a critical incident—public interest was reinstated as a matter to consider by the Region Commander in whether or not to categorise an incident as critical.
- b. Inadequate identification of conflicts of interest—the Professional Standards Command agreed to consider developing process that will document potential conflicts of interest in respect of key individuals involved in a critical incident investigation.
- c. The revised definition of 'serious injury' in the guidelines including the potential for confusion with the term 'seriously injured' in the mandatory Drug & Alcohol provisions of the Police Act 1990—PSC will reinstate the 2006 definition for serious injury with only minor, agreed modifications.
- d. The need to clarify responsibilities around misconduct and systemic issues—the PSC agreed to note in the guidelines that information indicative of misconduct, procedural or systemic issues, and OH&S, ought to be dealt with as identified even

<sup>28</sup> The Hon Bruce James QC, *Transcript of evidence*, 22 February 2013, p 3

<sup>29</sup> Mr Allan Kearney, *Transcript of evidence*, 22 February 2013, p 4

<sup>30</sup> The Hon Bruce James QC, *Transcript of evidence*, 22 February 2013, p 4

though the Investigation Report in the case of a death is not required to be completed until after the conclusion of the coronial inquest.<sup>31</sup>

2.16 In the following exchange with the Committee, Mr Kearney noted that it was often the interpretation of guidelines, rather than the guidelines themselves, that can cause difficulties:

**CHAIR:** Stepping back to the ownership of the procedures, would you see a need or would it be beneficial for the Police Integrity Commission to play a role beyond advising, perhaps a more formal role in determining what are those guidelines?

**Mr KEARNEY:** I am comfortable that the police policies in many areas, including critical incidents, are quite good. The problem comes when the policies and procedures hit the ground. Compliance can often be an issue, the exercise of judgement.

**Mr KEVIN ANDERSON:** An interpretation.

**Mr KEARNEY:** Indeed. That is where the issues arise. The policies are pretty good.<sup>32</sup>

## Project Harlequin

2.17 Project Harlequin is a PIC research project which is examining data and literature on critical incident investigations. It commenced in mid-2012. The project's objective is 'to determine what misconduct risks may exist before and after a critical incident has occurred and to establish how well these risks are being managed by the NSWPF'.<sup>33</sup> At the General Meeting, Mr Kearney was asked to comment on areas of 'misconduct risk'. Noting that Project Harlequin was still in its early stages, Mr Kearney replied:

I think the biggest one is going to be conflict of interest whether through actual knowledge of the individuals involved, potentially even friendship, or a conflict of interest that arises through an exercise of poor judgement because "we are all part of the same club". The culture still has those kinds of issues. I expect those sorts of things will come out of the research.<sup>34</sup>

## Committee comment

2.18 The Committee was interested to hear the PIC's views on police critical incident investigations and the guidelines that are followed in such cases. Critical incidents constitute matters of a serious nature (often involving death or serious injury) and the PIC has played an important role in strengthening the protocols and guidelines around critical incidents by providing feedback to the police. The Committee also notes the NSW Government's review of police critical incidents,

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<sup>31</sup> Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, pp 7–8, question 6

<sup>32</sup> Mr Allan Kearney, *Transcript of evidence*, 22 February 2013, p 5

<sup>33</sup> Police Integrity Commission, *Answers to Questions on Notice*, 31 January 2013, p 5, question 7

<sup>34</sup> Mr Allan Kearney, *Transcript of evidence*, 22 February 2013, p 7

announced in September 2013, will include making the critical incident guidelines publicly available.<sup>35</sup>

## COMPLAINTS ASSESSMENT

- 2.19 Another area of interest to the Committee was the PIC's internal process for assessing complaints about police misconduct. In particular, the Committee was interested to hear what criteria were used to determine which complaints were worthy of further investigation.

### Process of complaints assessment

- 2.20 The PIC informed the Committee that there is a multi-stage process for considering complaints.<sup>36</sup> The key components of complaint assessment include: preliminary scanning; formal assessment by the Complaint Assessment Team; 'scoring' by the Tasking and Coordination Group; and investigation selection.<sup>37</sup>
- 2.21 Complaints are either 'referred' (provided to the PIC by the NSWPF or the Ombudsman) or 'non-referred' (made directly to the PIC by complainants). Almost all referred complaints come to the PIC from the NSWPF complaints management system known as 'c@ts.i'. All referred complaints are subject to a preliminary scan to determine which are suitable for formal assessment, while all non-referred complaints proceed directly to formal assessment, without the need for a preliminary scan.<sup>38</sup>
- 2.22 During the preliminary scan, reference is made to a *Priority Setting Criteria* document which assists in selecting complaints suitable for formal assessment.<sup>39</sup> The Commissioner described these criteria to the Committee:

There are five principal criteria and they have a number of subheadings. They refer to the nature of the activity, and, of course, that goes largely to seriousness. The currency of the activity is also an issue. For example, is it something that appears to be ongoing or is it likely to recur? We also have a separate criterion dealing with relative seriousness and one with public confidence; that is, would it be likely to weaken public confidence in the Police Integrity Commission or in the Police Force if we did not undertake an investigation?

A further matter is what is compendiously described as a strategic outcome, which is partly how an investigation of this particular complaint fits in with the larger picture of what the Police Integrity Commission is trying to do. Under those five criteria, there are, I think, roughly 30 to 40 subheadings, and loadings are given to

<sup>35</sup> The Hon Barry O'Farrell MP, Premier, 'Oversight of Police Critical Incidents', *Media Release*, <<http://www.premier.nsw.gov.au/sites/default/files/OVERSIGHT%20OF%20POLICE%20CRITICAL%20INCIDENTS.pdf>>, viewed 18 September 2013

<sup>36</sup> 'Complaints are made up of complaints of misconduct (which may be subject to disciplinary action or prosecution if allegations are proved), and less serious Local Management Issues (often customer service related issues which are usually dealt with through counselling, training and performance management).' Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, p 2, question 1, footnote 1

<sup>37</sup> Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, p 2, question 1

<sup>38</sup> As above

<sup>39</sup> As above

subheadings. In other words, some factors are regarded as having greater weight than others.<sup>40</sup>

- 2.23 Formal assessment by the Complaints Assessment Team is the next step in the process, again with reference to the *Priority Setting Criteria*. This Team may decide to refer a complaint to the Tasking & Coordination Group (T&CG) for consideration for investigation. The PIC commented:

Credibility is also a key factor throughout the assessment process as often quite serious complaints are raised that are without foundation and ought not attract disproportionate attention. The Team may also recommend no further action in regard to a referred complaint or that a non-referred complaint be referred to the NSWPF and/or the Ombudsman.<sup>41</sup>

- 2.24 The T&CG Team determines whether complaints should proceed to preliminary or full investigations. The PIC described this process of more detailed assessment:

T&CG applies a more refined filtering process, formally 'scoring' each complaint referred to it against the detailed criteria contained in the Case Categorisation & Prioritisation Model (CCPM) score sheet ... If there is insufficient information to 'score' the complaint, the T&CG can arrange for further research to be undertaken and advice provided. Generally, those that score high in the process become the subject of a preliminary investigation or are recommended to the Commissioner as a potential subject for a full investigation. Those scoring less may be the subject of oversight. Those with low scores are not generally subject to further action by the PIC apart from referral to the NSWPF in the case of a non-referred complaint.<sup>42</sup>

## Complaints not formally assessed or investigated

- 2.25 The Committee sought information about complaints that are not assessed by the PIC and, of those that are formally assessed, how many do not proceed to a preliminary or full investigation.

- 2.26 The PIC responded that each year about 3,500 referred and non-referred complaints are made. However, the total pool of complaints is approximately 5,000 each year (which includes 'less serious' local management issues).<sup>43</sup> Formal assessment (using the *Priority Setting Criteria*) is conducted for approximately 1,000 complaints per year. The PIC provided the following statistics:

[W]hile the Commission may scan all complaints it formally assesses only 20% of the complaints.

Of the approximately 1,000 complaints that are formally assessed by the Commission approximately 200 are referred to the T&CG for assessment and scoring ... About 85 of these will go on to become preliminary or full investigations. Approximately 115 (58%) do not progress to preliminary or full investigation.<sup>44</sup>

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<sup>40</sup> The Hon Bruce James QC, *Transcript of evidence*, 22 February 2013, p 6

<sup>41</sup> Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, p 2, question 1

<sup>42</sup> Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, p 3, question 1

<sup>43</sup> Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, p 3, question 2

<sup>44</sup> Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, p 3, question 2



- 2.27 Mr Kearney told the Committee that the PIC investigates about 7 per cent of the complaints that it assesses (which is about 3 per cent of all complaints).<sup>45</sup>
- 2.28 When asked to comment on the nature of those complaints that do not progress to preliminary or full investigations, the PIC responded that without detailed research, it was 'not possible to characterise [them] with any particularity'.<sup>46</sup>

### *Preliminary investigations*

- 2.29 On the question of preliminary investigations that do not progress to full investigations, the PIC commented that preliminary investigations are used as 'a way of assessing the merit of complaints prior to declaring a full investigation'.<sup>47</sup> There may be a number of reasons that a preliminary investigation may not become a full investigation, including:
- all reasonable lines of inquiry have been exhausted;
  - the allegation was vexatious or otherwise not made in good faith;
  - the facts in a matter have been misinterpreted by a complainant;
  - the allegation is false;
  - misconduct has been identified, but that misconduct is not serious enough to warrant further action from PIC
  - the PIC has referred an allegation back to the NSWPF for further investigation; and
  - the PIC is satisfied that another agency has investigated the matter satisfactorily.<sup>48</sup>
- 2.30 The PIC reported that in 2011-12, 99 of the 137 preliminary investigations that were active during the year were closed. Of these 99, 71 were closed with no further action. In 34 per cent of cases where no further action was taken, all reasonable lines of inquiry had been exhausted. In 22 per cent of cases where no further action was taken, the PIC had formed the view that the allegation was false, and in 14 per cent of cases, the PIC was satisfied that another agency had investigated the matter satisfactorily.<sup>49</sup>

### *Referral of complaints*

- 2.31 Sometimes the PIC determines that a complaint should not be investigated and that, for example, the NSW Police Force or the Ombudsman would be better placed to look into the matter. Mr Kearney explained that in those circumstances, the PIC would normally take into account the views of the complainant before making a referral:

<sup>45</sup> Mr Allan Kearney, *Transcript of evidence*, 22 February 2013, p 6

<sup>46</sup> Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, p 3, question 2

<sup>47</sup> Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, p 4, question 3

<sup>48</sup> Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, pp 4–5, question 3

<sup>49</sup> Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, p 5, question 3

He or she may prefer that some matters not be provided to the police and we will take that into consideration. It does not mean it will not be referred if there is an overriding public interest in doing so. If there is an overriding public interest in referring it, it will be referred. If the complaint has been sourced from the police complaints management system, there is no need for a referral. In that case, the police go about their business not being aware that we have conducted a separate assessment. In some circumstances we might provide the outcome of that assessment to the police to assist them in their own decision-making.<sup>50</sup>

## Complaints from the public

- 2.32 The Committee asked the PIC to comment on whether more complaints might come directly from the public if the PIC had a higher public profile. The PIC responded that a higher profile could 'possibly' lead to more complaints being received from the public, but also argued that 'the value in diverting a greater proportion of complaints to the PIC is questionable'.<sup>51</sup> The PIC elaborated:

Complaints from the public to the PIC, while serious to the individual concerned, are rarely of a kind that meets the PIC's criteria for investigation. Such matters predominantly relate to unsatisfactory interactions with police, for example rudeness, minor assaults, inaction, or unfairness in an application for an Apprehended Violence Order. The kinds of matters that might meet the PIC's criteria for investigation are rarely the subject of a complaint from the public ... By way of example, of the 114 preliminary and full investigations commenced by the PIC in 2011-12, only 13 (11%) originated from a complaint made by a member of the public by the PIC. None of the 13 investigations became a full investigation.

In addition, increasing public awareness of the PIC or actively encouraging the public to make complaints to the PIC, as distinct from the NSWPF or the Ombudsman, is likely to lead to double handling.<sup>52</sup>

- 2.33 The PIC also noted that it is required to assess all complaints that are made directly to it by a member of the public. It pointed out the likely difficulty in assessing a greater number of complaints each year while applying the same degree of rigour to the process.<sup>53</sup>

## Complaints from police

- 2.34 An area of particular interest to the Committee is the handling of police complaints about the conduct of fellow police officers. During its current Inquiry into Performance Measures and Accountability of Oversight Agencies, the Committee requested information from the PIC about how many of the total complaint pool (about 5,000) were complaints made by police. The PIC responded that as it only collects information on complaints which it assesses for potential investigation, it was unable to answer the question. The PIC suggested that the Committee seek information from the Ombudsman or the NSW Police Force.<sup>54</sup>

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<sup>50</sup> Mr Allan Kearney, *Transcript of evidence*, 22 February 2013, p 6

<sup>51</sup> Police Integrity Commission, *Answers to Questions on Notice*, 31 January 2013, pp 8–9, questions 10b and 10c

<sup>52</sup> Police Integrity Commission, *Answers to Questions on Notice*, 31 January 2013, p 8, question 10b

<sup>53</sup> Police Integrity Commission, *Answers to Questions on Notice*, 31 January 2013, pp 8–9, question 10c

<sup>54</sup> Police Integrity Commission, *Answers to Questions on Notice*, 8 May 2013, p 2, question 1

2.35 The PIC advised that during 2011-12, of the 381 complaints made directly to the PIC, 31 were made by serving police officers.<sup>55</sup> The Committee also asked PIC how many of the 200 complaints referred to the Tasking and Coordination Group for consideration for investigation were made by police officers. The PIC responded:

During 2011-12, of the total of 965 complaints of police misconduct assessed by the Commission, 203 were referred to the Tasking and Coordination Group for consideration for investigation, 13 of which were made by serving police officers. Notably, 11 (85%) of these went on to become a preliminary or full investigation compared to 60 (32%) from other sources, which may be indicative of a more informed insight into misconduct by police officers, perhaps greater credibility or some other factor.<sup>56</sup>

2.36 The Ombudsman advised the Committee that it does not hold information in relation to all complaints made by police about other officers. It has established guidelines with the NSW Police Force and the PIC, under which the NSW Police Force is required to notify the Ombudsman of certain types of complaints in order to concentrate resources on the most serious allegations. In 2011-12, there were 3,386 complaints made about police. 1,246 of these complaints were made by police. The Ombudsman also reported that in 2011-12, 52 officers were criminally charged following complaints by other officers (79 per cent of officers about whom complaints had been made by other officers).<sup>57</sup>

2.37 The NSW Police Force provided the following information<sup>58</sup> on complaints made by police about other officers:

Year	2008	2009	2010	2011	2012
Complaints	2,109	2,073	1,992	1,769	1,695

2.38 The NSW Police Force noted that counts of complaint outcomes are more difficult to determine due to a number of factors:

- a complaint can have more than one issue and can be about more than one officer;
- over [2008-2012] changes in policy saw a shift away from the use of “resolved” as an outcome in favour of the clearer “sustained” or “not sustained”;
- some complaints are declined (matters that are being addressed by other means such as court or tribunal);
- some complaint investigations have not been finalised; and

<sup>55</sup> Police Integrity Commission, *Answers to Questions on Notice*, 8 May 2013, p 2, question 3

<sup>56</sup> Police Integrity Commission, *Answers to Questions on Notice*, 8 May 2013, p 2, question 4

<sup>57</sup> Correspondence from the Ombudsman to the Committee, 6 June 2013, pp 1–3

<sup>58</sup> Correspondence from the Commissioner of Police to the Committee, 1 July 2013, p 1

- sometimes it is not possible to identify the officer who is the proper subject of the complaint.<sup>59</sup>

2.39 Keeping in mind these qualifications, the outcomes of complaints<sup>60</sup> are detailed below:

Year	2008	2009	2010	2011	2012
<b>Not sustained</b>	824	1568	1,488	1,371	1,236
<b>Resolved</b>	153	214	80	57	2
<b>Sustained</b>	1,310	2,378	2,254	1,790	1,891

### *Committee comment*

- 2.40 The Committee thanks the PIC for providing information about how complaints are assessed, including what criteria they are measured against and how many proceed to preliminary or full investigations. As well as the information furnished to the Committee at the General Meetings and through Answers to Questions on Notice, the PIC also delivered a presentation to Committee members on its approach to complaints management during a visit of inspection on 31 May 2013. The Committee appreciated the time made available by PIC officers during this visit to help further its understanding of complaints handling processes. In particular, the Committee acknowledges the Hon Bruce James QC, Commissioner; Mr Allan Kearney, Director, Prevention and Information; Ms Michelle O'Brien, Commission Solicitor; Mr Peter Barnett, Manager, Assessments and Prevention; Mr Roy Cottam, Manager, Investigations and Intelligence; Mr Matthew Currie, Deputy Manager, Intelligence; and Ms Pru Sheaves, Executive Officer.
- 2.41 In relation to complaints made by police about fellow officers, the Committee notes that data is collected by a range of agencies, including the Ombudsman, the NSW Police Force and the PIC. NSW Police officers are uniquely placed to observe and report corruption and serious misconduct involving other officers. The Committee intends to monitor trends in data about internal police complaints from year to year.
- 2.42 The Committee also notes the PIC's advice that 85 per cent of complaints made by police about fellow officers went on to become 'preliminary or full investigations'. The Committee will seek further information from the PIC about the number of complaints that became full investigations. It is in the public interest for the PIC to report transparently on police complaints against fellow officers, including trends in numbers of complaints and outcomes.
- 2.43 In May 2013, the Committee referred a matter to the Inspector of the Police Integrity Commission concerning the PIC's handling of a complaint involving the

<sup>59</sup> Correspondence from the Commissioner of Police to the Committee, 1 July 2013, pp 1–2

<sup>60</sup> Correspondence from the Commissioner of Police to the Committee, 1 July 2013, p 2

former New England Local Area Commander Superintendent David Cushway. The PIC's decision not to proceed to a full investigation, despite the complaint being made by a serving police officer, raises questions about how the PIC handles complaints of this nature.

## FUTURE RESOLUTION OF LEGAL DISPUTES WITH THE CRIME COMMISSION

2.44 The Committee heard from the PIC that protocols in relation to future resolution of legal disputes with the Crime Commission would be useful.<sup>61</sup> The Committee questioned the Commissioner about what could be done in the future to avoid costly and protracted litigation between the two agencies. The Commissioner responded:

**MR JAMES:**... I have actually spoken to the Solicitor General about this informally and it would be my hope that if any dispute arose between PIC and the Crime Commission that could not be amicably resolved, it simply be submitted for arbitrament to the Crown Solicitor or the Solicitor General and there be no litigation.

**CHAIR:** It is your submission that that is how the process should occur?

**Mr JAMES:** Yes. I would hope that it would not get to that stage. I would hope it could simply be resolved between the two bodies but if it could not be resolved between the two bodies, it should be submitted to a government lawyer to determine the issue.<sup>62</sup>

2.45 The PIC also noted that there was uncertainty about whether the *Premier's Guidelines for Litigation Involving Government Authorities: M1997-26*<sup>63</sup> had been observed by the Crown Solicitor when he had decided to act for the Crime Commission. The guidelines state that, prior to commencing legal proceedings, a matter in dispute between two government agencies should be referred to the Premier, if attempts at resolution by senior officers and ministers have not been successful. The PIC explained:

The Commission was advised by the Crown Solicitor by letter dated 24 March 2011 that the Premier's approval was not obtained for the commencement or maintenance of the proceedings brought by the NSW Crime Commission against the Police Integrity Commission in 2011 and that in the Crown Solicitor's opinion, Premier's Memorandum M1997-26 did not apply to a dispute between the Crime Commission and the Police Integrity Commission in relation to the Police Integrity Commission's powers.

In the Commission's view the guidelines are quite clear but there appears to be no mechanism for ensuring compliance.<sup>64</sup>

<sup>61</sup> In 2011, the Crime Commission engaged the Crown Solicitor to act against the PIC in relation to matters arising out of Operation Winjana.

<sup>62</sup> The Hon Bruce James QC, *Transcript of evidence*, 22 February 2013, p 11

<sup>63</sup> See: <[http://www.dpc.nsw.gov.au/announcements/ministerial\\_memoranda/1997/m1997-26](http://www.dpc.nsw.gov.au/announcements/ministerial_memoranda/1997/m1997-26)>, viewed 25 September 2013

<sup>64</sup> Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, p 7, question 5

### *Committee comment*

- 2.46 The Committee does not wish to see the PIC and the Crime Commission engaging in costly and protracted litigation in the future. The Committee supports the proposal made by the PIC Commissioner as a way of avoiding litigation between the two agencies, should future disagreements arise. The Committee considers that it would be valuable for the two agencies to jointly develop formal protocols, as a way of seeking alternatives to litigation. The Committee intends to monitor closely the progress being made in this area.
- 2.47 Given the uncertainty arising from the lack of compliance with the *Premier's Guidelines for Litigation Involving Government Authorities: M1997-26* during the dispute between the Crime Commission and the Police Integrity Commission, the Committee considers that the Premier should review the guidelines to determine whether stronger compliance mechanisms should be established.

## RECOMMENDATION 2

**The Committee recommends that the Police Integrity Commission and the Crime Commission jointly develop formal protocols to be followed in the event of any future disagreements between the two agencies, with the objective of promoting alternatives to litigation.**

## RECOMMENDATION 3

**The Committee recommends that, in light of the specific history of the Police Integrity Commission and the Crime Commission, the Premier review the *Premier's Guidelines for Litigation involving Government Authorities: M1997-26* with a view to providing clarity about how agencies considering litigation should proceed in future. Consideration could be given to developing a new guideline that meets the more complex circumstances of litigation associated with oversight agencies.**

## RESOURCING AND STAFFING

- 2.48 The PIC told the Committee at the General Meeting that its resourcing and funding levels were adequate at present. When asked about recent media claims<sup>65</sup> that the PIC was seeking an expanded role in police critical incident investigations, the PIC informed the Committee that there was no substance to such reports. The Commissioner did, however, note that if the PIC were to take on a substantially enhanced role, extra funding would be needed.<sup>66</sup>
- 2.49 The Police Integrity Commission provided information to the Committee on expenses and revenues (including staffing) over the past two years.<sup>67</sup> This information is detailed in Chapter Eight.

## COMMITTEE COMMENT

- 2.50 The Committee thanks the PIC for providing valuable information about its activities and key concerns during this period of oversight. In particular, the

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<sup>65</sup> Lisa Davies, 'PIC pitches for critical incident investigations', *Sydney Morning Herald*, 3 September 2012, p 9

<sup>66</sup> The Hon Bruce James QC, *Transcript of evidence*, 22 February 2013, p 5

<sup>67</sup> Correspondence from Police Integrity Commission to Committee, dated 9 July 2013

Committee welcomes the progress being made by the PIC in strengthening relations with other organisations, including the Crime Commission and the Inspector of the Police Integrity Commission.

## Chapter Three – Thirteenth General Meeting with the Inspector of the Police Integrity Commission

- 3.1 On 22 February 2013, the Committee conducted the Thirteenth General Meeting with the Hon David Levine AO RFD QC, the Inspector of the Police Integrity Commission ('the PIC').
- 3.2 As part of the preparation for the General Meeting, the Committee sent the Inspector a series of questions on notice about matters arising out of the Inspectorate's 2011-12 Annual Report. The answers to these questions on notice can be found on the Committee's website.<sup>68</sup>
- 3.3 Evidence was taken at the General Meeting in relation to the Inspectorate's Annual Report as well as other issues raised by the Committee. These included the matter of Taskforce Emblems; the relationship between the PIC and Inspector of the PIC; communication with other agencies and key personnel; and resourcing and staffing matters. These issues are discussed in greater detail below.

### TASKFORCE EMBLEMS

- 3.4 As noted in the Committee's report on the Twelfth General Meeting with the Inspector of the PIC, Taskforce Emblems was the name given to an internal police operation conducted in 2003–04 which reviewed particular aspects of Operation Mascot. Operation Mascot was a joint operation between the NSW Police Force, the Police Integrity Commission and the NSW Crime Commission, which reportedly involved the surveillance of more than 100 police officers and at least two civilians. Taskforce Emblems reportedly reviewed the circumstances in which the surveillance warrants were granted.<sup>69</sup>
- 3.5 At the time of the last General Meeting (May 2012), the Inspector told the Committee that he had recently been asked by the Minister for Police to review the Taskforce Emblems report, including whether the report itself should be the subject of public release.
- 3.6 The Minister had requested that the Inspector undertake this review pursuant to section 217 of the *Police Act 1990*. (Section 217(1) states: 'The Minister may appoint any person (an **authorised person**) to inquire into, and to report to the

<sup>68</sup> See: <<http://www.parliament.nsw.gov.au/ombudsmanpic>>, viewed 25 September 2013

<sup>69</sup> See <<http://www.smh.com.au/nsw/pressure-on-new-police-watchdog-to-lay-past-to-rest-20120521-1z1es.html>>, viewed 10 July 2013

Minister on, any matter on which the Minister wishes to be advised in relation to the management and administration of the NSW Police Force').<sup>70</sup>

## Developments since the previous General Meeting

3.7 In November 2012, the Inspector wrote back to the Minister for Police stating that it was not in the public interest for the Taskforce Emblems report to be publicly released. He had come to the view that the report was 'a document so wanting in the requisite qualities to make it public'.<sup>71</sup> His letter to the Minister stated:

The report of Strike Force Emblems I have found to be such an abstruse and unsatisfactory internal police document that it is not in the public interest for it, its findings (such as they are) and its recommendations (such as they are) to be made public.

With the utmost respect to those involved in the preparation of the Strike Force Emblems Report it is severely wanting in sound reasoning and logical exposition of investigations said to have been undertaken. Its findings and recommendations on my reading of accompanying internal police communications do not enjoy support or confidence among police commentators of high rank.<sup>72</sup>

3.8 The Inspector informed the Minister that he had produced a report on the Emblems matter, but that it would be released only to the Minister, the Premier, the Police Commissioner and the Ombudsman, and advised against any wider publication.<sup>73</sup> The letter also indicated that the Inspector had referred the Emblems matter to the Ombudsman for investigation.<sup>74</sup>

3.9 The letter also reinforced the Inspector's view that he did not consider it part of his function under section 217 of the *Police Act 1990* to pursue the question of suspected or perceived criminal misconduct in relation to the surveillance warrant application at the heart of the Emblems matters.<sup>75</sup>

3.10 In evidence to the Committee at the General Meeting, the Inspector explained how he had come to the conclusion that the Emblems matter lay outside the remit of his jurisdiction:

...the candid position is that the penny did not drop, as it were, until well after I had received the communication from the police Minister and I turned my mind gradually when I realised, "No, hang on a minute. Who is my Minister and does the power under which the police Minister purported to refer it to me in fact permit me to deal with it?"<sup>76</sup>

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<sup>70</sup> Section 217(1), *Police Act 1990* (NSW)

<sup>71</sup> The Hon David Levine QC, Inspector of the Police Integrity Commission, *Transcript of evidence*, 22 February 2013, p 5

<sup>72</sup> The Hon David Levine QC, *Transcript of evidence*, 22 February 2013, p 5

<sup>73</sup> Correspondence from the Inspector of the Police Integrity Commission to the Minister for Police and Emergency Services, 23 November 2012, p 2, Attachment F to *Answers to Further Questions on Notice*, 13 March 2013

<sup>74</sup> See: Operation Prospect, <<http://www.ombo.nsw.gov.au/what-we-do/our-work/operation-prospect>>, viewed 9 July 2013; see also Chapter Six of this report on the Eighteenth General Meeting with the Ombudsman.

<sup>75</sup> The Hon David Levine QC, *Transcript of evidence*, 22 February 2013, p 5

<sup>76</sup> The Hon David Levine QC, *Transcript of evidence*, 22 February 2013, p 2



## Memorandum on the independence of the Inspectorate

3.11 In February 2013, the Inspector prepared a memorandum outlining his key concerns arising from the Emblems matter, including the question of whether the Minister should have referred the matter to the Inspectorate at all. He sent copies to the Police Minister, the Premier, the Attorney General, the Ombudsman and the Law Reform Commission.<sup>77</sup>

3.12 Two significant points made in the memorandum were: firstly, that the Inspectorate of the Police Integrity Commission should not fall within the portfolio of the Police Minister; and secondly, that when the appropriate Minister (that is, one who does have the jurisdiction to refer a matter to the Inspectorate—currently, the Premier) makes a reference, the terms of reference should be specified, or an initial process of consultation should be undertaken to settle the terms of reference.<sup>78</sup>

3.13 The Inspector's memorandum also included a clear call to amend section 217 of the *Police Act 1990*, which he believed was too broad.

3.14 The Inspector told the Committee that an amendment was required:

... to avoid what I perceive to be the embarrassing position where the police Minister can ask the Inspector of the Police Integrity Commission to deal with matters that essentially relate to the administration of the Police Force. That is not the purpose for which I exist or the office exists.<sup>79</sup>

3.15 In answers to questions on notice, the Inspector argued that the independence of his Inspectorate from the portfolio of the Minister for Police should be strictly maintained:

As a matter of policy I am of the view that under no circumstances should either entity [the Police Integrity Commission or the Inspectorate of the Police Integrity Commission] be within the ambit of the portfolio of the Minister of Police as this profoundly derogates from the independence of each entity and not least the Inspectorate. The present state of affairs whereby both entities are within the portfolio of the Premier should be adhered to as a matter of policy.

... Thus it can be said that I would be recommending consideration of the amendment of the *Police Act 1990* and any consequential amendments to the *Police Integrity Commission Act 1996* and any other legislation that would prevent the reference by the Minister for Police to the Inspector of the Police Integrity Commission of a matter in the nature of 'Strike Force Emblems'.<sup>80</sup>

## Committee comment

3.16 The Committee supports the proposal put forward by the Inspector of the Police Integrity Commission for the amendment of section 217 of the *Police Act 1990*. The Committee recognises that the referral of the Taskforce Emblems matter by

<sup>77</sup> The Hon David Levine QC, *Transcript of evidence*, 22 February 2013, p 3

<sup>78</sup> The Hon David Levine QC, *Transcript of evidence*, 22 February 2013, pp 2–3

<sup>79</sup> The Hon David Levine QC, *Transcript of evidence*, 22 February 2013, p 3

<sup>80</sup> Inspectorate of the Police Integrity Commission, *Answers to Questions on Notice*, 25 January 2013, p 3, question 5

the Minister for Police to the Inspectorate effectively required the Inspector to review police procedures. This is clearly outside the statutory function of the Inspectorate, which is to maintain oversight of the Police Integrity Commission. The proposed amendment would help to guard against a similar situation occurring in the future, whereby the Minister of Police could ask the Inspector of the PIC to review matters outside his jurisdiction.

- 3.17 The Committee thanks the Inspector for bringing clarity to the Taskforce Emblems matter and for proposing a mechanism to ensure that the boundaries of his statutory jurisdiction over matters relating to the Police Integrity Commission, and not the NSW Police Force, are respected and maintained.

#### RECOMMENDATION 4

**The Committee recommends that the Minister for Police introduce amendments to *Police Act 1990* to remove the scope for the Minister of Police to ask the Inspector of the Police Integrity Commission to review matters outside the Inspector's statutory jurisdiction.**

#### RELATIONSHIP WITH THE POLICE INTEGRITY COMMISSION

- 3.18 The Committee asked the Inspector about his relationship with the Police Integrity Commission. The Inspector described it as 'cordial and cooperative':

There has been nothing yet to provoke any other state of affairs. It is really only since I was able to be rid of Emblems that I was able to commence the establishment of a series of protocols or regimes for auditing the procedures of the commissioner and that is still ongoing. No, nothing has exploded or anything like that. It is all very cordial.<sup>81</sup>

- 3.19 The Inspector illustrated the practical aspects of the relationship with the PIC by describing the Inspectorate's audit of the PIC investigation into the shooting of Adam Salter (known as Operation Calyx). He noted that Operation Calyx was the first opportunity (post-Emblems) to put in place arrangements between the Inspectorate and the PIC on information sharing (i.e. evidence and investigation material). He elaborated:

Most of the public material—for example, transcript—I think is sent electronically. If not electronically, surveillance device material is sent in hard copy or can be collected—it is not just sent via the mail or anything; it is securely delivered from one to the other—and we have now just got in place a system whereby I and my staff can use the inspector's room at the PIC premises that my predecessor used. For the first time we have availed ourselves of access and will be continuing to use that access, which gives direct access to their electronic databases.<sup>82</sup>

#### COMMUNICATION WITH OTHER AGENCIES

- 3.20 The Committee asked the Inspector to describe the level of communication and interaction he has with counterparts in other agencies.

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<sup>81</sup> The Hon David Levine QC, *Transcript of evidence*, 22 February 2013, p 3

<sup>82</sup> The Hon David Levine QC, *Transcript of evidence*, 22 February 2013, p 4

- 3.21 The Inspector told the Committee that he intended to have a personal meeting with the Commissioner of the Crime Commission (Mr Peter Hastings QC) by way of courtesy, though he also noted that the Crime Commission was a complainant to the Inspectorate and ‘thus it is desirable otherwise to maintain an arm’s length relationship with that Commission.’<sup>83</sup> The Inspector also stated that it would not be a useful exercise to meet regularly with the Commissioner of the Independent Commission Against Corruption, nor with the Ombudsman, commenting:

The fundamental issue is to maintain the independence of this Inspectorate particularly in relation to the Independent Commission Against Corruption which is the body to which the Inspectorate’s conduct can be referred.<sup>84</sup>

- 3.22 The Committee also asked how the Inspector would balance the need to maintain an ‘arm’s length’ relationship with the Crime Commission against the practical need for communication and exchange of information with that agency. He responded that ‘good sense, discretion and impartiality’ would characterise his relationship with the Crime Commission:

The balancing referred to will be constituted by the dealing with the Crime Commission on any matter on a sensible and businesslike basis. I see no impediment to the obtaining of any information or the conducting of any communication with the NSW Crime Commission in undertaking my statutory duties merely because in one particular area in relation to one particular inquiry being conducted by PIC, complaints have been lodged with this Inspectorate by the Crime Commission.<sup>85</sup>

## RESOURCING AND STAFFING

- 3.23 The Inspector informed the Committee that he was quite comfortable with the level of resources provided to discharge the functions of the Inspectorate.<sup>86</sup> He also noted that the 2012-2013 Budget for the Inspectorate was \$339,300 and that, in addition, \$68,000 had been provided for the engagement of the Inspectorate’s Senior Project Officer.<sup>87</sup>
- 3.24 The Inspectorate of the Police Integrity Commission provided information to the Committee on expenses and revenues (including staffing) over the period 2010-11 and 2011-12.<sup>88</sup> This information is detailed in Chapter Eight.

## COMMITTEE COMMENT

- 3.25 The Committee appreciates the evidence provided by the Inspector of the Police Integrity Commission at the General Meeting. The Committee particularly thanks the Inspector for enhancing its understanding of issues surrounding the Taskforce

<sup>83</sup> Inspectorate of the Police Integrity Commission, *Answers to Questions on Notice*, 25 January 2013, p 7, question 15

<sup>84</sup> Inspectorate of the Police Integrity Commission, *Answers to Questions on Notice*, 25 January 2013, p 7, question 17

<sup>85</sup> Inspectorate of the Police Integrity Commission, *Answers to Further Questions on Notice*, 13 March 2013, p 1, question 2

<sup>86</sup> The Hon David Levine QC, *Transcript of evidence*, 22 February 2013, p 9

<sup>87</sup> Inspectorate of the Police Integrity Commission, *Answers to Questions on Notice*, 25 January 2013, pp 5–6, question 12

<sup>88</sup> Correspondence from Inspector of the PIC to the Committee, dated 5 July 2013

Emblems matter. The Committee looks forward to following the progress of the Inspectorate's work over the coming year.

## Chapter Four – First General Meeting with the NSW Crime Commission

- 4.1 On 22 February 2013, the Committee conducted the First General Meeting with the NSW Crime Commission. The Committee met Mr Peter Hastings QC, the Commissioner, and Mr Peter Singleton, Assistant Commissioner.
- 4.2 As part of the preparation for the General Meeting, the Committee sent the Commission a series of questions on notice about matters arising out of the Commission's 2011-12 Annual Report. The answers to these questions on notice can be found on the Committee's website.<sup>89</sup>
- 4.3 Evidence was taken at the General Meeting in relation to the Commission's Annual Report as well as other issues raised by the Committee. These included an overview of the new structure of the Commission under its modernised legislation; relationships with the Police Integrity Commission and the NSW Police Force; the Commission's involvement in investigations of recent shootings; audits; confiscation work; and resourcing and staffing matters. These issues are discussed in greater detail below.

### NEW LEGISLATION AND STRUCTURE

- 4.4 With the commencement of the *Crime Commission Act 2012*, the Committee now has oversight of the Crime Commission, its Management Committee and the Inspector of the Crime Commission. The new legislation also implemented most of the recommendations of the Special Commission of Inquiry into the NSW Crime Commission, conducted by Mr David Patten. The Patten inquiry examined the structure, procedures, accountability and oversight of the NSW Crime Commission and was established after the sentencing of the former assistant director of the NSW Crime Commission.<sup>90</sup>
- 4.5 This General Meeting was the Committee's first opportunity to meet formally with the Crime Commission within the new oversight arrangements. The Committee was interested to hear about the changes to the Commission's structure and governance under the modernised legislation.
- 4.6 According to the Commissioner, the previous management structure was more 'flat line' and 'very much influenced by the commissioner', whereas now there is more of a hierarchy in the Commission's management. The Management Committee of the Crime Commission now has an independent chair (no longer the Minister for Police), Mr Patten, who has an extensive knowledge of the Commission.<sup>91</sup>

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<sup>89</sup> See: <<http://www.parliament.nsw.gov.au/ombudsmanpic>>, viewed 25 September 2013

<sup>90</sup> The Hon. Michael Gallacher MLC, Minister for Police and Emergency Services, *Second Reading Speech*, Crime Commission Bill 2012, 15 August 2012.

<sup>91</sup> Mr Peter Hastings QC, Commissioner, NSW Crime Commission, *Transcript of evidence*, 22 February 2013, p 1

- 4.7 The Commission also has a new governance unit, with responsibility for internal audits and risk management. The Commissioner explained that '[e]ach of the senior members of the commission now owns risks which are to be audited.' Some of the auditing is outsourced through a committee with an independent chair, and internal audits are also conducted.<sup>92</sup>
- 4.8 The Commissioner assured the Committee that the new oversight and governance arrangements 'can only enhance the integrity of the commission'.<sup>93</sup>

### Commissioner's focus

- 4.9 The administration and management of the Commission is largely being handled by the Assistant Commissioner, while the Commissioner's focus is on 'discharging the statutory objective vested in the commissioner of reducing the incidence of organised crime'.<sup>94</sup> He explained:

I am embarking upon a more disciplined and strategic approach to attack organised crime as adopted in the United Kingdom through the Serious and Organised Crime Agency and in Canada through the Royal Mounted Police and through the Australian Crime Commission with a view to devising a formal structure which will allow us to pursue our statutory goal in a slightly more disciplined fashion than has been the case in the past. From my perspective I am very encouraged. The staff to my observation are very enthusiastic and loyal and I am sure that we will continue to secure some major arrests and confiscations in the future.<sup>95</sup>

- 4.10 The Commissioner said that he wanted to create a more sophisticated 'matrix of organised crime' in NSW by understanding the links between groups and their activities, as well as incorporating information about assets which will be vulnerable to confiscation, and then being able to prioritise targets. These efforts are being undertaken in consultation with the NSW Police Force.<sup>96</sup>

### Delegation of functions to the Assistant Commissioner

- 4.11 The Assistant Commissioner explained that he is more active in the day-to-day operations of the Commission.<sup>97</sup> He explained how the delegation of functions had taken effect:

Under the 1985 Act the commission was a commission of members and it could only make decisions by way of resolution of the members meeting, in effect, in committee. In the period from July 2010 to November 2011 the commission was constituted by [former commissioner] Phillip Bradley and me, and the commission met in formal session and delegated all of its functions to Mr Bradley and to me, subject to any contrary decision of the commissioner. I am still operating under that

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<sup>92</sup> Mr Peter Hastings QC, *Transcript of evidence*, 22 February 2013, p 1

<sup>93</sup> Mr Peter Hastings QC, *Transcript of evidence*, 22 February 2013, p 2

<sup>94</sup> Mr Peter Hastings QC, *Transcript of evidence*, 22 February 2013, p 2

<sup>95</sup> Mr Peter Hastings QC, *Transcript of evidence*, 22 February 2013, p 2

<sup>96</sup> Mr Peter Hastings QC, *Transcript of evidence*, 22 February 2013, p 9

<sup>97</sup> Mr Peter Singleton, Assistant Commissioner, NSW Crime Commission, *Transcript of evidence*, 22 February 2013, p

delegation so all of the functions of the commission are delegated to me and, of course, Mr Hastings has full authority as well.<sup>98</sup>

## RELATIONSHIP WITH THE POLICE INTEGRITY COMMISSION AND THE NSW POLICE FORCE

- 4.12 The Commissioner noted that he and the Commissioner of the Police Integrity Commission (PIC) had the intention of meeting together regularly for 'friendly discussions'. Both believed it was important to ensure that the relationship between the two agencies avoided the 'undesirable position of litigation and expense' which had occurred in the past. The Commissioner acknowledged that tension may still exist between the personnel in each organisation:

The problem is there will always be an underlying tension because the people in the Crime Commission are concerned that they are being targeted by people in the Police Integrity Commission. It is unfortunate because we ought to be able to work together as agencies operating in the same area rather than one of our people feeling that they are under surveillance by the other ... I think at least at an executive level we will work together better than has been the case in the past.<sup>99</sup>

- 4.13 The Commissioner also noted that provisions in the *Crime Commission Act 2012* had addressed concerns about the PIC 'targeting' the Crime Commission, but that more could be done to make the new arrangements clearer:

... the legislation did ameliorate some of our concerns in that the provisions now are that the PIC is not to effectively target our people without a complaint unless with the consent of the inspector [of the Crime Commission] so that to some extent our staff's worries that every call they make is being intercepted and every time they walk out the door there will be some surveillance of them has abated, but I am sure there is scope for us to sit down and come up with some more better defined lines of agreement.<sup>100</sup>

- 4.14 In answers to questions on notice, the Crime Commission described its relationship with the NSW Police Force as one of 'partnership and cooperation'. The operational differences between the Commission and the Police Force were also spelled out:

The agencies' joint work features each agency focusing on its specialties and responsibilities and working to co-ordinate their respective efforts. The precise details of how the agencies work together will vary from case to case, but typically, as is proper, the Police undertake most of the field work such as surveillance, the execution of search warrants and work related to the deployment of police undercover officers, undertake other standard police work associated with criminal investigation (e.g. canvassing for witnesses), and prepare briefs of evidence for using in criminal proceedings, and the Commission undertakes intelligence analysis and forensic accounting, discharges its functions under the *Criminal Assets Recovery Act 1990* and the *Crime Commission Act*, and undertakes telecommunications interception and monitoring.<sup>101</sup>

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<sup>98</sup> Mr Peter Singleton, *Transcript of evidence*, 22 February 2013, p 9

<sup>99</sup> Mr Peter Hastings QC, *Transcript of evidence*, 22 February 2013, p 2

<sup>100</sup> Mr Peter Hastings QC, *Transcript of evidence*, 22 February 2013, p 3

<sup>101</sup> NSW Crime Commission, *Answers to Further Questions on Notice*, 12 March 2013, pp 1–2, question 1

## RECENT SHOOTINGS

- 4.15 The Committee sought information about the Commission's role in investigating a spate of recent public shootings, predominantly in south west Sydney. Since January 2012, the Commission has been involved in these matters at the request of police. Details of the Commission's involvement are set out below:

Since 1 January 2012, in respect of these matters, the Commission has issued 75 summonses requiring witnesses to attend Commission hearings (not all matters proceeded to hearings), obtained nine surveillance device warrants (not including such warrants by police officers who may also be Commission staff members), intercepted 62 telecommunications services, and established 'live' receipt of call associated data in respect of 67 telecommunications services. Most importantly, the Commission has assigned significant analytical staff to the investigations. The Commission's work has contributed to the making of 29 arrests and the laying of 106 charges.<sup>102</sup>

- 4.16 The ability of the Commission to pierce the 'wall of silence' (through its powers to summons witnesses and require them to answer questions) was acknowledged as one of the most significant factors motivating police to seek the Commission's help. The Commission's analytical and intelligence gathering capabilities, as well as the good relationships between Commission personnel and police officers, were also cited as motivating factors behind the request for assistance.<sup>103</sup>

- 4.17 At the General Meeting, the Committee asked whether the Commission would see any value in providing police with the power to compel witnesses to answer questions. The Commissioner stated that the current arrangement, whereby the Police Force can call on the Crime Commission, should remain in place:

I think from a policy point of view the current arrangement is good. If you were to give the powers to the Police Force generally, I think that would be a matter of concern to the community. The fact that we are a separate agency and now seem to be highly regulated gives a sense of comfort to the community that what might be regarded by some as special powers are being properly reserved for those occasions when they are needed.<sup>104</sup>

- 4.18 The Commissioner believed that the skills and powers of the Commission were 'adding a lot of value' to the investigations of shootings.<sup>105</sup> The Assistant Commissioner noted that many arrests had taken place, but also acknowledged that despite 'solving' who shot whom and what happened, getting enough evidence to launch prosecutions was a more complex matter:

We have two things that we want to do. One is to disrupt the crime and stop it happening again, and the other is to get a prosecutable brief. The latter is a subset of the former and obviously there are more in the former category than in the latter category. It should be perhaps borne in mind that we are used to conducting long-term, complex investigations and it is just over a year since the Minister made a

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<sup>102</sup> NSW Crime Commission, *Answers to Questions on Notice*, 1 February 2013, pp 5–6, question 15

<sup>103</sup> NSW Crime Commission, *Answers to Questions on Notice*, 1 February 2013, p 6, question 16

<sup>104</sup> Mr Peter Hastings QC, *Transcript of evidence*, 22 February 2013, p 11

<sup>105</sup> Mr Peter Hastings QC and Mr Peter Singleton, *Transcript of evidence*, 22 February 2013, p 12



public announcement that our assistance was sought in this problem and, as I said, a number of arrests have already been made.<sup>106</sup>

## AUDITS

4.19 The Commission explained that an external auditor supervises the Commission's risk management processes and timetables. The external auditor ensures that the Commission has carried out its own internal audits in areas of risk such as human source management and statutory compliance under the *Telecommunications (Interceptions and Access) Act 1979*.<sup>107</sup> The latest audit of human source management practices was described by the Assistant Commissioner:

Broadly speaking, there was a satisfactory level of compliance. They found a few matters that needed to be attended to and they made a number of policy recommendations, including ones that pointed out that some of the policies were unnecessarily convoluted and gave rise to breaches which were breaches of the written letter of the policy but the policy was poorly drafted. Certainly no misconduct or impropriety was found in the audit.<sup>108</sup>

## CONFISCATION WORK

4.20 The Committee noted that the effect of the judgment in the *NSW Crime Commission v Cook* (2011) NSWSC 1348 was to impair the Crime Commission's capacity to undertake confiscation work under the *Criminal Assets Recovery Act 1990* ('CAR Act'). The decision meant that the court was required to examine evidence where confiscation settlement agreements involved legal expenses.<sup>109</sup> However, the *Crime Commission Act 2012* overturned the effects of this judgement and the Commission reported to the Committee that it was satisfied that 'all necessary steps have been taken to ameliorate the effects of [the judgement]'.<sup>110</sup>

## RESOURCING AND STAFFING

4.21 The Crime Commission provided information to the Committee on expenses and revenues (including staffing) over the period 2010-11 and 2011-12. This information is detailed in Chapter Eight.

## COMMITTEE COMMENT

4.22 The Committee thanks the Crime Commission for providing a helpful overview of its functions, structure and recent work during the First General Meeting. The Committee looks forward to building a constructive relationship with the Crime Commission as part of the new oversight arrangements established in the *Crime Commission Act 2012*.

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<sup>106</sup> Mr Peter Hastings QC and Mr Peter Singleton, *Transcript of evidence*, 22 February 2013, p 12

<sup>107</sup> Mr Peter Hastings QC, *Transcript of evidence*, 22 February 2013, p 6

<sup>108</sup> Mr Peter Hastings QC, *Transcript of evidence*, 22 February 2013, p 7

<sup>109</sup> The Hon. Michael Gallacher MLC, Minister for Police and Emergency Services, *Second Reading Speech*, Crime Commission Bill 2012, 15 August 2012.

<sup>110</sup> NSW Crime Commission, *Answers to Questions on Notice*, 1 February 2013, p 4, question 8

## Chapter Five – Second General Meeting with the Information and Privacy Commission

- 5.1 On 22 February 2013, the Committee conducted the Second General Meeting with the Information and Privacy Commission (IPC). The Committee met Ms Deirdre O'Donnell, the Information Commissioner and Chief Executive Officer (CEO), and Dr Elizabeth Coombs, the Privacy Commissioner.
- 5.2 As part of the preparation for the General Meeting, the Committee sent the IPC a series of questions on notice about matters arising out of the IPC's 2011-12 Annual Report. The answers to these questions on notice can be found on the Committee's website.<sup>111</sup>
- 5.3 Evidence was taken at the General Meeting in relation to the IPC's Annual Report as well as other issues raised by the Committee. These included the experiences and challenges since the merger of the Information Commission and the Privacy Commission; relationships with external practitioners of information and privacy policy; challenges to privacy raised by technology; issues experienced by local councils on privacy and information policy; and resourcing and staffing matters. These issues are discussed in greater detail below.

### RECENT EXPERIENCES AND CHALLENGES

- 5.4 The IPC identified a number of challenges it has faced since its formation in 2011 following the merger of the Office of the Information Commissioner (OIC) and the Office of the Privacy Commissioner (OPC). These include responding to budget cuts, striking the right balance between reactive work and proactive systemic policy work, and implementing a new case management system.
- 5.5 The IPC told the Committee it had been working to integrate its systems to create 'one IPC', with a uniform approach to functions and a central contact point. A single website has been created with updated material from the historic OIC and IPC websites, and a single free call number for telephone enquiries has been established.<sup>112</sup>
- 5.6 At the end of 2012, the IPC conducted an extensive review of its organisational structure. It found that many service areas are already working across both privacy and information access, including the policy, communications, stakeholder engagement and business teams. The casework teams were still separated, although it was expected that they would merge in the first half of 2013.<sup>113</sup>

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<sup>111</sup> See: <<http://www.parliament.nsw.gov.au/ombudsmanpic>>, viewed 25 September 2013

<sup>112</sup> Information Commissioner, *Answers to Questions on Notice*, 1 February 2013, p 1, question 1

<sup>113</sup> Information Commissioner, *Answers to Questions on Notice*, 1 February 2013, p 1, question 1

5.7 The IPC undertakes work which is both 'proactive' and 'reactive'. Proactive work involves engagement with stakeholders, agencies, the public and peers in other jurisdictions to raise awareness of the IPC's functions. Reactive work is predominantly focused on reviews of agency decisions, complaints or investigations under the *Government Information (Public Access) Act 2009* (GIPA Act).<sup>114</sup>

5.8 The Information Commissioner noted that in the tighter fiscal environment, the IPC's focus has been largely 'reactive' work and that 'proactive' work would become more targeted:

In response to the budget cuts of late last year, we focused our efforts and attentions on our core business functions, which largely represent our reactive work. Citizens and agencies look to the independent watchdog to ensure their rights are protected and independent oversight is available to provide them with redress where government processes have let them down. Our proactive work around promotion of rights and education about our legislation will now become much more targeted and will be enhanced by collaboration with key partners, such as our peers in other jurisdictions or other oversight agencies.<sup>115</sup>

5.9 The Information Commissioner noted that the government sector's administrative record-keeping and information management systems were not as good as they could be, and this presented challenges in terms of compliance with the GIPA Act and being able 'to give people the information they want in good time in the form that they need it'.<sup>116</sup> Another challenge was compliance burdens:

... there is a significant level of compliance for a chief executive officer of a small agency, equating to the level of compliance of large agencies, and ensuring that you reach a proportional approach to compliance which ensures people can be confident in your integrity and transparency and that you still deliver good business services.<sup>117</sup>

5.10 The Privacy Commissioner identified the challenges of growing demand from the community for information and investigation of privacy matters; the balance between individual complaints and more systemic issues; and engagement with government, councils and universities. Another challenge was 'the issues which people think you as a Privacy Commissioner will be able to assist them with and those that the legislation actually allows us to have a direct involvement with'.<sup>118</sup>

### Purchase of a case management system

5.11 The Committee heard that another major challenge for the IPC was the purchase of a software program for its case management system.

<sup>114</sup> Ms Deirdre O'Donnell, Information Commissioner, Information and Privacy Commission, *Transcript of evidence*, 22 February 2013, p 2

<sup>115</sup> Ms Deirdre O'Donnell, *Transcript of evidence*, 22 February 2013, p 2

<sup>116</sup> Ms Deirdre O'Donnell, *Transcript of evidence*, 22 February 2013, p 4

<sup>117</sup> As above

<sup>118</sup> Dr Elizabeth Coombs, Privacy Commissioner, Information and Privacy Commission, *Transcript of evidence*, 22 February 2013, p 6

5.12 The 'Resolve' case management system was implemented in November 2012 and replaced the previous databases used by the OIC and OPC. The estimated total project cost was \$396,059.<sup>119</sup> All casework and enquiries on privacy and information access matters will now be managed through this common system.<sup>120</sup> Its benefits will include greater efficiency and productivity and an ability to analyse trends in the methods and frequency of stakeholder contact with the IPC.<sup>121</sup>

5.13 However, the IPC experienced significant delays in acquiring and establishing the case management system, which had a negative impact on the delivery of the IPC's core work:

One of the greatest impediments to finalising cases last year was the lack of a case management system (CMS), a core business item for a watchdog agency. The delays in acquiring and establishing a CMS were largely outside our control, with it taking well over 18 months to be able to purchase an off-the-shelf system which is used by many watchdog agencies across the country but which was not available through a NSW panel contract.

The delay in acquiring and implementing our CMS has meant that inefficient and complex processes were followed to deal with demand. These were necessary but far from optimum. Now that the CMS is in place, I expect to see much better, quicker and more consistent processing of complaints. Reports from the system will also help us identify patterns of demand (such as for particular agencies) and address these more strategically.<sup>122</sup>

## Relationships with external stakeholders

5.14 The IPC reported that it had positive relationships with external stakeholders and that it works actively with privacy and information practitioners in the field:

We have a practitioner network which whom we can communicate who are actively, if you like, our many ambassadors out in the agencies. So to maintain a good and responsive line of communication to the right to information and privacy practitioners is a challenge but an important one ... I think the doors have been open to us in terms of our own speech giving or participating in agencies' professional development. I have not found any doors closed. If I have asked for access to an agency, I have been granted it, as I would expect.<sup>123</sup>

5.15 The Commissioners hold four annual meetings with practitioners and the IPC also communicates with them through a reference group.<sup>124</sup> The Privacy Commissioner commented that it is important for the IPC to support privacy practitioners to ensure that they are well-equipped to deal with problems earlier rather than later:

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<sup>119</sup> Information Commissioner, *Answers to Further Questions on Notice*, 14 March 2013, p 2, question iii

<sup>120</sup> Information Commissioner, *Answers to Questions on Notice*, 1 February 2013, p 1, question 1

<sup>121</sup> Information Commissioner, *Answers to Questions on Notice*, 1 February 2013, p 4, question 5

<sup>122</sup> Information Commissioner, *Answers to Questions on Notice*, 1 February 2013, p 8, question 11

<sup>123</sup> Ms Deirdre O'Donnell, *Transcript of evidence*, 22 February 2013, p 4

<sup>124</sup> Ms Deirdre O'Donnell, *Transcript of evidence*, 22 February 2013, p 5

I do not want to be there just pulling people out of the river—that is the analogy I frequently use. I want to be stopping them falling into the river. So I really want to make sure through the governance that the agency has in place and the people who are working and dealing with the service users' personal information on a daily or whatever basis, they know that the principles of the Privacy and Personal Information Protection Act and they act accordingly within that; and, if they do not know, they know where to go to get this information.<sup>125</sup>

- 5.16 The Information Commissioner told the Committee that she did not see any major areas of concern in the information access sphere and that the IPC was well-positioned to address individual areas of concern as they arose:

As a watchdog you will always see what goes wrong and on the whole what goes wrong does not terrify me. On the whole what goes wrong are things that I think can be rectified by either better recordkeeping processes, better internal training and more targeted resources from us, so on the whole I am not seeing anything that concerns me or worries me greatly. Where we do encounter individual issues that are of concern, what we are comfortable to do is to immediately escalate those. If there was a problem with a particular agency I have no hesitation in contacting the head of the agency, and I have never found an agency head who said, "Get lost". The door has always been open.<sup>126</sup>

## PRIVACY CHALLENGES FROM TECHNOLOGY

- 5.17 The Committee discussed with the Privacy Commissioner the challenges to privacy arising from modern technology. People approach the IPC in relation to their concerns about surveillance, CCTV and drone technology. However, the Commissioner pointed out that the IPC is constrained by the limited scope of privacy legislation:

... the things that people want to speak to us about, such as surveillance, are not necessarily addressed by the legislation. They are concerned about the CCTV camera that may be on their neighbour's property that is overlooking their property or into their backyard where they have a pool and young children are swimming. There are a lot of concerns there. In that way we seek to provide information and advice as to what they can do and how to go about it. For example, it is surprising that many people will come to us directly, because they feel a reticence or difficulty about raising matters of that nature with the neighbours. The issue of drones has come up but there is nothing in the legislation that enables us to do anything, unless a drone is being operated by a New South Wales public sector agency.<sup>127</sup>

- 5.18 The IPC directs enquiries relating to drones to the Federal Privacy Commissioner, as federal legislation has greater coverage of private sector privacy issues, as well as aviation matters.<sup>128</sup>
- 5.19 The Privacy Commissioner commented that emerging technology posed real challenges to privacy and that an awareness of the need for 'privacy by design' should form part of the conversation between regulators and industry:

<sup>125</sup> Dr Elizabeth Coombs, *Transcript of evidence*, 22 February 2013, p 9

<sup>126</sup> Ms Deirdre O'Donnell, *Transcript of evidence*, 22 February 2013, p 4

<sup>127</sup> Dr Elizabeth Coombs, *Transcript of evidence*, 22 February 2013, p 7

<sup>128</sup> As above

Technology is imposing challenges which were not thought of in 1998 when the PPIP Act was passed. In the same way, from some of these technologies, out of the challenges you get accepted norms of behaviour so that you get either direct intervention through legislation or you get voluntary codes which come in, not necessarily in the area of drones but in the area of technology generally. We should also be saying to the technology industry that if they are so capable of making this intrusive technology, it must also be capable of providing privacy security measures. That is the discussion we have been having with the industry, both through ICT strategy and separately with the Australian industry body, to try and get that sort of awareness.<sup>129</sup>

### Committee comment

- 5.20 The Committee will maintain its interest in the issue of drone technology, and notes that the IPC has undertaken to provide further advice about drone technology and its implications in regard to privacy after it consults with the Information and Privacy Advisory Committee.<sup>130</sup>

### LOCAL GOVERNMENT ISSUES

- 5.21 The Committee heard that the IPC has provided assistance to local councils regarding privacy and information access matters. A model privacy management plan is now available as a resource for local councils:

Obviously many councils share things in common. They should not each have to struggle to write with limited resources their own individual privacy management plan. There is a model one which provides information, for example, on public registers and the like or minutes of council meetings. It gives them the basics and then they make some variations according to the processes and procedures of their own council.<sup>131</sup>

- 5.22 The Information Commissioner noted that councils are currently grappling with the problem of conflicts between the GIPA Act and the *Copyright Act 1968*. The IPC has helped to advocate for the concerns raised by local government on these matters:

One of the big problems that has emerged out of the legislative regime is the conflict between the Copyright Act and the Government Information (Public Access) Act. That has really caused enormous problems for local councils. We have not been able to resolve it because there is a real conflict between what you are meant to put on your website versus what development applications and the Copyright Act say you can. We made a small submission to the recent Law Reform Commission review of copyright legislation nationally, bringing the perspective of the local government voice that had been raised with us. We thought that was really important, and the policy team did that for us. At least we have put on the table that this is a big problem and how do we get to a solution? We do not yet have a solution. That has been probably one of the most notable from mine—local government.<sup>132</sup>

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<sup>129</sup> Dr Elizabeth Coombs, *Transcript of evidence*, 22 February 2013, p 7

<sup>130</sup> Privacy Commissioner, *Answers to Further Questions on Notice*, 14 March 2013, p 1, question 1

<sup>131</sup> Dr Elizabeth Coombs, *Transcript of evidence*, 22 February 2013, p 9

<sup>132</sup> Dr Elizabeth Coombs, *Transcript of evidence*, 22 February 2013, p 10

## RESOURCING AND STAFFING

5.23 The Committee asked the IPC whether it was adequately resourced to conduct its business effectively. The IPC responded that it was seeking to increase productivity by internal means (for example, through the integration of the privacy and information access case management teams) rather than by seeking further funding.<sup>133</sup>

5.24 The Information Commissioner advised that after an operational review of the IPC was conducted in late 2012, efficiencies were identified to meet savings targets. This included a voluntary redundancy program designed to reduce the IPC's labour-related expenses.<sup>134</sup> She also highlighted that the IPC's forward budget would require additional staffing reductions:

My firm view is that 28.6 is the minimum requirement to fulfil our legislative obligations as an accountability agency that also champions citizens' privacy and access to government information rights.

The savings we have made in our operating expenses has allowed the IPC to forecast a surplus in our operating statement over the next 4 years, including 2012-13. The recurrent budget has provided us with sufficient funds to finance the operating expenses, as well as labour related expenses.

I am therefore writing to Treasury to propose the following options to tackle the labour cap predicament we will be facing in the forward years from 2014-15:

1. to allow our labour expense and operating expense to be combined as the assessment criteria in budget compliance; or
2. to increase the labour expense cap limit and at the same time reduce the operating expense budget by the same amount.<sup>135</sup>

5.25 The IPC provided information to the Committee on expenses and revenues (including staffing) for 2011-12.<sup>136</sup> This information is detailed in Chapter Eight.

## COMMITTEE COMMENT

5.26 The Committee welcomes the benefits and efficiencies that have come from the IPC's merged functions, particularly in a challenging budget environment. The Committee commends the work of both Commissioners and particularly thanks Ms Deirdre O'Donnell for her hard work as both Information Commissioner and CEO. Ms O'Donnell retired during 2013 and the Committee appreciates her role in establishing the IPC as a new and innovative agency.

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<sup>133</sup> Privacy Commissioner, *Answers to Questions on Notice*, 1 February 2013, p 3, question 3

<sup>134</sup> Correspondence from the Information Commissioner to the Committee Chair, 5 July 2013, p 1

<sup>135</sup> Correspondence from the Information Commissioner to the Committee Chair, 5 July 2013, p 2

<sup>136</sup> Correspondence from the IPC to the Committee, dated 5 July 2013. The IPC was not fully operational during the 2010-11

## Chapter Six – Eighteenth General Meeting with the NSW Ombudsman

- 6.1 On 22 February 2013, the Committee conducted the Eighteenth General Meeting with the Ombudsman. The Committee met Mr Bruce Barbour, the Ombudsman, Mr Steven Kinmond, the Deputy Ombudsman and Community and Disability Services Commissioner, Mr Chris Wheeler, Deputy Ombudsman, Public Administration, and Ms Linda Waugh, Deputy Ombudsman, Police and Compliance.
- 6.2 As part of the preparation for the General Meeting, the Committee sent the Ombudsman a series of questions on notice about matters arising out of the Ombudsman's 2011-12 Annual Report. The answers to these questions on notice can be found on the Committee's website.<sup>137</sup>
- 6.3 Evidence was taken at the General Meeting in relation to the Ombudsman's Annual Report as well as other issues raised by the Committee. These included Operation Prospect; oversight of custodial environments; the use of Tasers by the NSW Police Force; child protection issues; management of asbestos; and resourcing and staffing matters. These issues are discussed in greater detail below.

### OPERATION PROSPECT

- 6.4 In 2003 the Special Crime and Internal Affairs branch of the NSW Police Force (NSWPF) commenced an investigation, Strike Force Emblems, into allegations of serious misconduct by officers of the NSWPF, the NSW Crime Commission and the Police Integrity Commission (the PIC) in relation to a number of investigations jointly conducted by the agencies. Following a referral from the PIC Inspector, who in 2012 had reviewed the report on Strike Force Emblems, the Ombudsman has commenced his own investigation, Operation Prospect, into the allegations and other complaints about the matters.
- 6.5 Amendments to the *Ombudsman Act 1974* in November 2012 gave the Ombudsman the power to compel the Crime Commission and the PIC to provide evidence and/or produce documents in relation to a matter referred to the Ombudsman by the Inspector of either of these two agencies. Hitherto the Ombudsman's 'Royal Commission' powers had not extended to the Crime Commission and the PIC.<sup>138</sup>
- 6.6 The Ombudsman anticipates Operation Prospect will be 'protracted and resource intensive'.<sup>139</sup> He told the Committee he had created an operating environment separate from the rest of the office, with a purpose-built investigation database 'to ensure the integrity and security of the information they now hold'.<sup>140</sup>

<sup>137</sup> See: <<http://www.parliament.nsw.gov.au/ombudsmanpic>>, viewed 25 September 2013

<sup>138</sup> Mr Bruce Barbour, NSW Ombudsman, *Transcript of evidence*, 22 February 2013, pp 5–6

<sup>139</sup> NSW Ombudsman, *Operation Prospect Fact Sheet*, October 2012

<sup>140</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 4



Specialist staff were being recruited and the Ombudsman was confident that 'the investigation will not only be independent and impartial but also thorough'.<sup>141</sup>

- 6.7 The Ombudsman received a grant from the Department of Premier and Cabinet for 2012-2013 of approximately \$1.57 million to fund Operation Prospect, including \$1.168 million for employee-related expenses and \$400,000 for capital expenditure, and he told the Committee he would be seeking in excess of \$2 million for 2013-14, of which \$1.547 million would be employee-related. Mr Barbour considered it essential to have 'the right capital, systems and personnel in place to work on the investigation'.<sup>142</sup>

### Committee comment

- 6.8 The Committee will maintain its interest in the Ombudsman's work on Operation Prospect, noting that it will be a resource intensive investigation into complex matters dating back a number of years.

## OVERSIGHT OF CUSTODIAL ENVIRONMENTS

- 6.9 In response to a Committee question about the possible impact of the appointment of an Inspector of Custodial Services on the Ombudsman's role and work in the area of custodial environments, the Ombudsman said that he would work constructively and cooperatively with the Inspector to minimise any duplication in their work.<sup>143</sup>

## Operational Protocol to the Convention Against Torture

- 6.10 In the course of discussion about his office's relationship with the Inspector of Custodial Services, the Ombudsman raised the possibility of duplication if the Inspector is made the monitoring agency for custodial environments under the Optional Protocol to the Convention against Torture (OPCAT). OPCAT is an international agreement aimed at preventing torture and cruel, inhuman or degrading treatment or punishment of people in detention.<sup>144</sup> Parties to the Protocol agree to international inspections of places of detention by a United Nations sub-committee and are required to establish an independent National Preventive Mechanism (NPM) to conduct inspections, make recommendations and prepare reports in relation to all places of detention, aimed at detecting and preventing practices contravening the aims of the convention. Australia has signed but not yet ratified or implemented the Protocol.<sup>145</sup>
- 6.11 The Ombudsman commented:

OPCAT, as far as I am aware from my research, was introduced because the United Nations had concerns about the quality and human rights conditions that attached

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<sup>141</sup> As above

<sup>142</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 4

<sup>143</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 7

<sup>144</sup> Places of detention include prisons, juvenile detention centres, mental health and social care institutions and any other places where people are or may be deprived of their liberty.

<sup>145</sup> See: NSW Ombudsman's OPCAT documents, 1 March 2013 at <<http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/2DAAD2625D3F3EF0CA257B34001BE801>>, viewed 1 October 2013

to areas where people were detained in certain countries around the world. As many United Nations Protocols are introduced, signatories to them are not only those where there are problems but also those where there are probably less problems in place, such as New Zealand and Australia. We already have fairly significant monitoring and examination processes but none that are quite as complex or will offer, if you like, the degree of consistency that this will.

It is envisaged, I think, given the States' responsibilities for so many of these areas to have monitoring mechanisms within each of the States. They would then report to a central national body—quite possibly the Human Rights Commission or alternatively the Commonwealth Ombudsman, that is yet to be determined—and then that body would then work with the Commonwealth Government in terms of reporting to the United Nations.<sup>146</sup>

6.12 The Ombudsman has made a submission to the Australian Federal Parliament's Joint Standing Committee on Treaties proposing that, once the Protocol is ratified, his office be designated as an agency to form the NPM in NSW. The Ombudsman considers his office is well qualified to carry out the role as it already:

- visits or inspects prisons, juvenile detention centres and disability services
- can visit police facilities
- oversees the Official Community Visitor scheme in NSW. The role of Official Community Visitors includes identifying issues about the quality of care at government and non-government residential services operated, funded or licensed to provide accommodation and care by Ageing, Disability and Homecare or Community Services.<sup>147</sup>

### Committee comment

6.13 The Committee notes the Ombudsman's comments in relation to possible duplication of the responsibility for monitoring custodial environments with the appointment of the new Inspector of Custodial Services.<sup>148</sup> The Committee has oversight of the Inspector of Custodial Services and will monitor matters raised by the Ombudsman regarding the Operational Protocol to the Convention Against Torture.

### USE OF TASERS BY THE NSW POLICE FORCE

6.14 In October 2012 the Ombudsman produced a report on his office's investigation into the use of Tasers by general duties police in the NSW Police Force (NSWPF).<sup>149</sup> The investigation involved analysis of data on 2,252 Taser incidents occurring between October 2008 and November 2010 and a detailed review of 556 of those incidents. In the majority of cases the Taser use was justified;

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<sup>146</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 8

<sup>147</sup> A copy of the NSW Ombudsman's submission, dated 30 March 2012, to the Joint Standing Committee on Treaties was provided to the Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission following a request by the Committee Chair during the hearing on 22 February 2012.

<sup>148</sup> The Inspector of Custodial Services, Dr John Paget, was appointed on 18 September 2013.

<sup>149</sup> NSW Ombudsman, *How are Taser weapons used by NSW Police Force?*, October 2012

however, the Ombudsman's investigation did identify incidents where Taser use was inappropriate, as well as areas for improvement in the NSWPF's internal accountability system relating to Taser use.<sup>150</sup>

- 6.15 In response to a question on notice from the Committee, the Ombudsman reported that the NSWPF supported 44 of the report's 46 recommendations and partly supported the remaining two recommendations.<sup>151</sup> Ms Linda Waugh, Deputy Ombudsman, Police and Compliance, assured the Committee that, during the investigation of Taser use, if issues arose in individual cases that the office considered needed further examination, those issues were raised with the NSWPF. Ms Waugh was satisfied that the police had re-visited matters as appropriate.<sup>152</sup>

## CHILD PROTECTION ISSUES

### Working with children check

- 6.16 Mr Steven Kinmond, Deputy Ombudsman and Community and Disability Services Commissioner, provided information to the Committee about discussions the office has had with the NSWPF about including police intelligence in the working with children check process. The office's use of police intelligence has been quite important in its examination of some employment-related child protection matters and has instigated further police investigation which resulted in charges being laid in several cases. However Mr Kinmond emphasised that it was necessary to distinguish between information and intelligence and to 'strike an appropriate balance on the one hand in terms of ensuring the safety of children, but on the other hand not unfairly prejudicing people's rights'.<sup>153</sup>

### Reportable conduct matters

- 6.17 A centralised unit in the Department of Community Services has carried out investigations into reportable conduct allegations against Community Services employees, including authorised foster carers. Following legislative changes, the management of the majority of out-of-home care placements will transfer from Community Services to the non-government sector. A concern was raised in the Ombudsman's *Annual Report 2011-12*<sup>154</sup> that the non-government sector will not have an equivalent unit with the knowledge and skills to handle reportable conduct cases that will follow from the transfer.
- 6.18 Mr Kinmond told the Committee that the office had raised the issue with the Department of Community Services and with the Association of Children's Welfare Agencies (ACWA). ACWA had subsequently convened a meeting with the Department and the Children's Guardian.

<sup>150</sup> NSW Ombudsman, *How are Taser weapons used by NSW Police Force?*, October 2012

<sup>151</sup> NSW Ombudsman, *Answers to Questions on Notice*, 1 February 2013, p 14, question 24

<sup>152</sup> Ms Linda Waugh, Deputy Ombudsman, Police and Compliance, *Transcript of evidence*, 22 February 2013, p 11

<sup>153</sup> Mr Steven Kinmond, Deputy Ombudsman, Community and Disability Services Commissioner, *Transcript of evidence*, 22 February 2013, p 11

<sup>154</sup> NSW Ombudsman, *Annual Report 2011-2012*, October 2012, p 85

## Aboriginal child sexual assault

- 6.19 The Ombudsman drew the Committee's attention to the most recent of four reports on his office's audit of the implementation of the interagency plan to tackle Aboriginal child sexual assault. It was apparent from the audit that frontline services for all child sexual assault victims were not coping with demand.<sup>155</sup>
- 6.20 The Ombudsman told the Committee that the Joint Investigation Response Team, the multiagency vehicle responsible for responding to child sexual abuse, faced serious statewide resourcing challenges. The Ombudsman's office had:
- ...recommended targeted funding in certain priority areas, [but] this must not simply involve allocating more money to existing programs. There needs to be effective planning, allocation, implementation and review to ensure that the intended results are being achieved and money and services are being put where they are needed most.<sup>156</sup>
- 6.21 The Ombudsman reported that his office's audit revealed that in western New South Wales the response rate to child sexual assault matters was a little over 20 per cent in relation to indigenous children and under 20 per cent for non-indigenous children.<sup>157</sup> He considers this rate to be unacceptable. Part of the problem is staffing shortages in these locations. The Ombudsman's understanding is that the matter is before the Public Service Commission, which is examining:
- ... strategies that can be utilised by not just community services but other universal and smaller service providers to ensure that there are better resources and appropriate incentives to permit ongoing staffing levels to be what are needed in those areas.<sup>158</sup>
- 6.22 The Ombudsman also provided details about a range of policy and practice changes the Office has initiated so that it supports agencies to respond to allegations of serious reportable conduct. These initiatives include a number of measures which promote and strengthen interagency collaboration and information exchange.<sup>159</sup>

### *Committee comment*

- 6.23 The Committee commends the NSW Ombudsman for the valuable work his Office is doing in the area of child protection.

## MANAGEMENT OF ASBESTOS

- 6.24 Asbestos, a component in many older homes, workplaces and public buildings, continues to pose a significant risk to public health and safety. The Ombudsman published his first report on the way NSW deals with asbestos in November

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<sup>155</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 3

<sup>156</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 3

<sup>157</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 13

<sup>158</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 13

<sup>159</sup> NSW Ombudsman, *Answers to Additional Questions on Notice*, 14 March 2013, p 2, question 3

2010.<sup>160</sup> The report called for measures to increase public awareness and implement long-term regulatory reform and remediation strategies, which the Ombudsman considered were necessary in order to reduce the incidence of asbestos-related diseases and death.

- 6.25 The Ombudsman told the Committee that he had reported in July 2012 on his office's investigation into the management of asbestos and other hazardous material in police buildings across NSW.<sup>161</sup> As in his earlier report, the Ombudsman found that there is confusion over the division of responsibility for the safe removal of asbestos. The Ombudsman told the Committee that the report's recommendations were being considered by Cabinet and that both the Minister for Police and the Police Commissioner are committed to change.<sup>162</sup>
- 6.26 The Committee asked the Ombudsman about progress on remediation work at the now disused Woods Reef asbestos mine, the subject of investigation in the Ombudsman's 2010 asbestos report. The Ombudsman said that he was not aware that any remediation had commenced, largely because a bat colony had taken up residence on the site.<sup>163</sup>

## RESOURCES AND STAFFING

- 6.27 The Ombudsman provided information to the Committee on expenses and revenues (including staffing) over the period 2010-11 and 2011-12. This information is detailed in Chapter Eight.

### Budgets for integrity and watchdog agencies

- 6.28 At the 2012 General Meeting, the Ombudsman argued that independent integrity agencies should be able to negotiate directly with Treasury on budget matters. The Ombudsman considered that his office's impartiality and integrity could be seen as compromised if the office is grouped in the NSW Government's superagency structure for budgetary, financial or other purposes. His view was that it is 'inappropriate for an agency [the Department of Premier and Cabinet] that is technically within my jurisdiction to potentially be making decisions about my budget and other matters...'<sup>164</sup>
- 6.29 At this General Meeting, the Ombudsman reported:

... I am pleased to advise that since our last meeting there have been meetings between Treasury and Premier and Cabinet discussing the special nature of integrity and watchdog accountability agencies and the need for them to be appropriately and independently dealt with around budgetary issues. To that extent Treasury is dealing with our agency—I cannot speak on behalf of the others—much more as an

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<sup>160</sup> NSW Ombudsman, *Responding to the asbestos problem: The need for significant reform in NSW*, November 2010, see: <[http://www.ombo.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0015/3372/SR\\_AsbestosProblem\\_Nov10.pdf](http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0015/3372/SR_AsbestosProblem_Nov10.pdf)>, viewed 25 September 2013

<sup>161</sup> NSW Ombudsman, *Safe as houses? Management of asbestos in Police buildings*, July 2012, see: <[http://www.ombo.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0011/5969/SR\\_Safe\\_as\\_Houses\\_PoliceHazmat\\_web\\_Jul12.pdf](http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0011/5969/SR_Safe_as_Houses_PoliceHazmat_web_Jul12.pdf)>, viewed 25 September 2013

<sup>162</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 2

<sup>163</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 6

<sup>164</sup> Mr Bruce Barbour, *Transcript of evidence*, Seventeenth General Meeting, 18 June 2012, p 8

independent agency. Indeed, my head of corporate and I are meeting with Treasury and other people shortly before the expenditure review committee, to go through our Treasury needs and issues. That is a very positive sign.<sup>165</sup>

## COMMITTEE COMMENT

- 6.30 The Committee commends the Ombudsman and his staff for discharging the Office's legislative functions with a high degree of professionalism and commitment to accountability. The Committee has confidence that the Ombudsman's Office will continue to perform important work across a wide range of areas of public interest.

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<sup>165</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 6

## Chapter Seven – Second General Meeting with the Child Death Review Team

- 7.1 On 22 February 2013, the Committee conducted the Second General Meeting with the Child Death Review Team. The Committee met Mr Bruce Barbour, the NSW Ombudsman, in his capacity as Convenor of the Child Death Review Team. Ms Monica Wolf, Director, Systemic Reviews, and Dr Jonathan Gillis, Deputy Convenor, also gave evidence.
- 7.2 As part of the preparation for the General Meeting, the Committee sent the Child Death Review Team a series of questions on notice about matters arising out of the Team's 2011 Annual Report. The answers to these questions on notice can be found on the Committee's website.<sup>166</sup>
- 7.3 Evidence was taken at the General Meeting in relation to the Child Death Review Team's 2011 Annual Report as well as other issues raised by the Committee. These included data system issues; current work and future projects; and resourcing and staffing matters. These issues are discussed in greater detail below.

### DATA SYSTEM ISSUES

- 7.4 In last year's report on the First General Meeting with the Child Death Review Team, the Committee noted that the Ombudsman's Office had encountered data collection and technological challenges. One of the prime responsibilities of the Team—detailed and accurate analysis of trends and patterns in data on child deaths—had been hampered by the limited capacity of the Team's data systems.
- 7.5 During the Second General Meeting, the Committee heard that these technological difficulties were an ongoing problem for the Child Death Review Team. According to the Team's database consultant, the current system is 'reaching its "end of life" in terms of stability and maintainability'.<sup>167</sup> The Ombudsman stated that the 16 year-old system, inherited from the Commission for Children and Young People, presented serious problems for the effective functioning of the Team:

The system is very unstable and problematic and has been altered many times in its history. The nature of the information that has been put into it is different over many years and as a result when we do a search and retrieval, we often get different outcomes each time. It causes us to need to do everything manually over the top to make sure that the data is accurate, which is very labour intensive.<sup>168</sup>

- 7.6 In 2012, the Ombudsman's Office made three requests to Treasury for funding for a new data system:

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<sup>166</sup> See: <<http://www.parliament.nsw.gov.au/ombudsmanpic>>, viewed 25 September 2013

<sup>167</sup> Ombudsman (Child Death Review Team), *Answers to Questions on Notice*, 1 February 2013, p 1, question 1

<sup>168</sup> Mr Bruce Barbour, Ombudsman and Convenor of the Child Death Review Team, *Transcript of evidence*, 22 February 2013, p 4

- In July 2012 we submitted a request for supplementary funding of \$160,000 in 2012-13 and a further \$90,000 the following year to NSW Treasury. It is usually not the practice of NSW Treasury to provide supplementary funding however we thought that this project required immediate action. Our request was not successful.
- In October 2012 we submitted a request for funding from the ICT reinvestment pool. Our request included a short form business case. In December 2012 we were advised by the NSW Treasury that our application was unsuccessful.
- In November 2012 we submitted a 'Parameter and Technical Adjustment Proposal' to NSW Treasury as part of our forward estimates submission. This proposal is still to be considered by NSW Treasury as part of its overall 2013-2014 budget strategy. NSW Treasury has sought additional information from us, including some more detailed costing of various options. This information is to be submitted by early February 2013.<sup>169</sup>

7.7 The Ombudsman updated the Committee on the various costing options for an appropriate data system as requested by Treasury. The first option, estimated to cost \$563,000, would involve adapting the current system and adding a reporting tool. The second option, estimated to cost \$579,000, would be the purchase of a new system, already in use by the Queensland Commission for Children and Young People for child death reviews. The third option, estimated to cost \$587,000, would be to develop a new purpose-built system. The Ombudsman said that the Team's preferred option was the Queensland system, given that it was already in operation and its adaptation would avoid the 'teething problems' associated with setting up a new system from scratch.<sup>170</sup>

### Committee comment

7.8 The Committee notes that the NSW Budget Papers for 2013-2014 provided a \$580,000 capital appropriation to the Ombudsman's Office for a reviewable death database.<sup>171</sup> The Committee is pleased that funding has now been made available, given the critical need for a stable, reliable and up-to-date data system to allow the Child Death Review Team to undertake its core functions.

## CURRENT WORK AND FUTURE PROJECTS

7.9 The Ombudsman outlined the main areas of focus for the Child Death Review Team since the last General Meeting in June 2012.

7.10 In October 2012, the Team's annual report for 2011 was tabled. The report made 17 recommendations covering the areas of Sudden Unexpected Death in Infancy (SUDI); transport fatalities; drowning deaths; poisoning and suicide.<sup>172</sup> The Team has produced an issues paper for public distribution on low-speed vehicle run overs. A research project on the causes of death for children with a child

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<sup>169</sup> Ombudsman (Child Death Review Team), *Answers to Questions on Notice*, 1 February 2013, p 1, question 1

<sup>170</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 3

<sup>171</sup> Correspondence from the Ombudsman to the Committee re: Budget and staffing of the Child Death Review Team, 17 July 2013, p 1

<sup>172</sup> NSW Child Death Review Team, *Annual Report 2011*, October 2012, pp 11-13, see: <[http://www.ombo.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0015/7053/CDRT-Annual-Report-2011.pdf](http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0015/7053/CDRT-Annual-Report-2011.pdf)>, viewed 25 September 2013



protection history is also being conducted. It will analyse data over a ten year period to identify any differences in the causes of death for this group of children, compared with children whose families had no child protection history. In August 2012, the Team was also involved in the third Australasian Conference on Child Death Inquiries and Reviews.<sup>173</sup>

- 7.11 The Ombudsman commented on future plans to harness relevant expertise, both from outside and within the Team:

At the moment it is very difficult to engage with researchers and other experts beyond the team who are doing really interesting work or who want to use the team's data, because data is so unreliable and it is so difficult for them to get what they need. Once we are able to do that effectively we will be able to do all sorts of extraordinary things. We have created subcommittees to look at particular issues emphasising the specialities that are brought to the team by members of the team. We are looking at restructuring the staff of the area to make sure we have the highest level of support and research capability internally that we can get to support the team. A number of members of the team that are directly linked to universities and teaching facilities are keen to have postgraduate students and others who are doing research projects working with the team.<sup>174</sup>

### Identification of Indigenous status

- 7.12 The Committee heard that improved accuracy is needed in reporting on the deaths of children from Aboriginal and Torres Strait Islander backgrounds and the Team intends to engage expert assistance to address this problem.<sup>175</sup> The Ombudsman observed that there are no protocols or common practices across NSW Government agencies to determine Aboriginality, which presents dilemmas for accurate data collection.<sup>176</sup>

### RESOURCING AND STAFFING

- 7.13 Funding for the Child Death Review Team is provided to the Ombudsman's Office as part of the Office's total annual budget allocation.<sup>177</sup> The Ombudsman advised the Committee that his Office received an additional \$539,000 when the Child Death Review Team secretariat and research functions were transferred from the Commission for Children and Young People (CCYP). However, he also emphasised that the 12 staff who support the Child Death Review Team also work within the systemic reviews unit of the Ombudsman's Human Services Branch. They perform other duties for the Ombudsman's Office relating to statutory child and disability death review work.<sup>178</sup>

<sup>173</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 2

<sup>174</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 7

<sup>175</sup> Ombudsman (Child Death Review Team), *Answers to Further Questions on Notice*, 14 March 2013, p 3, question 4

<sup>176</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 11

<sup>177</sup> Correspondence from the Ombudsman to the Committee re: Budget and staffing of the Child Death Review Team, 17 July 2013, p 1

<sup>178</sup> Correspondence from the Ombudsman to the Committee re: Budget and staffing of the Child Death Review Team, 17 July 2013, pp 1–2

- 7.14 The Ombudsman outlined several efficiencies that had been achieved with the transfer of Child Death Review Team responsibilities from the CCYP to the Ombudsman's Office:
- The establishment of a single child death register for NSW, which has reduced duplication and the need to 'match' two separate registers. It has also significantly alleviated the burden on agencies in providing records required for review; previously records were provided separately to the CCYP and to this office.
  - Reduced administrative costs through elimination of duplication. A child's death is now reviewed only once and more holistically. Previously, if a child's death was 'reviewable' under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, it would be reviewed twice; once by the Ombudsman's office and separately, by the CDRT/CCYP.
  - Reduced burden and cost associated with records management. This office has direct access to the NSW Police Force Computer Operated Policing System (COPS) and Community Services' Key Information Directory System (KiDS). This alleviates the need for retrieval of records by those agencies, and for records management by this office.<sup>179</sup>

## COMMITTEE COMMENT

- 7.15 The Committee commends the achievements of the Child Death Review Team and particularly welcomes the funding provided in the 2013-2014 Budget to address the critical need for an upgraded database to support the Team's important work.

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<sup>179</sup> Ombudsman (Child Death Review Team), *Answers to Further Questions on Notice*, 14 March 2013, pp 1–2, question 1

## Chapter Eight – Resourcing and staffing

8.1 Below are tables for each agency overseight by the Committee, which set out financial resourcing and staffing profiles for the years 2010–2011 and 2011–12. Each year, the Committee intends to monitor changes in financial resourcing and staffing across all the agencies it oversees. (Note that the table for the Ombudsman includes the funding for the Child Death Review Team, which forms part of the Ombudsman’s total budget allocation).

**Table 1: Police Integrity Commission resourcing profile for 2010-11 and 2011-12**

<b>Resourcing profile</b>				
	<b>2010-11</b>		<b>2011-12</b>	
	<b>Budget (\$'000)</b>	<b>Actual (\$'000)</b>	<b>Budget (\$'000)</b>	<b>Actual (\$'000)</b>
<b>Staffing expenses</b> (salaries, superannuation, leave etc)	14,012	13,229	14,184	14,132
<b>Operating expenses</b> (leases, insurance, maintenance, travel, printing etc)	4,752	4,243	4,862	4,334
<b>All other expenses</b>	1,481	1,320	1,411	1,191
<b>TOTAL expenses</b>	<b>20,245</b>	<b>18,792</b>	<b>20,457</b>	<b>19,657</b>
<b>Revenue—recurrent appropriations</b>	17,961	16,947	18,147	17,454
<b>Revenue—capital appropriations</b>	1,790	1,166	1,790	1,270
<b>All other revenue</b>	744	636	770	1,083
<b>TOTAL revenues</b>	<b>20,495</b>	<b>18,749</b>	<b>20,707</b>	<b>19,807</b>

**Table 2: Police Integrity Commission staffing profile for 2010-11 and 2011-12**

<b>Staffing profile</b>		
	<b>2010-11</b>	<b>2011-12</b>
<b>Total number of staff</b>	116	111
<b>Number of full-time equivalent staff</b>	105.63	103
<b>Number of men</b>	68	65
<b>Number of women</b>	48	46
<b>Number of people of Aboriginal or Torres Strait Islander background</b>	1	1
<b>Number of people whose first language was not English</b>	11	9
<b>Number of people with a disability</b>	8	7

**Table 3: Inspector of the Police Integrity Commission resourcing profile for 2010-11 and 2011-12**

<b>Resourcing profile</b>				
	<b>2010-11</b>		<b>2011-12</b>	
	<b>Budget (\$)</b>	<b>Actual (\$)</b>	<b>Budget (\$)</b>	<b>Actual (\$)</b>
<b>Staffing expenses</b> (salaries, superannuation, leave etc)	259,000	258,873	266,709	292,890
<b>Operating expenses</b> (leases, insurance, maintenance, travel, printing etc)	88,000	70,110	92,974	157,006
<b>All other expenses</b>	0	0	0	0
<b>TOTAL expenses</b>	<b>347,000</b>	<b>328,983</b>	<b>359,683</b>	<b>449,896</b>
<b>Revenue—recurrent appropriations</b>	347,000	328,818	359,683	449,896
<b>Revenue—capital appropriations</b>	0	0	0	0
<b>All other revenue</b>	0	165	0	0
<b>TOTAL revenues</b>	<b>347,000</b>	<b>328,983</b>	<b>359,683</b>	<b>449,896</b>

**Table 4: Inspector of the Police Integrity Commission staffing profile for 2010-11 and 2011-12**

<b>Staffing profile</b>		
	<b>2010-11</b>	<b>2011-12</b>
<b>Total number of staff</b>	2	2
<b>Number of full-time equivalent staff</b>	0	0
<b>Number of men</b>	1	1
<b>Number of women</b>	1	1
<b>Number of people of Aboriginal or Torres Strait Islander background</b>	0	0
<b>Number of people whose first language was not English</b>	0	0
<b>Number of people with a disability</b>	0	0

Table 5: NSW Crime Commission resourcing profile for 2010-11 and 2011-12

<b>Resourcing profile</b>				
	<b>2010-11</b>		<b>2011-12</b>	
	<b>Budget (\$'000)</b>	<b>Actual (\$'000)</b>	<b>Budget (\$'000)</b>	<b>Actual (\$'000)</b>
<b>Staffing expenses</b> (salaries, superannuation, leave etc)	13,092	12,615	13,419	12,996
<b>Operating expenses</b> (leases, insurance, maintenance, travel, printing etc)	4,313	5,279	4,438	5,607
<b>All other expenses</b>	1,357	1,461	1,198	1,023
<b>TOTAL expenses</b>	<b>18,762</b>	<b>19,355</b>	<b>19,055</b>	<b>19,626</b>
<b>Revenue—recurrent appropriations or grants/contributions</b>	16,765	16,968	17,019	17,019
<b>Revenue—capital appropriations or grants/contributions</b>	1,544	1,544	1,482	1,250
<b>All other revenue</b>	89	590	441	1,016
<b>TOTAL revenues</b>	<b>18,398</b>	<b>19,102</b>	<b>18,942</b>	<b>19,285</b>

Table 6: NSW Crime Commission staffing profile for 2010-11 and 2011-12

<b>Staffing profile</b>		
	<b>2010-11</b>	<b>2011-12</b>
<b>Total number of staff</b>	105 (as well as 35 casual staff)	108 (as well as 29 casual staff)
<b>Number of full-time equivalent staff</b>	97	99
<b>Number of men</b>	50	48
<b>Number of women</b>	55	60
<b>Number of people of Aboriginal or Torres Strait Islander background</b>	0	0
<b>Number of people whose first language was not English</b>	24	29
<b>Number of people with a disability</b>	5	5

**Table 7: Information and Privacy Commission resourcing profile for 2011-12<sup>180</sup>**

<b>Resourcing profile</b>				
	<b>2010-11</b>		<b>2011-12</b>	
	<b>Budget (\$)</b>	<b>Actual (\$)</b>	<b>Budget (\$)</b>	<b>Actual (\$)</b>
<b>Staffing expenses</b> (salaries, superannuation, leave etc)	N/A	N/A	3,930,000	3,345,078
<b>Operating expenses</b> (leases, insurance, maintenance, travel, printing etc)	N/A	N/A	1,428,000	1,844,482
<b>All other expenses</b>	N/A	N/A	-	-
<b>TOTAL expenses</b>	N/A	N/A	<b>5,358,000</b>	<b>5,189,560</b>
<b>Revenue—recurrent appropriations</b>	N/A	N/A	5,272,000	5,274,200
<b>Revenue—capital appropriations</b>	N/A	N/A	366,000	248,300
<b>All other revenue</b>	N/A	N/A	42,000	188,309
<b>TOTAL revenues</b>	N/A	N/A	<b>5,680,000</b>	<b>5,710,809</b>

**Table 8: Information and Privacy Commission staffing profile for 2011-12**

<b>Staffing profile</b>		
	<b>2010-11</b>	<b>2011-12</b>
<b>Total number of staff</b>	N/A	33
<b>Number of full-time equivalent staff</b>	N/A	32.6
<b>Number of men</b>	N/A	7
<b>Number of women</b>	N/A	26
<b>Number of people of Aboriginal or Torres Strait Islander background</b>	N/A	0
<b>Number of people whose first language was not English</b>	N/A	6
<b>Number of people with a disability</b>	N/A	0

<sup>180</sup> The IPC was not fully operational until 1 January 2011, so information is not provided for 2010-11.

Table 9: NSW Ombudsman resourcing profile for 2010-11 and 2011-12<sup>181</sup>

<b>Resourcing profile</b>				
	<b>2010-11</b>		<b>2011-12</b>	
	<b>Budget (\$'000)</b>	<b>Actual (\$'000)</b>	<b>Budget (\$'000)</b>	<b>Actual (\$'000)</b>
<b>Staffing expenses</b> (salaries, superannuation, leave etc)	18,724	19,222	20,233	21,491
<b>Operating expenses</b> (leases, insurance, maintenance, travel, printing etc)	4,044	4,612	4,744	4,704
<b>All other expenses</b>	453	463	571	767
<b>TOTAL expenses</b>	<b>23,221</b>	<b>24,297</b>	<b>25,548</b>	<b>26,962</b>
<b>Revenue—recurrent appropriations</b>	21,460	21,804	23,406	23,796
<b>Revenue—capital appropriations</b>	314	369	219	248
<b>All other revenue</b>	1,100	2,255	1,237	1,854
<b>TOTAL revenues</b>	<b>22,874</b>	<b>24,428</b>	<b>24,862</b>	<b>25,898</b>

Table 10: NSW Ombudsman staffing profile for 2010-11 and 2011-12

<b>Staffing profile</b>		
	<b>2010-11</b>	<b>2011-12</b>
<b>Total number of staff</b>	207	209
<b>Number of full-time equivalent staff</b>	185.19	186.36
<b>Number of men</b>	56	55
<b>Number of women</b>	151	154
<b>Number of people of Aboriginal or Torres Strait Islander background</b>	5	6
<b>Number of people whose first language was not English</b>	36	38
<b>Number of people with a disability</b>	19	21

<sup>181</sup> The resourcing and staffing profiles for the Ombudsman's Office include funding and staffing which supports the Child Death Review Team.

**Table 11: Resourcing profile for all agencies overseight by the Committee – 2011-12**

<b>Resourcing profile – 2011-12</b>		
	<b>Budget (\$'000)</b>	<b>Actual (\$'000)</b>
<b>Staffing expenses</b> (salaries, superannuation, leave etc)	52,033	52,257
<b>Operating expenses</b> (leases, insurance, maintenance, travel, printing etc)	15,565	16,646
<b>All other expenses</b>	3,180	2,981
<b>TOTAL expenses</b>	<b>70,778</b>	<b>71,884</b>
<b>Revenue—recurrent appropriations</b>	64,204	63,994
<b>Revenue—capital appropriations</b>	3,857	3,016
<b>All other revenue</b>	2,490	4,141
<b>TOTAL revenues</b>	<b>70,551</b>	<b>71,151</b>



## Chapter Nine – Ongoing oversight matters

- 9.1 Two ongoing oversight matters of concern to the Committee relate to affidavits and warrants for the use of surveillance devices, and confidential settlements.

### AFFIDAVITS AND WARRANTS FOR SURVEILLANCE DEVICES

- 9.2 Surveillance device warrants are issued by eligible Judges of the Supreme Court or eligible Magistrates. They enable the use of surveillance devices by certain agencies, including the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission. Applications for warrants are generally accompanied by an affidavit specifying the grounds on which the warrant is sought.<sup>182</sup>

- 9.3 The Committee discussed with the Inspector of the Police Integrity Commission the issue of warrants and affidavits in support of the use of surveillance devices. In particular, the Committee was interested to know whether the veracity of the information put before a judge is open to any scrutiny or testing. The Inspector responded:

The first means would be some internal flaw or inconsistency in the form of the warrant or in the affidavit in support of it ...

The second is, for the system then to work and still to work—I think there have been changes—the judicial officers who can now issue all these surveillance warrants must have confidence in the integrity of the applying body ... I know of one instance ... where the judge rejected an application, after examining the officers.

In one instance I had such reservations about the merits of the application that I made it clear that, unless something of substance was obtained on the issue of warrant, they should not come back asking to try again. Otherwise, there still is, fundamentally, the reliance that has to be placed upon the integrity of the officers from the respective bodies who are entitled to approach a judge or a magistrate.<sup>183</sup>

- 9.4 The Inspector observed that the ultimate integrity check is the power of the courts to admit or not admit evidence obtained through these means, although he acknowledged that this was not a guaranteed safeguard:

I think there is a legitimate complaint, or area for complaint to be made—and this is perhaps more for the courts than for my own office—of the number of institutions that now have the power, under so many statutes, particularly in the last decade, to apply for all these forms of surveillance. The ultimate sanction which is, I suppose, not satisfactory in moral terms, is that the courts would still have the power to say: No, the evidence will not get in. That is the ultimate position. But that takes a lot of time, expense and worry, to get to that.<sup>184</sup>

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<sup>182</sup> NSW Ombudsman, Report under *Surveillance Devices Act 2007* for period ending 31 December 2012, June 2013, p 1, see: <[http://www.ombo.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0008/10133/2012-Surveillance-Devices-Report.pdf](http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0008/10133/2012-Surveillance-Devices-Report.pdf)>, viewed 25 September 2013

<sup>183</sup> The Hon David Levine QC, Inspector of the Police Integrity Commission, *Transcript of evidence*, 22 February 2013, p 6

<sup>184</sup> The Hon David Levine QC, *Transcript of evidence*, 22 February 2013, p 6

- 9.5 According to the Ombudsman, it is difficult to say whether there has been a significant increase in the use of surveillance devices over time:

When you look at the whole suite of covert operation activities and look at controlled operations and telecommunication intercepts and surveillance devices and so forth, I think what is clear is that there are fluctuations around their use. You see particular increases sometimes because of particular operations that are being undertaken, and sometimes those operations, particularly as they involve lots of people, will mean that you will see spikes in numbers for different things. I would not say that we are observing a significant trend of increase and I think probably it would be something that one would need to monitor over a period of time to see whether that sharp increase continued or whether that was a particular aberration at that time.<sup>185</sup>

- 9.6 The Ombudsman agreed that there were risks in the current system:

**CHAIR:** ... if a police officer were to make incompetent, false or fabricated information, what is the test? How does that get tested? How does that get detected? How does that get rectified? ...

**Mr BARBOUR:** And I think that is a sound observation and I think that is a risk with the system. I think with judges who sometimes are very overburdened and have to make decisions very quickly, there is a potential risk for something like that to happen and one hopes that it does not.<sup>186</sup>

### Committee comment

- 9.7 Given that the powers to use surveillance devices are available to a number of agencies, including the Police Integrity Commission and the NSW Crime Commission, the Committee notes the need for a strong and accountable system of integrity checks for affidavits in support of warrants.
- 9.8 It is in the interests of all parties—judicial officers, the individuals targeted by surveillance devices and the agencies who apply for their use—to have confidence that the system is not open to abuse. The Committee notes that the Ombudsman inspects the records of each agency for compliance with record and document keeping requirements under the *Surveillance Devices Act 2007*, but that these examinations do not look at the sufficiency, or otherwise, of the information provided in support of the application for a warrant.<sup>187</sup>

## RECOMMENDATION 5

**The Committee recommends that the Attorney General review the current system for granting surveillance device warrants, with the aim of strengthening integrity checks on affidavits submitted in support of warrants.**

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<sup>185</sup> Mr Bruce Barbour, Ombudsman, *Transcript of evidence*, 22 February 2013, p 13

<sup>186</sup> Mr Bruce Barbour, *Transcript of evidence*, 22 February 2013, p 14

<sup>187</sup> NSW Ombudsman, Report under *Surveillance Devices Act 2007* for period ending 31 December 2012, June 2013, p 1, see: <[http://www.ombo.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0008/10133/2012-Surveillance-Devices-Report.pdf](http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0008/10133/2012-Surveillance-Devices-Report.pdf)>, viewed 25 September 2013

## CONFIDENTIAL SETTLEMENTS

- 9.9 In the 2012 reports on the General Meetings, the Committee took an interest in the court proceedings relating to the licensing and distribution of software among a number of NSW Government agencies, including the Ombudsman and the Police Integrity Commission. A number of confidential settlements were reached with the software company, Microfocus.<sup>188</sup>
- 9.10 The Committee holds concerns about the lack of transparency and accountability inherent in confidential settlements, particularly for NSW taxpayers, who remain in the dark about the costs that have been incurred.

## RECOMMENDATION 6

**The Committee recommends that the Premier revise the *Premier's Guidelines for Litigation Involving Government Authorities: M1997-26* to include guidance about the circumstances in which confidential court settlements may be entered into by NSW Government agencies.**

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<sup>188</sup> See: <<http://www.smh.com.au/it-pro/government-it/nsw-police-hit-with-18m-legal-bill-after-piracy-case-20130426-2ijr8.html>>, viewed 25 September 2013

## Appendix One – List of Witnesses

22 February 2013, Macquarie Room, Parliament House

Witness	Organisation
The Hon David Levine AO RFD QC Inspector of the Police Integrity Commission	Inspectorate of the Police Integrity Commission
The Hon Bruce James QC Commissioner of the Police Integrity Commission	Police Integrity Commission
Ms Michelle Margaret O'Brien Commission Solicitor	Police Integrity Commission
Mr Allan Geoffrey Kearney Director Prevention and Information	Police Integrity Commission
Mr Roy Cottam, Acting Director Operations	Police Integrity Commission
Ms Deirdre O'Donnell, Information Commissioner	Information and Privacy Commission NSW
Dr Elizabeth Coombs, Privacy Commissioner	Information and Privacy Commission NSW
Mr Bruce Barbour, Ombudsman and Convenor of the Child Death Review Team	NSW Ombudsman and Child Death Review Team
Mr Christopher Wheeler, Deputy Ombudsman Public Administration	NSW Ombudsman
Ms Linda Waugh, Deputy Ombudsman Police and Compliance	NSW Ombudsman
Mr Steven Kinmond, Deputy Ombudsman, Community and Disability Services Commissioner	NSW Ombudsman
Ms Monica Wolf, Manager, Child Deaths Review	Child Death Review Team
Dr Jonathan Gillis, Independent Member	Child Death Review Team
Mr Peter Hastings QC, Commissioner	NSW Crime Commission
Mr Peter Singleton, Assistant Commissioner	NSW Crime Commission

## Appendix Two – Extracts from Minutes

### MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND POLICE INTEGRITY COMMISSION (NO. 21)

3:30 PM, Monday, 10 December 2012  
Room 1153, Parliament House

#### Members Present

Ms Cusack (Chair) and Mr Searle

Via teleconference: Mr Anderson, Mr Evans, Mr Lynch, Mrs Mitchell and Mr Park

Staff in attendance: Rachel Simpson, Emma Matthews, Hilary Parker, Todd Buttsworth and Rohan Tyler

The meeting commenced at 3:33 PM.

#### 1. Minutes of previous meetings

Resolved, on the motion of Mrs Mitchell:

'That the Committee adopt the draft minutes as circulated for the meeting held on 21 November 2012.'

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#### 1. Draft questions on notice

Members noted the circulated draft questions on notice.

Resolved, on the motion of Mr Evans:

'That the Committee resolve to send the draft questions as circulated, and any additional questions as agreed by the Committee, to the appropriate agency in advance of the General Meetings on 22 February 2013.'

#### 2. General Business

The Committee adjourned at 3:55 PM until 10:00 AM on 20 February 2013 in room 1153 Parliament House.

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### MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND POLICE INTEGRITY COMMISSION (NO. 22)

10:00 AM, Wednesday, 20 February 2013  
Room 1153, Parliament House

## 1. Minutes of previous meetings

Resolved, on the motion of Mrs Mitchell:

'That the Committee adopt the draft minutes as circulated for meetings held on 10 December 2012.'

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## 4. General Meetings

Resolved, on the motion of Mr Evans,

'That the Committee invite the following representatives to the General Meeting on 22 February 2013:

- The NSW Ombudsman, Mr Bruce Barbour – in his dual capacity as Ombudsman and Convenor of the Child Death Review Team and office holders from the office of the Ombudsman and the Child Death Review Team;
- The Commissioner, the Hon. Bruce James QC, and office holders from the Police Integrity Commission
- The Inspector of the Inspector of the Police Integrity Commission, the Hon. David Levine AO RFD QC, and office holders from his Inspectorate;
- The Information Commissioner, Ms Deirdre O'Donnell and the Privacy Commissioner, Dr Elizabeth Coombs, and office holders from the Information and Privacy Commission;
- The Crime Commissioner, Mr Peter Hastings QC and office holders from the Crime Commission (NSW); and

'That the Committee authorises the audio-visual recording, photography and broadcasting of the public hearing on 22 February 2013 in accordance with the NSW Legislative Assembly's guidelines for coverage of proceedings for parliamentary committees administered by the Legislative Assembly.'

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The Committee adjourned at 10:28 AM until 9:25 AM on 22 February 2013 in the Macquarie Room.

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## MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND POLICE INTEGRITY COMMISSION (NO. 23)

9:30 AM, Friday, 22 February 2013  
Macquarie Room, Parliament House

### Members Present

Ms Cusack (Chair), Mr Evans, Mr Anderson, Mrs Mitchell and Mr Searle

## Apologies

Apologies were received from Mr Lynch and Mr Park

### 1. General Meetings

The committee convened a General Meeting with the Inspector of the Police Integrity Commission at 9:31am. The public and the media were admitted.

The Hon. David Levine QC, Inspector of the Police Integrity Commission, was affirmed and examined.

The Inspector made reference to two documents that had been previously provided to the committee and agreed that they be included as part of his answers to questions on notice, with those documents being:

- A letter to the Minister for Police dated 23 November 2012 re Strike Force Emblems;
- A memorandum from the Inspector dated February 2013 re section 217 of the Police Act 1990;

Mr Levine agreed to take further questions from the committee on notice.

Evidence completed, Mr Levine withdrew.

The committee adjourned at 10:15am until:

The committee convened a General Meeting with the Commission of the Police Integrity Commission at 10:41am. The public and the media were admitted.

The Hon. Bruce James QC, Commissioner of the Police Integrity Commission, and Mr Roy Cottam, Acting Director Operations, were sworn and examined.

Mr Allan Kearney, Director Prevention and Information, and Ms Michelle O'Brien, Commission Solicitor, were affirmed and examined.

The Commissioner agreed to take further questions from the committee on notice.

Evidence completed, the witnesses withdrew.

The committee adjourned at 11:52am until:

The committee convened a General Meeting with the Information and Privacy Commission at 12:03pm. The public and the media were admitted.

Ms Deirdre O'Donnell, Information Commission and Chief Executive Officer of the Information and Privacy Commission and Dr Elizabeth Coombs, Privacy Commissioner, were sworn and examined.

The Commissioners agreed to take further questions from the committee on notice.

Evidence completed, the Commissioners withdrew.

The committee adjourned at 1:04pm until:

The committee convened a General Meeting with the NSW Ombudsman at 1:35pm. The public and the media were admitted.

Mr Bruce Barbour, Ombudsman, Mr Chris Wheeler, Deputy Ombudsman Public Administration, Ms Linda Waugh, Deputy Ombudsman Police and Compliance and Mr Steve Kinmond, Deputy Ombudsman and Community and Disability Services Commissioner, were affirmed and examined.

The Ombudsman agreed to take further questions from the committee on notice.

Evidence completed, the witnesses withdrew.

The committee adjourned at 2:45pm until:

The committee convened a General Meeting with the Child Death Review Team at 2:46pm. The public and the media were admitted.

Mr Bruce Barbour, Convenor Child Death Review Team, Ms Monica Wolf, Manager Child Death Review Team and Dr Jonathan Gillis, Independent Member Child Death Review Team, were affirmed and examined.

The Convenor agreed to take further questions from the committee on notice.

Evidence completed, the witnesses withdrew.

The committee adjourned at 3:41pm until:

The committee convened a General Meeting with the Crime Commission at 4:15pm. The public and the media were admitted.

Mr Peter Hastings QC, Commissioner, was sworn and examined.

Mr Peter Singleton, Assistant Commissioner, was affirmed and examined.

Resolved, on the motion of Mrs Mitchell, to hear further evidence from the Commissioner and Assistant Commissioner in camera. The Chair ordered that the room be cleared.

The Convenor agreed to take further questions from the committee on notice.

Evidence completed, the witnesses withdrew.

Resolved, on the motion of Mrs Mitchell:  
'That the committee publish the transcript of the public hearing, subject to correction.'

Resolved, on the motion of Mr Evans:



'That the questions taken on notice, and any outstanding questions without notice, including a request to all agencies for a copy of their Corporate Plan, be forwarded to the appropriate agency with a request for answers within two weeks.'

Resolved, on the motion of Mrs Mitchell:

'That the Inspector's Memorandum concerning section 217 of the Police Act 1990 dated February 2013, and the Inspector's letter dated 23 November 2012 to the Minister of Police concerning Strike Force Emblems form part of his evidence and be published and posted on the Committee's website.'

The Committee adjourned at 5:17 PM until 10:00 AM on 13 March 2013 in Room 1153.

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## MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND POLICE INTEGRITY COMMISSION (NO. 24)

10:00 AM, Thursday, 14 March 2013  
Room 1136, Parliament House

### Members Present

Ms Cusack (Chair), Mr Evans, , Mrs Mitchell, Mr Park and Mr Searle

### Apologies

Apologies were received from Mr Anderson and Mr Lynch

### 1. Minutes

Resolved, on the motion of Mr Evans:

'That the Committee adopt the draft minutes as circulated for meetings held on 30 February 2013 and 22 February 2013.

### 2. Correspondence

Resolved on the motion of Mrs Mitchell

That the Committee publish the Ombudsman's letter of 5 March 2013 in relation to his clarification of evidence provided to the Committee and provide a link to the letter via a footnote in the Transcript of the Hearing.

\*\*\*\*\*

### 3. General Meetings

The Chair provided an update on the receipt of corrected transcripts and further questions on notice.

\*\*\*\*\*

The Committee adjourned at 11:03 AM until 10:00 AM on 11 April 2013 in the Waratah Room.

## MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND POLICE INTEGRITY COMMISSION (NO. 25)

12:13pm, Tuesday, 26 March 2013  
Room 1153, Parliament House

### Members Present

Ms Cusack (Chair), Mr Anderson, Mr Lynch, Mrs Mitchell, and Mr Park

### Apologies

Apologies were received from Mr Evans and Mr Searle

### 1. Minutes

Resolved, on the motion of Mr Park:

'That the Committee adopt the draft minutes as circulated for meetings held on 14 March 2013.

### 2. Correspondence

Resolved, on the motion of Mrs Mitchell:

That the Committee note the Answers to Questions on Notice taken at the General Meetings of 22 February 2013 received from the following agencies:

- Crime Commission, dated 12 March 2013;
- Police Integrity Commission, dated 13 March 2013;
- Inspector of the Police Integrity Commission, dated 13 March 2013;
- NSW Ombudsman, dated 14 March 2013; and
- Information and Privacy Commission, dated 14 March 2013.

### 3. Briefing note – Answers from the Police Integrity Commission and the Crime Commission

The Committee considered two issues arising from the Answers to Questions on Notice, taken at the General Meetings of 22 February 2013, received from the Police Integrity Commission and the Crime Commission:

- 1) the police Integrity Commission gave two answers that did not provide the information requested in questions 4 and 6 of the Committee's Questions on Notice; and
- 2) the Crime Commission provided confidential material to the Committee following the General Meeting, which included copies of correspondence between the Crime Commission and the Police Integrity Commission;

The Committee resolved, on the motion of Mrs Mitchell:

- to publish the Answers to Questions on Notice received as noted in Agenda Item 2, in line with the resolution of 20 February 2013, with the exception of:

- Question 5 to the Crime Commission and the answer provided to this question, including the supporting material; and
- Questions 4 and 6 to the PIC and the answers provided to these questions by the PIC;

to write to the Crime Commission as follows:

- advising of the Committee's intention to seek further information about the issues raised in Further Question on Notice Number 5 on 11 April during an *in-camera* session;
  - noting that the PIC would be advised by letter of the material provided to the Committee by the Commission;
  - seeking clarification in relation to the current arrangements between the Commission and the PIC;
  - requesting copies of any current agreements between the Commission and the PIC, including any updates to existing agreements by 5 April 2013.
- to write to the Police Integrity Commission as follows:
- advising that the Crime Commission had provided the Committee with copies of correspondence relating to Further Question on Notice Number 6;
  - noting that the Committee would advise the Crime Commission that it had written to the PIC with respect to the receipt of the abovementioned copies of correspondence;
  - advising of the Committee's intention to seek further information about the issues raised in Further Questions on Notice Numbered 4 and 6 on 11 April during an *in-camera* session;
  - seeking clarification in relation to the current arrangements between the Commission and the PIC;
  - requesting copies of any current agreements between the Commission and the PIC, including any updates to existing agreements by 5 April 2013.
- to hold the proposed in-camera hearings on 11 April 2013 by extending the time already allotted for each agency to give evidence to the Performance Measures and Accountability of Oversight Agencies Inquiry.

#### 4. Next meeting

The Committee noted it will next convene at the public hearing scheduled for 11 April 2013 on the Inquiry into Performance Measures and Accountability of Oversight Agencies/

The Committee adjourned at 12:21pm until 9:30am on 11 April 2013 in the Waratah Room.

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## MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND POLICE INTEGRITY COMMISSION (NO. 26)

10:45am, Thursday 11 April 2013  
Waratah Room, Parliament House

### Members Present

Ms Cusack (Chair), Mr Anderson, Mr Evans, Mr Lynch, Mr Park and Mr Searle.

## Apologies

An apology was received from Mrs Mitchell.

### 1. Minutes

Resolved, on the motion of Mr Park:

That the Committee adopt the draft minutes as circulated for meetings held on 26 March 2013.

### 2. Correspondence

Resolved, on the motion of Mr Evans:

That the Committee note the incoming correspondence as follows:

\*\*\*\*\*

- Letter from the Information Commissioner, dated 22 March 2013, advising of her resignation; and that the Committee write to the Information Commissioner to thank her for her contribution and arrange a meeting between her and the Committee before her term ends.

\*\*\*\*\*

Resolved, on the motion of Mr Searle:

That the Committee visit the NSW Police Professional Standards Command and the Police Integrity Commission.

### 4. Next Meeting

The Committee adjourned at 4:33pm until a date and time to be decided.

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## MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND POLICE INTEGRITY COMMISSION (NO. 27)

1:22pm, Tuesday 30 April 2013

Room 1136, Parliament House

### Members Present

Ms Cusack (Chair), Mr Evans, Mrs Mitchell and Mr Searle

## Apologies

Apologies were received from Mr Anderson, Mr Lynch and Mr Park

### 1. Minutes

Resolved, on the motion of Mr Searle:

That the Committee adopt the draft minutes as circulated for the meeting and hearing held on 11 April 2013.

## 2. Correspondence

Resolved, on the motion of Mrs Mitchell:

That the Committee note the letter from the Police Integrity Commission dated 17 April 2013 in relation to its invitation to attend the PIC; and

That the Committee send the draft letter as circulated to the Commissioner for Police in relation to the proposed visit to the Professional Standards Command on 31 May 2013;

\*\*\*\*\*

## 4. General Meetings

The Committee noted that all public documentation was now available on the Committee website, and that as soon as copies of the Memoranda of Understanding between the PIC and the Crime Commission become available, these would be forwarded to Committee Members only and would not be published.

\*\*\*\*\*

The Committee adjourned at 1:35pm until Wednesday 22 May at 12pm in room 1153.

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## MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND POLICE INTEGRITY COMMISSION (NO. 29)

2:11 PM, Wednesday 22 May 2013  
Room 1043, Parliament House

### Members Present

Ms Cusack (Chair), Mr Anderson, Mr Lynch, Mrs Mitchell, Mr Park and Mr Searle

### Apologies

An apology was received from Mr Evans

## 1. Minutes

Resolved, on the motion of Mr Searle:

That the Committee adopt the draft minutes as circulated for the meeting and hearing held on 30 April 2013.

## 2. Correspondence

The Committee noted the following incoming correspondence.

- Letter dated 8 May 2013 from the Police Integrity Commission enclosing answers to questions taken on notice on 11 April 2013 and a supplementary submission

\*\*\*\*\*

- E-mail from Samantha Knox, Ministry of Police, confirming the appointment of Graham Barr QC as Inspector of the Crime Commission

\*\*\*\*\*

### **3. Visits of Inspection**

The Committee noted the upcoming visits of inspection on 31 May 2013 to the Crime Commission, the Police Integrity Commission and the NSW Police Professional Standards Command.

### **4. General Meetings**

The Chair noted that all public documentation was now available on the Committee's website and the report was in the process of being drafted.

\*\*\*\*\*

The Committee adjourned at 12:59pm until Wednesday 19 June at 12pm in room 1136.

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## **MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND POLICE INTEGRITY COMMISSION (NO. 30)**

12:03 PM, Wednesday 19 June 2013  
Room 1136, Parliament House

### **Members Present**

Ms Cusack (Chair), Mr Anderson, Mr Evans, Mr Lynch, Mrs Mitchell

### **Apologies**

Apologies were received from Mr Park and Mr Searle

### **1. Minutes**

Resolved, on the motion of Mrs Mitchell:  
That the Committee adopt the draft minutes as circulated for the roundtable hearing on 20 May 2013 and for the meeting held on 22 May 2013.

### **2. Correspondence**

The Committee noted the following incoming correspondence:

\*\*\*\*\*

- Letter dated 6 June 2013 from the Ombudsman in response to the Committee's letter requesting information about complaints made by NSW Police Officers about the conduct of other officers

\*\*\*\*\*

Resolved on the motion of Mr Evans:

\*\*\*\*\*

That the Committee send the draft letters of thanks as circulated to the Crime Commission, Police Integrity Commission and NSW Police Force Professional Standards Command.

\*\*\*\*\*

### 3. Inquiries

The Chair noted that the reports for the General Meetings and the Inquiry into Performance Measures and Accountability of Oversight Agencies were in the process of being drafted.

\*\*\*\*\*

### 6. General Business

Mrs Mitchell informed the Committee that during her forthcoming period of leave during August and September, she intends to participate in meetings via teleconference. The Committee adjourned at 12:17pm until 12pm Wednesday 21 August, Room 1136, Parliament House.

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## MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OMBUDSMAN, THE POLICE INTEGRITY COMMISSION AND THE CRIME COMMISSION (NO. 33)

10:05am, Wednesday 28 August 2013  
Room 1153, Parliament House

### Members Present

Ms Cusack (Chair), Mr Evans (Deputy Chair), Mr Anderson, Mr Lynch, Mr Park, Mr Searle.

### Apologies

Apologies were received from Ms Mitchell.

### Officers in Attendance

Helen Minnican, Abi Groves, Clara Hawker, Meg Banfield, Jacqueline Isles.

The Chair commenced the meeting at 10:05am.

### 1. Confirmation of Minutes

Resolved, on the motion of Mr Anderson: That the minutes of the meetings held on 19 June, 21 June, and 25 July 2013 be confirmed.

## 2. Correspondence

(a) Received from agencies

The Committee noted the following items of correspondence received:

\*\*\*\*\*

- Letter dated 1 July 2013 from the Commissioner of Police in response to Committee's letter of 22 May 2013 re number and outcomes of complaints made by NSW Police officers about other NSW Police Officers;

Resolved, on the motion of Mr Lynch: That the Committee publish the letters received on the Committee's web page.

\*\*\*\*\*

## 4. General Business

\*\*\*\*\*

e) The Committee Secretariat provided an update to the Committee on the status of the Annual General Report and the Report of the Inquiry into Performance Measures and Accountability of Oversight Agencies.

\*\*\*\*\*

## 5. Next Meeting

The committee adjourned at 10:18am until 10:00am on Wednesday 11 September 2013.

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# MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OMBUDSMAN, THE POLICE INTEGRITY COMMISSION AND THE CRIME COMMISSION (NO. 35)

10:00am, Wednesday 16 October 2013

Room 1136, Parliament House

### Members Present

Ms Cusack (Chair), Mr Evans (Deputy Chair), Mr Anderson, Mr Lynch, Ms Mitchell, Mr Park, Mr Searle.

### 1. Apologies

### Officers in Attendance

Abi Groves, Clara Hawker, Jacqueline Isles.

The Chair commenced the meeting at 10:02am.



## 1. Confirmation of Minutes

Resolved, on the motion of Mr Park, seconded by Mr Evans: That the minutes of the meetings held on 28 August and 11 September 2013 be confirmed.

\*\*\*\*\*

## 5. 2013 General Meetings

### 5.1 Correspondence

#### (a) *Received from Agencies*

- Received from Ms Deirdre O'Donnell, dated 4 July 2013, enclosing IPC action plans and strategic plan.

The Committee noted the correspondence from the IPC relating to its action plans and strategic plan.

### 5.2 Consideration of General Meetings Report 2013

Resolved, on the motion of Mr Searle, seconded by Mr Anderson: That the Committee consider the Chair's draft report *in globo*.

Resolved, on the motion of Ms Mitchell, seconded by Mr Park: That, subject to agreement to the proposed amendments to Recommendation 3 to be circulated to members by email today, the draft report be the report of the Committee, signed by the Chair and presented to the House.

Resolved, on the motion Ms Mitchell, seconded by Mr Park: That the Chair and secretariat be permitted to correct stylistic, typographical and grammatical errors.

Resolved, on the motion of Ms Mitchell, seconded by Mr Park: That, once tabled, the report be posted on the Committee's website.

\*\*\*\*\*

## 9. Next meeting

The committee adjourned at 10:27am until 10:00am on Wednesday 13 November 2013.

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# Appendix Three – M1997-26 Litigation Involving Government Authorities

## M1997-26 Litigation Involving Government Authorities

Status: current

The purpose of this Memorandum is to issue revised guidelines for litigation involving Government authorities. This Memorandum replaces Memorandum 91-9 issued on 18 April 1991. The guidelines issued by way of this Memorandum take effect immediately.

The guidelines apply both to civil and criminal proceedings. They are based on the general principle that litigation between Government authorities is undesirable and should be avoided whenever possible. Where litigation does occur, Government authorities should take steps, as set out in the guidelines, to consult with the authority against which litigation has been commenced and attempt to reach agreement on as many factual and legal issues as possible, to ensure only matters which need to be resolved by the Court are left in issue. In civil proceedings, alternative dispute resolution procedures should be utilised before resorting to the Court system.

The guidelines recognise that, in some circumstances, the only appropriate course is to commence prosecutions against Government authorities as a way of enforcing compliance with environmental, safety and other standards. The guidelines are not intended to interfere with the normal prosecution discretion of Government authorities.

The guidelines apply to all Government authorities, including Government Trading Enterprises. The guidelines are not expressed to apply to State Owned Corporations. However, as the guidelines provide a sound approach to the management of litigation and disputes, I urge shareholding Ministers and Boards of State Owned Corporations to agree to adopt the guidelines by incorporating them into their Statements of Corporate Intent. This Memorandum should therefore be forwarded to all State Owned Corporations for their consideration.

Any inquiries as to the operation and application of the guidelines may be directed to Mr Bill Grant, Deputy Director-General, Attorney General's Department (Ph 9228 7017) or Ms Jane Smith, Legal Branch, The Cabinet Office (Ph 9228 4000), or Louise Wattus, Legal Branch, The Cabinet Office (Ph 9228 5546).

Would you please ensure that these guidelines are brought to the attention of all departments and other authorities within your portfolio.

Bob Carr  
Premier

ISSUED: Legal Branch, The Cabinet Office  
DATE: 8 October 1997

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### **GUIDELINES FOR LITIGATION INVOLVING OR BETWEEN GOVERNMENT DEPARTMENTS AND AUTHORITIES**

#### **1.0 Application of these Guidelines**

1.1 These guidelines apply to:

(a) all Government Departments; and

(b) all Government agencies, instrumentalities and bodies, including Government Trading Enterprises, whether or not they represent the Crown.

1.2 In these guidelines, the above will all be referred to as Government authorities.

1.3 These guidelines do not apply to State Owned Corporations or local government authorities. However, as the guidelines and the principles underpinning them provide a sound approach to the management of litigation by publicly owned enterprises, State Owned Corporations are encouraged to adopt the guidelines as part of their policy. Similarly, prosecution agencies are urged to apply the principles of the guidelines to State Owned Corporations.

1.4 These guidelines do not affect any statutory requirement for the consent of a particular person or body before proceedings are commenced.

1.5 The aims of the guidelines are, so far as possible, to ensure that:

(i) in the prosecution of one Government authority by another the cost to the public purse is kept to a minimum;

(ii) only appropriate prosecution action is taken;

(iii) inappropriate or irrelevant defences are not pleaded;

(iv) the Court's time spent in resolving prosecutions or disputes involving Government authorities is kept to a minimum;

(v) that responsible Ministers are kept informed of pending prosecutions and possible disputes between Government authorities; and

(vi) Government authorities act, so far as is possible, as model litigants in proceedings before the Court.

1.6 These guidelines replace and expand those which were issued on 18 April 1991 by the then Premier, the Honourable N. F. Greiner.

## **2.0 Criminal Proceedings**

2.1 Government authorities have a responsibility to comply with the law and can be subject to the same penal sanctions as the rest of the community.

2.2 Criminal proceedings against Government authorities may be the only appropriate method of enforcing compliance with prescribed safety, environmental and other standards. Such prosecution action may be necessary to ensure the acceptance of an appropriate sense of responsibility for the consequences of the breach of such standards or because it is otherwise in the public interest for proceedings to be commenced.

2.3 Nothing in these guidelines is meant to in any way interfere with the normal prosecution discretion as to whether or not to commence prosecution proceedings or to discontinue prosecution proceedings.

2.4 However, it is appropriate that Government authorities vested with the power to commence prosecutions should consult with the Government authority against whom a prosecution is contemplated. Such consultation will ensure that:

- (i) inappropriate procedures are changed as soon as possible;
- (ii) the facts surrounding the incident are ascertained and, if possible, agreed upon;
- (iii) any defence to the prosecution is made known;
- (iv) inappropriate proceedings which would not achieve the object of sheeting home responsibility against the body to be prosecuted are not taken; and
- (v) the Government authorities co-operate to ensure the Court only has to deal with the real questions in issue.

2.5 This consultation process is consistent with the normal processes that are followed by a prosecution agency when determining whether or not, in all the circumstances, prosecution action is the most appropriate way of dealing with a possible breach of law and is not meant to imply that Government authorities are treated any more favourably than other defendants.

2.6 The consultation process should be initiated at senior officer level with a view to full discussion, on a without prejudice basis, of the incident in question. It may be appropriate that legal proceedings not be commenced. To illustrate, the Government authority liable to prosecution action may undertake some action which will ensure that similar breaches do not occur in the future and in particular circumstances, this may be acceptable to the prosecution authority.

2.7 If the matter is to continue then the consultation process should be used to identify the factual or legal issues in dispute in the matter and to assist with reaching agreement on as many of those issues as possible. To illustrate, it may be that there can be an agreed statement of facts or a significant number of the relevant facts can be agreed so that a Court's time is not wasted in establishing these facts.

2.8 It is incumbent on Government authorities to do all they can to narrow the issues before the Court and in this regard authorities are urged to be 'model litigants', ensuring that only matters which need to be resolved by the Court are left in issue.

2.9 It should be recognised that to enable the allegedly offending Government authority to participate with full knowledge in the consultation process it will be necessary for the prosecuting authority to supply a statement of facts outlining the nature of the alleged offence. Whilst it may not be appropriate, at this stage of proceedings, for the prosecuting authority to provide a full brief of evidence to the other authority, it is recognised that sufficient information should be provided to allow the other authority to evaluate its position.

2.10 The consultation process is to take place within an appropriate time frame. It is essential that these guidelines are not used by any Government authority to delay the resolution of a matter which could result in prosecution action. All necessary consultations should be finalised within a period of 30 days from the time that the statement of facts is provided.

2.11 If, after the consultation process the prosecution authority considers that prosecution action should be instituted, then the Chief Executive Officers must bring the matter to the attention of the responsible Ministers.

2.12 If there are points of law in dispute between the Government authorities, it may be appropriate that these questions be referred to the Attorney General for Crown Law advice.

2.13 Whilst the Crown law officers' opinion on the matters referred should be given due weight in any consideration of whether or not charges should be laid or defended, these questions must ultimately be resolved by the relevant Government authorities.

2.14 If the matter proceeds to prosecution action it is emphasised that all steps must be taken by the authorities to reduce the issues in dispute between the parties, including the admission of all facts not in issue, thereby saving court time and keeping the cost to the public purse to a minimum.

2.15 The level of representation for both the prosecuting authority and the defending authority should be appropriate to the difficulty of the facts and issues still in dispute, but every effort should be made to keep legal costs to a minimum.

2.16 Where a prosecution action has been finalised, appeals should only be considered in exceptional cases. If possible, the Attorney General should be asked to provide Crown law advice on the likelihood of success of any appeal proceedings. Whilst such advice is not binding, it must be given due weight in any consideration of whether or not there should be an appeal.

### **3.0 Civil Proceedings**

3.1 These guidelines apply where civil proceedings are being contemplated by one Government authority against another (including civil proceedings by way of cross claim) or if proceedings are commenced against two or more Government authorities.

3.2 Litigation is expensive to the parties and to the State which funds the legal system. Civil disputes between Government authorities should not be litigated before the procedure set out in paragraphs 3.3, 3.4 and 3.5 has been followed. The Premier will not approve the institution of proceedings unless there are compelling circumstances. Furthermore, Government authorities should, if practicable, co-operate to ensure that the total liability of the government is kept to a minimum: this means that cross claims for indemnity or contribution between Government authorities should not be litigated.

3.3 Where a dispute arises between Government authorities which could give rise to civil proceedings, all attempts must be made to resolve the dispute at senior officer level and, if necessary, by the relevant Ministers, with a view to resolving the matter without recourse to litigation.

3.4 It is Government policy that, where possible, attempts should be made to settle disputes by utilising alternative dispute resolution techniques rather than by resorting to the Court system. If a dispute cannot be resolved at officer level then alternative dispute resolution procedures should be used prior to litigation being commenced.

3.5 Where it is not possible to resolve the matter in dispute, the matter should be referred to the Premier.

3.6 The Premier may decide to obtain the opinion of the Attorney General as to the merits of the dispute. No proceedings should be instituted without the approval of the Premier.

3.7 Where a number of Government authorities are defendants in the same civil proceedings, they should co-operate in the conduct of their defences with a view to avoiding inflating the damages recoverable by the plaintiff, as well as unnecessary expense or use of resources. Unless impracticable, this co-operation should involve the sharing of legal representation.

### **4.0 Claims for Public Interest Immunity**

4.1 Except in cases of emergency, no Government authority should object to the production of documents or the disclosure of information on the ground of public interest immunity without first consulting the Solicitor General or, if the Solicitor General is unavailable, the Crown Solicitor. If it is not possible to consult first, notice should be given to the Solicitor General at the earliest opportunity.

4.2 This practice will ensure that those charged with the responsibility of advising the Attorney

General (who in the last resort may have to swear an affidavit formulating and claiming the immunity) can have an appropriate opportunity to do so before a claim is publicly made. The practice can result in inappropriate or excessive claims being withdrawn before public embarrassment or waste of costs occur.

4.3 Any process of discovery or subpoena relating to Cabinet documents or records should continue to be brought to the attention of the Director General of The Cabinet Office before any decision regarding access is made.

## **5.0 General**

5.1 No Government authority should claim that any New South Wales legislation (including subordinate legislation) is invalid without first consulting the Attorney General.

## **6.0 Technical Defences**

6.1 No Government authority should take a "technical defence" (i.e., defence not available to normal litigant) without first consulting the Attorney General.

## **7.0 Operation of the guidelines**

7.1 These guidelines are not intended to affect substantial legal rights or to give rise to additional legal claims or defences. The guidelines should not be raised by Government authorities in legal proceedings.