PARLIAMENT OF NEW SOUTH WALES

Committee on the Office of the Ombudsman and the Police Integrity Commission

TWELFTH GENERAL MEETING WITH THE NSW OMBUDSMAN

Together with Transcript of Proceedings, Written Responses to Questions and Minutes

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Functions of the Committee

The Committee on the Office of the Ombudsman and the Police Integrity Commission is constituted under Part 4A of the *Ombudsman Act 1974*. The functions of the Committee under the *Ombudsman Act 1974* are set out in s.31B(1) of the Act as follows:

- to monitor and to review the exercise by the Ombudsman of the Ombudsman's functions under this or any other Act;
- to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Ombudsman or connected with the exercise of the Ombudsman's functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;
- to examine each annual and other report made by the Ombudsman, and presented to Parliament, under this or any other Act and to report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;
- to report to both Houses of Parliament any change that the Joint Committee considers desirable to the functions, structures and procedures of the Office of the Ombudsman;
- to inquire into any question in connection with the Joint Committee's functions which is referred to it by both Houses of Parliament, and to report to both Houses on that question.
- These functions may be exercised in respect of matters occurring before or after the commencement of this section of the Act.

Section 31B(2) of the Ombudsman Act specifies that the Committee is not authorised:

- 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; or
- to exercise any function referred to in subsection (1) in relation to any report under section 27; or
- to reconsider the findings, recommendations, determinations or other decisions of the Ombudsman, or of any other person, in relation to a particular investigation or complaint or in relation to any particular conduct the subject of a report under section 27; or
- to exercise any function referred to in subsection (1) in relation to the Ombudsman's functions under the T*elecommunications (Interception) (New South Wales) Act 1987*.

The Committee also has the following functions under the *Police Integrity Commission Act 1996*:

- to monitor and review the exercise by the Commission and the Inspector of their functions;
- to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise

of their functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;

- to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing, or arising out of, any such report;
- to examine trends and changes in police corruption, and practices and methods relating to police corruption, and report to both Houses of Parliament any changes which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector; and
- to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

The Act further specifies that the Joint Committee is not authorised:

- 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 Commission in relation to a particular investigation or a particular complaint.

The *Statutory Appointments (Parliamentary Veto) Amendment Act*, assented to on 19 May 1992, amended the Ombudsman Act by extending the Committee's powers to include the power to veto the proposed appointment of the Ombudsman and the Director of Public Prosecutions. This section was further amended by the *Police Legislation Amendment Act 1996* which provided the Committee with the same veto power in relation to proposed appointments to the positions of Commissioner for the PIC and Inspector of the PIC. Section 31BA of the Ombudsman Act provides:

(1) The Minister is to refer a proposal to appoint a person as Ombudsman, Director of Public Prosecutions, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission to the Joint Committee and the Committee is empowered to veto the proposed appointment as provided by this section. The Minister may withdraw a referral at any time.

(2) The Joint Committee has 14 days after the proposed appointment is referred to it to veto the proposal and has a further 30 days (after the initial 14 days) to veto the proposal if it notifies the Minister within that 14 days that it requires more time to consider the matter.

(3) The Joint Committee is to notify the Minister, within the time that it has to veto a proposed appointment, whether or not it vetoes it.

(4) A referral or notification under this section is to be in writing.

(5) In this section, a reference to the Minister is;

(a) in the context of an appointment of Ombudsman, a reference to the Minister administering section 6A of this Act;

(b) in the context of an appointment of Director of Public Prosecutions, a reference to the Minister administering section 4A of the *Director of Public Prosecutions Act 1986*; and

(c) in the context of an appointment of Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission, a reference to the

Minister administering section 7 or 88 (as appropriate) of the Police Integrity Commission Act 1996.

Chairman's Foreword

The twelfth General Meeting with the Ombudsman highlights the importance of the Ombudsman's ability to report to Parliament direct, in keeping with the status of the Ombudsman as an independent statutory officer.

Since the Committee conducted the public hearing for the General Meeting the Ombudsman has tabled the annual report of the Office on reviewable deaths and a special report to Parliament on improving outcomes for children at risk of harm. The annual report is the first by the Ombudsman on the reviews of the deaths of certain children and those people with a disability who have died in care.

The Committee has monitored the implementation of the Ombudsman's new statutory functions in this area and has noted the key findings of the reports. The outcomes of the serious issues covered in the Ombudsman's investigations under this part of his jurisdiction and the adoption of the Ombudsman's recommendations will be closely scrutinised by the Committee, which is reassured that the Ombudsman has the power to make further special reports direct to Parliament should he consider this to be necessary.

However, there are a number of legislative review functions performed by the Ombudsman that are not subject to direct report to Parliament. In these instances, the Ombudsman's reports are provided to the Minister in the first instance, who is responsible for tabling the Ombudsman's report in Parliament. The Committee has recommended that the reporting provisions relating to all of the Ombudsman's statutory review functions be amended so that the Minister has 28 days within which to table the Ombudsman's report, after which time the Ombudsman may table the report direct to Parliament. This preserves an appropriate balance between ministerial responsibility and the Ombudsman's independence.

A number of statutes, other than the *Ombudsman Act* 1974, confer jurisdiction on the Ombudsman and may be subject to legislative review by the relevant Minister. The Committee has continued to follow such reviews and has been critical of their conduct and the length of time taken to report to Parliament on the outcomes. The information obtained through the General Meeting has done nothing to allay the Committee's concerns in this regard.

The extension of the Ombudsman's jurisdiction in recent years has significantly increased the range of issues covered during General Meetings, which remain a key accountability exercise. Consequently, preparing answers to the Committee's questions on notice and participating in the public hearing requires considerable effort and resources by the Office. The Committee appreciates the level of detailed information and evidence provided by the Ombudsman, and the Office's statutory officers and staff for this purpose. I also wish to thank the Members of the Committee for their contribution to the General Meeting and their participation in deliberations.

Paul Lynch MP
Chairman

Chapter One - Commentary

Special Reports

1.1 The Committee is particularly concerned about the findings contained in both of the Ombudsman's Special Reports—on assisting homeless people, and on the need for the Department of Aging, Disability and Home Care to improve services for children, young people and their families — and will continue to monitor the adoption of the Reports' recommendations, particularly the failure to implement, or the decision to only partly implement, six of the nineteen recommendations in the *Assisting Homeless People Report*.

1.2 The Committee is also very concerned by the findings of the Ombudsman's Special Report, *Improving Outcomes for Children at Risk of Harm – A Case Study*, published in December 2004, as well those in its *Reviewable Deaths Annual Report 2003-2004* and will monitor the uptake of the Ombudsman's recommendations in these reports.

1.3 The Committee notes that the Ombudsman would be able to make a further special report to Parliament on the take-up of his recommendations in any of the aforementioned reports should he consider such a course to be necessary.

Reporting on the Ombudsman's legislative review functions

1.4 A number of statutes, in particular statutes that confer new powers on NSW Police, are subject to review by the Ombudsman. The Committee examined the length of time that had elapsed between the provision of the Ombudsman's reports to relevant Ministers on the legislative reviews undertaken by the Office, and the subsequent tabling of the report in Parliament by the Minister.

1.5 The Ombudsman gave details of the timeframes for the tabling of his reports as follows:

1.6 Minister for Police:

1. *Crimes Legislation Amendment (Police and Public Safety) Act 1998*
   - provided to the Minister on 11 November 1999; tabled in Parliament approximately 7.5 months later on 29 June 2000.
2. *Police Powers (Vehicles) Act 1999*
   - provided to the Minister on 5 August 2000; tabled 4 months later on19 December 2000

1.7 The Committee considers that such delays in the tabling of the Ombudsman's legislative review reports are unacceptable.

1.8 The shortest period between provision of the Ombudsman's legislative review report to the Minister and tabling of the report in Parliament occurred in the case of the interim legislative review report on *Crimes (Forensic Procedures) Act 2000*, which the Attorney General tabled five weeks after having received the report (report provided to Attorney General on 21 September 2004 and tabled by the Minister on 28 October 2004.)

1.9 The Ombudsman also provided a report on the legislative review of the *Police Powers (Vehicles) Act* (as amended by the *Police Powers (Vehicles) Amendment Act 2001*) to the Minister for Police and the Commissioner of Police on 22 September 2003. There is no requirement under the Act for the Minister to table the report in Parliament. The Committee notes that despite giving an undertaking to the Ombudsman to table the report, the Minister had not done so as at 17 November 2004. The report does not appear to have been tabled in Parliament at the time the Committee's report was finalised.

1.10 The Committee considers that the reporting obligations with respect to the outcomes of legislative reviews undertaken by the Ombudsman should be consistent between the various acts that include review by the Ombudsman. Also, they should be consistent with the reporting provisions for Ombudsman reports generally. Most of the legislative review reporting provisions state that the Minister must table the Ombudsman's report as soon as practicable after receiving it. At a minimum, the Committee considers it desirable that the provisions for legislative review by the Ombudsman should consistently specify a period for tabling of the Ombudsman's report by the Minister in Parliament.

1.11 However, given the considerable length of time that has elapsed between provision of the Ombudsman's legislative review reports to the relevant Minister and their tabling in Parliament, the Committee thinks that providing for a consistent timeframe for tabling is not enough to guarantee that tabling occurs within a reasonable period. The Committee notes that under the Ombudsman Act the Ombudsman reports direct to the Parliament, with the exception of reports made under s.26 of the Ombudsman Act, which are provided to the relevant Minister. However, s.27(1) of the Ombudsman Act enables the Ombudsman to make a report to the Presiding Officer of each House of Parliament, where he is not satisfied that sufficient steps have been taken in due time in consequence of a report under section 26. Under s.31 of the *Ombudsman Act 1974* the Ombudsman may make a special report at any time direct to Parliament. Under s.31(2) the Ombudsman may include in a s.31 or s.27 report a recommendation that the report be made public forthwith. The Ombudsman's Annual Report also is furnished to the Presiding Officer of each House of Parliament.

1.12 The Ombudsman expressed a preference that he either table the legislative review reports directly to Parliament, as is the practice with the Office's other reports, or, where the legislation provides for the Minister to table the Ombudsman's report, a time period for the tabling process should be specified. In response to a question from the Chair at the General Meeting, Mr Barbour stated:

> My preferred position would be for the Ombudsman to table it in Parliament once it is concluded. We always conduct appropriate discussion and communication with those parties that have an interest in the matter. So by the time we finalise our report there will have been a copy of our provisional thinking and our provisional report provided to those agencies and/or Minister relevant for the particular task.
>
> If our preference is not met then certainly I think the next preferable course would be for there to be a time period set out in the legislation under which the Minister ought table the report in Parliament. Ideally I would think that would be within a 28-day period.

1.13 In view of a Minister's responsibility for proposals affecting the legislation within his or her portfolio, the Committee has decided that the statutes that provide for legislative review by the Ombudsman should specify a 28-day period for the Minister to table the report to Parliament. Where a Minister does not table a legislative review report by the Ombudsman within 28 days of its receipt, provision should be made for the Ombudsman to table the report in question direct to the Presiding Officers of Parliament, as is the case with the reporting provisions under the *Ombudsman Act 1974*.

1.14 The Ombudsman also pointed out an anomaly in his review of the *Crimes (Forensic Procedures) Act 2000*, where the legislation provided only that the Attorney General receive the interim report, although the final report was to be submitted to the Minister for Police and the Commissioner of Police as well, both of whom have a substantial role in the administration of DNA sampling and analysis. The Ombudsman suggested that legislation conferring a review function on his office should provide that interim reports are provided to the same Ministers and heads of agency as are required to receive the final report. The Committee supports this proposal.

Recommendation:

The Committee recommends that the statutory reporting provisions contained within any legislation that confers a review function on the Ombudsman should provide that:

i. a report by the Ombudsman on the review of any legislation falling within a Minister's administrative responsibility be tabled in Parliament by the Minister within 28 days of receipt of the report;

ii. where the Minister fails to table a legislative review report by the Ombudsman within the specified 28 days time limit, provision be made for the Ombudsman to table the report in question direct to the Presiding Officers;

iii. interim reports on legislative reviews undertaken by the Ombudsman be provided to the same Ministers and heads of agency as receive the final report.

Review of the Law Enforcement (Controlled Operations) Act 1997

1.15 In previous reports to Parliament, the Committee has been critical of the conduct of the review of legislation impacting upon the Ombudsman's jurisdiction and the operation of the Office. In following up on the progress of the review of the *Law Enforcement (Controlled Operations) Act 1997*, the Committee has become aware that the report on this legislative review was provided to Cabinet before it was tabled in Parliament.

1.16 The statutory reporting deadline for tabling the review on the controlled operations legislation in Parliament was 1 December 2003. Section 32 of the *Law Enforcement (Controlled Operations) Act 1997* requires that the report on the second review of the Act be tabled in Parliament by this date. However, the report by the Ministry for Police is dated February 2004 and was not tabled in Parliament until 23 June 2004, six months after the reporting date specified in the Act. The Committee became

aware through the Ombudsman's Annual Report for 2003-2004 that the Office provided comment on 24 March 2004 in relation to a Cabinet Minute dealing with the report on the legislative review of the controlled operations legislation. The Ombudsman's answers to questions on notice from the Committee indicate that he was asked to comment on a Cabinet Minute that:

> . . . sought approval to (i) table the report of the review, (ii) accept the recommendations of the review and (iii) approve the development of a Bill arising from the recommendations contained within it.

1.17 The Committee considers that the process of submitting legislative review reports to Cabinet without meeting the date for tabling in Parliament is a breach of the statutory reporting requirements of the relevant review legislation, in this case the *Law Enforcement (Controlled Operations) Act 1997*.

1.18 It is the opinion of the Committee that where Parliament has enacted legislation that requires a Minister to report to it on the outcomes of the review of legislation within the Minister's portfolio, the report must be tabled on or before the deadline provided in the Act. The Committee holds the view that failure to report within the required period, on the basis that Cabinet approval is being sought for tabling, is a clear breach of the reporting requirements of the Act and shows an obvious disregard for the authority of the Parliament. Seeking Cabinet approval for tabling in this instance is unnecessary. The intent of Parliament in enacting the statutory provisions that deal with the Minister's reporting obligation was to require the Minister to table the report in Parliament by the specified dated. The Committee acknowledges that it is open to the Minister to seek the advice of his Cabinet colleagues on any matter relating to his portfolios responsibilities. However, that is no excuse for failing to meeting the legislative review reporting requirements.

1.19 Previously, the Committee has been critical of the consultation process by which the Ombudsman's opinion on proposed changes to the controlled operation legislation was sought. The Committee raised its concerns in previous General Meeting Reports and also with the former Minister for Police, in correspondence dated 16 August 2004. The proposed legislative amendments would make significant changes to the legislation by establishing a two-tier controlled operations scheme but the Committee considers that the Ministry's report includes little or no detailed analysis of the Ombudsman's views on the implications of the proposals for his jurisdiction, and the performance of his functions under the Act.

1.20 The extent of the consultation process undertaken on proposals to amend the controlled operations legislation meant that the Ombudsman was not in a position to advise the Committee at the General Meeting, as to how the outcomes of the legislative review would impact on his jurisdiction with respect to controlled operations and the operation of the Office. The Committee notes the issue that arose between the Ombudsman's Office and NSW Police over the nature and extent of the Ombudsman's jurisdiction under the controlled operations legislation remains unresolved. At the time of writing this report, amending legislation arising from the review of the Act had yet to be introduced into Parliament, and the Committee understands that the Ombudsman has yet to be consulted on the draft Bill.

1.21 The Committee will continue to monitor the exercise of the Ombudsman's functions with respect to controlled operations and the impact of any changes to the legislation on the Ombudsman's jurisdiction and the work of the Office.

Telecommunications interceptions (TI)

1.22 The Committee provided questions on notice for the purpose of exercising its functions under the *Police Integrity Commission Act 1996* concerning a report prepared by the Ombudsman for the Attorney General on the dissemination of TI and other surveillance material during Operation Florida, which was conducted by the Police Integrity Commission (PIC). This particular incident had been the subject of an investigation and report by the former Inspector of the PIC, the Hon. M.D. Finlay. In his response to the Committee, the Ombudsman stated that he had had no authority to provide a copy of the report to the PIC Inspector. The Committee considered that, in view of the Inspector's functions and jurisdiction, and in light of the report[1] by the previous Inspector on this particular matter, the Police Integrity Commission should ensure that a copy of the Ombudsman's report is forwarded to the PIC Inspector. It notes that the PIC provided a copy of the report to the Inspector on 11 January 2005.

Protected Disclosures

1.23 The Committee received correspondence in December 2004 from the Ombudsman advising that his office would be involved in a joint research project into whistleblower management and protection. Various agencies and academics from across Australia will contribute to the project whose completion is anticipated in 2008. Should the Committee be referred the third review of the Protected Disclosures Act by the Parliament, in accordance with s.32 of the Act, the Committee would not propose conducting the review until the research project was completed, so that the Committee had the benefit of the project's findings.

[1] Committee on the Office of the Ombudsman and the PIC, *Sixth General Meeting with the Commissioner for the Police Integrity Commission* (June 2002), Appendix 3: Report of a Preliminary Investigation re "Four Corners" program: 8 October 2001, by Hon Mervyn Finlay QC, Inspector of the Police Integrity

Chapter Two - Questions on Notice

GENERAL MEETING with the OMBUDSMAN
30 NOVEMBER 2004

QUESTIONS ON NOTICE

1. Office Management

(i) Of a total 76 complaints received about the office, 7 were justified or partly justified and a further 31 were found to have had some substance and were resolved by remedial action (p.18). What types of complaints were justified or partly justified, and what types of matters were resolved by remedial action?

(ii) The number of requests for decisions to be reviewed is highest in the General Area, specifically in relation to local councils and other public sector agencies. What particular factors lead to this tendency for review requests in relation to such complaints?

(iii) Has the Office's reviews of particular decisions led to any changes in its decision-making processes or other practices (p.18)?

(iv) The Annual Report refers to the review by the General Team, with the assistance of an evaluation consultant, of its performance indicators. Has the General Team changed its performance indicators as a result of this review? What performance benchmarks have been set across the Office and do these measures vary between divisions?

(v) Has the review of the Office's corporate plan been completed?

2. Special Reports to Parliament

During 2003-2004 the Ombudsman tabled two special reports to Parliament entitled:

- Assisting homeless people – the need to improve their access to accommodation and support services (May 2004); and
- DADHC – the need to improve services for children, young people and their families (April 2004).

(i) What has been the response of the relevant departments to the recommendations made in each report?

(ii) In particular, has the DADHC completed the implementation of their action plan in accordance with the timeline provided at Appendix 1 of the Special Report and does the Office anticipate that DADHC will be in a position at the end of January 2005 to give advice on the effectiveness of the action plan (p.28)?

(iii) Does the Office accept any of the criticisms made by certain agencies delivering SAAP services on the report concerning assistance to homeless people (p.36)?

3. Community Services

(i) The Annual Report details that five investigations were started in 2003-4 and six investigations were finalised. What factors prompted the Ombudsman to exercise his investigation powers in these instances?

(ii) Has the Office received the information requested from DOCS about the operation of its Helpline and what response has occurred with respect to the processing of risk-of-harm reports on which the Office had expressed concern (p.28)?

(iii) Has DoCS' fully implemented the recommendations arising from its internal review of case study 9 and the identified systemic issues relating to the investigation of risk of harm reports, and the carer assessment process and probity checking of foster and kinship carers?

(iv) What action has followed DADHC's review of legislation governing the licensing of boarding houses and the subsequent preparation of an options paper for the Minister (p.30)?

(v) Has DADHC adopted the Office's recommendation that the Department amend its policies and procedures for monitoring boarding houses, and that it review all boarding house files to ensure the inclusion of relevant documentation (see case study 10 - p.30)?

(vi) What has been the response of DADHC and the Department of Health to the Office's proposals concerning the provision of health and other services to people with a disability in care, following on from the Office's review of the death of 37 people who died with a disability in care between 1 July and 31 December 2002 (p.43)?

(vii) What is the Office's initial assessment of its revised approach to the allocation of resources for the official community visitors scheme as outlined at p.32 of the Annual Report?

(viii) Of the issues identified by official community visitors in 2003-2004, the number of issues resolved as a percentage of the number of issues identified fell below 50% in total and also in respect to each target group of services (see Figure 19 – p.34). Does the Ombudsman have any particular concerns or comment about this statistic?

(ix) Has the Office reported to DADHC on the systemic issues identified by audits of individual planning in non-government disability accommodation services (p.37)?

(x) How does the Office propose to examine the progress of NSW government agencies in meeting the needs of people with intellectual disabilities who are in contact, or at risk of contact, with the criminal justice system (p.37)?

(xi) Is there any update on the response of agencies to those recommendations by the Office that are discussed at p.41 of the Annual Report?

4. Child Protection

(i) From 30 September 2004 the Ombudsman's child protection jurisdiction will be extended to include all family day care services, and mobile and home-based children's services (p.186). What impact is this extension expected to have on the Office's workload in the child protection area?

(ii) The Annual Report notes that the Ombudsman's Office is of the view that the Catholic Commission for Employment Relations (CCER) "is not a viable head of agency for Catholic agencies in the future" and indicates that the Office has agreed to consult with representatives of the Catholic Church before finalising its view as to a suitable new head of agency (p.57). What view has the Office arrived at on this question and what has been the outcome of the Office's consultations with the representatives of the Catholic Church?

(iii) Has the Office completed its audit of the 11 diocesan Catholic Education Offices, undertaken as a result of the failure of the CCER to conduct such an audit (p.50)?

(iv) Is the Office satisfied that the centralised complaint assessment and review branch established by DOCS has led to significant improvements in the handling of reportable allegations involving employees, eg delays in notifications to the Office of the Ombudsman (p.57)?

(v) The Annual Report refers to a disagreement between the Department of Juvenile Justice and the Office about what constitutes sufficient evidence to determine that an allegation is false and to concerns on the part of the Office about the lack of documentation provided by the Department about their decision-making (p.59). Has a consensus been reached between the Office and the Department on these matters?

(vi) What is involved in exercising the Ombudsman's function of examining whether or not an agency's decision to notify or not notify the Commission for Children and Young People is reasonable?

(vii) The child protection scheme places significant responsibility on agencies for internal investigation of complaints, risk assessment of staff and the conduct of disciplinary proceedings. The Annual Report provides some insight into these activities by agencies and the efforts by the Ombudsman's Office to provide guidance and instruction to agencies in these areas. How well do agencies understand the concepts and methodologies relevant to the conduct of investigations, risk assessments and disciplinary proceedings?

(viii) To what extent have agencies taken up the Ombudsman's advice on policy, training and administrative measures that would assist them to undertake these activities?

(ix) In Carter v NSW Netball Association [2004] NSWSC 737, delivered on 17 August 2004, Palmer J drew attention to the fact that voluntary sporting bodies (such as the Defendant in this particular case i.e. the NSW Netball Association) are not designated employers within Part 3A of the *Ombudsman Act 1974* and, as a result, are not subject to the Ombudsman's monitoring of systems for handling and responding to allegations of conduct that would constitute child abuse. Does the Ombudsman have any views on the matters highlighted in the judgment, in particular, the proposed extension of the Office's jurisdiction to include associations such as voluntary sporting bodies?

(x) The Annual Report notes that children who identify as an Aboriginal or Torres Strait Islander make up 1% of the total NSW children population but are identified as the alleged victim in 8% of notifications received during the year. Also, 16% of notifications identified children with a disability as the alleged victim. The Annual Report also states that the Office will continue to audit schools and agencies providing substitute residential care and foster care to monitor these issues (p.63). Does the Ombudsman intend to report on its monitoring of these issues and what initiatives can be undertaken to try to reduce the representation of these children in such notifications?

5. Legislative Reviews

(i) The Office made a submission to the review of the *Police Act 1990* (p.131). What is the current status of this review and have any particular differences emerged between stakeholders on matters affecting the Ombudsman's jurisdiction and functions under the Act?

Internally concealed drugs – NSW Police have suggested that:

- the *Police Powers (Internally Concealed Drugs) Act 2001* be amended to dispense with the need for medical imaging, or to allow a court to waive the requirement for medical imaging and authorise a suspect's detention for the retrieval of drugs;
- and medical staff be required to administer treatment to make a suspect regurgitate orally ingested drugs and be allowed to conduct searches of body cavities at the request of police.(p.128).

(ii) What is the Ombudsman's view of these proposals?

(iii) *Drug detection dogs (pp.126-7)* – What views have been expressed in the responses to the Office's discussion paper on the review of the *Police Powers (Drug Detection Dogs) Act 2001*?

(iv) Has the Office formed any preliminary conclusions on the issues identified during the review?

(v) Many of the statutory provisions requiring the Ombudsman to monitor legislation do not specify a time frame within which the relevant Minister is to table the Ombudsman's report in Parliament. The legislation often states that the Minister

is to table the Ombudsman's report as soon as practicable after receiving it. What period of time usually lapses between furnishing a report to a Minister and the subsequent tabling of a report, and have there been any issues with the operation of the legislative review tabling provisions?

6. Police

(i) As a result of the changes made to the class or kind agreement between the Ombudsman and PIC regarding the classification of police complaints, what complaints will the Office directly oversight and what complaints will be managed entirely by local commands (p.112)?

(ii) c@tsi - The Annual Report states that by December 2003 c@tsi was having a significant adverse impact on the effective functioning of the Office and that despite some developments NSW Police have not secured funding to fix the problems (p.124). Has any progress been made towards obtaining sufficient funds to remedy the problems with the system and what particular administrative and intelligence functions of the Office have been affected?

(iii) The Annual Report refers to 700 police complaints that might have been notifiable to the Ombudsman's Office but which were not notified because of a problem with the c@tsi system (p.117). Have the police commands completed assessing which complaints should have been notified to the Office?

(iv) The Annual Report indicates that examination of officer profiles maintained by local commands were not up-to-date and failed to contain analysis that would assist complaint management teams in assessing new complaints or determining investigative strategies (p.112). What has been the NSW Police response to these concerns?

7. Controlled Operations

(i) The Ministry's report on the review of the controlled operations legislation is dated February 2004 and was required to be tabled in Parliament by 1 December 2003. However, it was not tabled until 23 June 2004. According to the Annual Report, the Ombudsman's Office provided comment on a Cabinet Minute dealing with the report of the review of the *Law Enforcement (Controlled Operations) Act 1997* (p.131). When did the Office provide its comment to Cabinet on the report and did this predate the tabling of the report in Parliament?

(ii) Has the Office been consulted concerning draft legislation to amend the controlled operations scheme and, if so, does the Ombudsman have any particular comment to make on the proposals being put forward?

(iii) Will the changes to the scheme as proposed in the Ministry's review report impact significantly on the work of the Office and the performance of the Ombudsman's oversight functions under the legislation?

(iv) Has NSW Police changed its view of the extent of the Ombudsman's jurisdiction in relation to the monitoring and review of controlled operations under Part 4 of the *Law Enforcement (Controlled Operations) Act 1997*?

8. Telecommunications Interceptions (TI)

(i) For the purpose of exercising the Committee's functions under the *Police Integrity Commission Act 1996,* did the Ombudsman prepare a report for the Attorney General on the dissemination of TI and other surveillance material during Operation Florida conducted by the PIC?

(ii) If so, was this done in accordance with the Ombudsman's functions under the *Telecommunications (Interception)(NSW) Act 1987*?

(iii) Was a copy of the report made available to the Inspector of the PIC?

9. Protected Disclosures

(i) The Office made a submission to the Premier and Cabinet Office about the possibility that the Protected Disclosures Act may cover certain private sector agencies (p.131). What particular agencies did the submission refer to and what was the response to the submission?

The Office has found the following deficiencies with the Protected Disclosures Act:

- there is no obligation on senior management to protect whistleblowers or establish procedures to protect whistleblowers;
- there is no central agency responsible for monitoring how well the scheme is working – this includes collecting data on how many protected disclosures are being made to particular agencies, how many have been made since the Act commenced, and how those disclosures are being handled;
- it is the only Australasian whistleblower legislation in which the whistleblowers themselves have no direct right to seek damages for detrimental action (p.106).

The Committee has received the attached correspondence[2] from central agencies on the outcomes of its earlier two statutory reviews.

(ii) Does the Ombudsman have any comment to make on the views expressed in this correspondence?

(iii) What submissions have been received in response to the Office's protected disclosures discussion paper?

10. Freedom of Information

(i) What has been the response of the Commissioner of Police to the concerns raised by the Office re the funds available to deal with FOI applications, in light of the

[2] See Appendix 2 of this Report

continuing increase in the number of applications received by NSW Police (p.102)?

(ii) What has been the response to the Ombudsman's proposal that s.64 of the FOI Act be amended to provide absolute protection against defamation proceedings being brought against the author of a document sent to a government agency or Minister (p.102)

(iii) The Annual Report indicates that agency compliance with mandatory "summary of affairs" reporting requirements in June 2004 was at its lowest since the Office commenced audits in June 1997 (p.99). What incentives are there for agencies to improve on this requirement?

(iv) Has the Ombudsman made a submission to the review of the Privacy and Personal Information Protection Act?

11. Local Government

(i) What has been the response to the Ombudsman's proposal that s.12 of the Local Government Act be amended to make it clear that the information protection principles in the Privacy and Personal Information Protection Act are not an impediment to releasing information under that section (p.77)?

(ii) Have Councils been provided with information to clarify the current situation regarding the tape recording of council meetings, their use and publication?

(iii) The Annual Report suggests advice that Councils could provide to minimise the potential for complaints (p.81). Can the Ombudsman give any indication as to the proportion of Councils that provide such advice?

Chapter Three - Answers to Questions on Notice

1. Office Management

(i) Of a total 76 complaints received about the office, 7 were justified or partly justified and a further 31 were found to have had some substance and were resolved by remedial action (p.18). What types of complaints were justified or partly justified, and what types of matters were resolved by remedial action?

The complaints against staff that were found to be justified or partly justified included the following:

- A preliminary inquiry letter to a public authority was incorrectly enveloped and sent by mistake to the complainant who posted it directly to the public authority
- A staff member promised to ring a complainant following a visit to a public authority but failed to
- A temporary staff member (whose contract was not extended) was rude and displayed a poor customer service manner
- Delay in conducting a preliminary investigation
- Letter to sent to wrong party
- Letters to agency and complainant contained information about unrelated third party

The complaints that were resolved by remedial action (described in the brackets) included the following:

- Use of Mrs instead of Ms and wrong house number on letter (apology given)
- Failure to return a promised phone call (another officer contacted complainant and her solicitor to deal with matter)
- Delay in finalising complaint (matter re-prioritised)
- Difficulties experienced contacting switchboard (apology given)
- Alleged failure to allow agency opportunity to resolve problem with complainant prior to investigation (explanation given of Ombudsman's discretion)
- Incorrect referral advice given (apology and correct referral information provided)
- Complaint responded to by both Police and General Teams instead of one combined response (apology given and explanation that it was not normal procedure)
- Complained about offhand remark interpreted as criticism made by staff member during visit to correctional centre (apology given and counsel given to the new staff member concerned)
- Alleged his concerns not properly dealt with (provided with advice about steps that needed to be taken in respect to premature complaint)
- Alleged no acknowledgement received for faxed complaint (never received but matter dealt with by provision of advice when complainant contacted by phone by senior officer)
- Alleged investigation officer hung up on him (call lost during transfer –explanation provided)

- Claimed judgement made about facts we did not have access to (case re-allocated and reviewed by more senior officer)
- Four day delay between date of letter and franking (apology given, reminder given to case officer about timely posting of letters)

(ii) The number of requests for decisions to be reviewed is highest in the General Area, specifically in relation to local councils and other public sector agencies. What particular factors lead to this tendency for review requests in relation to such complaints?

Review requests will always be higher in the General Team as that team conducts the greatest number of direct inquiries and investigations involving members of the public. The core work of the Police and Child Protection Team by contrast is oversighting investigations conducted by other agencies and while the Community Services Division conducts direct inquiries and investigations, it also refers a large percentage of its complaints for local resolution by the agencies concerned. Consequently, the other teams have less direct involvement with complainants and any dissatisfaction with the investigation of complaints monitored by those teams is more often directed at the agencies directly concerned rather than our office.

Broadly speaking, requests for reviews almost invariably arise from basic disagreements with our decisions. It is extremely rare for complainants to present new evidence at the time of requesting a review. They most often arise from complaints about decisions by agencies that directly impact on the amenity or welfare of complainants such as building/planning/enforcement and rating issues in the local government area. Local government complaints historically have generated the highest review request rate. Often these are complaints about development issues where the Ombudsman has no power to overturn decisions made by elected bodies.

Past complainant satisfaction research conducted by the Office has indicated that local government complainants have a distinct profile that in part may explain the higher rate of reviews requests in that area. The typical local government complainant is more likely to be male and over 45 with 50% being over 55. They have high expectations that we will investigate their complaint and are the most critical of all groups of complainants in terms of having their expectations met about how we will handle their complaints. They are also the group least likely to be satisfied with our final decision and general service levels and least likely to see their complaint as resolved in their favour irrespective of the objective outcome.

The overall review rate during 2003-2004 was 6.7% for the General Team which compares favourably with published review rate data of other Ombudsman offices. For example: Victorian Ombudsman 10.6% (2001/2002), Commonwealth Ombudsman 5.8% (2002/2003), Hong Kong 8.3%% (2003/2004), UK Local Government Ombudsman 7.8% (2002/2003).

(iii) Has the Office's reviews of particular decisions led to any changes in its decision-making processes or other practices (p.18)?

Generally, over 90% of reviews result in the original decision being affirmed. As they are essentially disagreements about the merits of decisions, they seldom if ever lead to changes in core decision making processes.

In late 2003 the General Team conducted an evaluation of its review process which led to some changes of the review procedure itself. We introduced a review evaluation checklist to gather more data about the nature and outcome of review requests. We also introduced an additional step whereby, unless there are special reasons not to, the case officer initially contacts the complainant to further clarify the reasons for our initial decision. Where this does not satisfy the complainant, they are asked to detail the reasons for saying the decision was wrong as a matter of law or fact and/or why the Ombudsman should take further action as a matter of discretion. In the past, most review requests were made without the complainant articulating why they considered our initial decision was wrong. The matter is then re-allocated to a different and usually more senior officer to conduct the review and provide advice to the Ombudsman who ultimately reviews the file.

More recently, we have trialled a further new process whereby the reviewing officer makes telephone contact with the complainant to discuss their dissatisfaction. We have found that this additional personal contact more often than not resolves their concerns simply through the provision of an opportunity to ventilate to a more senior officer and have them explain the Ombudsman's jurisdiction and reasons for the original assessment.

(iv) The Annual Report refers to the review by the General Team, with the assistance of an evaluation consultant, of its performance indicators. Has the General Team changed its performance indicators as a result of this review? What performance benchmarks have been set across the Office and do these measures vary between divisions?

The consultant's brief was to provide advice on how the General Team could better use existing performance information and other available data to evaluate its performance. The consultant drew up a logical model that related functions to intermediate results and intended results. Further action to amend the team's business plan in view of the advice was however suspended once a decision was taken to review the Office's corporate plan. Now that has been done, the General Team like the other teams and division is in the process of developing a new business plan. This will make use of the advice.

We have performance benchmarks relating to the work we do in overseeing other agencies, handling complaints, conducting investigations and monitoring compliance with our recommendations. The performance benchmarks differ between the teams to take into account the different functions performed. For example, the general team aims to assess 90% of complaints within 48 hours and the child protection team aims to include recommendations for changes to law, policy or procedures in 90% of final investigation reports.

We are currently reviewing the performance benchmarks across all of our teams.

(v) Has the review of the Office's corporate plan been completed?

The first stage of this process is complete. A copy of our new Statement of Corporate Purpose is attached (see attachment A). We are currently in the process of finalising Team Plans and Action Plans that together will form our complete corporate plan.

2. Special Reports to Parliament

During 2003-2004 the Ombudsman tabled two special reports to Parliament entitled:

- **Assisting homeless people – the need to improve their access to accommodation and support services (May 2004); and**
- **DADHC – the need to improve services for children, young people and their families (April 2004).**

(i) What has been the response of the relevant departments to the recommendations made in each report?

(ii) In particular, has the DADHC completed the implementation of their action plan in accordance with the timeline provided at Appendix 1 of the Special Report and does the Office anticipate that DADHC will be in a position at the end of January 2005 to give advice on the effectiveness of the action plan (p.28)?

(iii) Does the Office accept any of the criticisms made by certain agencies delivering SAAP services on the report concerning assistance to homeless people (p.36)?

Special Report: DoCS and SAAP services - Assisting homeless people

Recommendations were made to DoCS and SAAP agencies. In relation to DoCS, of the 19 recommendations made, the department has indicated:

- 13 are supported
- two are 'mostly supported'
- two are 'partly supported' and
- two are not supported.

DoCS has advised that a range of strategies will be put in place to promote more inclusive access to SAAP. Key strategies identified in the DoCS' response are:

- Provision of one-off funding to three SAAP peak agencies (the Youth Accommodation Association of NSW, Homelessness NSW/ACT, Women's Refuge Working Party) to employ additional staff to develop policies and procedures consistent with our recommendations regarding access and equity.

- Consultation by DoCS with the Supported Accommodation Advisory Council and SAAP peak agencies to enable the preparation of targeted plans to achieve objectives relating to improved policies around access and exiting; and subsequent work with agencies over the next 12-18 months to develop improved policies and procedures.

- Continuation of current work on the development of interagency agreements through the NSW Partnerships Against Homelessness.

- Revision of service specifications to promote agency awareness that 'global' exclusions are not in line with policy and that assessment is to be based on the presenting circumstances of the individual.

- Incorporation of changes to SAAP standards recommended by the report in relation to non-discriminatory and fair policies and practices regarding client eligibility, access and exiting.

- Meeting with agencies to identify exclusions as a result of 'blacklisting' and development of appropriate action.

As noted, DoCS 'partly' or 'mostly' supported a number of recommendations. Qualifications in support related to:

- DoCs' role in training. DoCS' interpretation of our recommendation that the SAAP training unit take responsibility for provision of specific training for SAAP agencies led the department to state that it is beyond the scope of the SAAP program to require or deliver intensive training in the development of appropriate service responses for clients with complex needs. We note that we did not recommend intensive training, but awareness training with a focus on '…service responses where individuals are appropriately receiving assistance from SAAP'.

- DoCS' role and responsibility in relation to occupational health and safety matters. DoCS's view is that it is not the role of the department to coordinate the provision of training on OH&S. The department did however acknowledge a need to ensure non-government organisations have sufficient capacity to manage OH&S.

- Negotiation of enhancement funding with the Commonwealth. DoCS' limited its commitment to raising the recommendation within the NSW government process for determining NSW priorities and directions to negotiate with the Commonwealth for the new SAAP Agreement. In response to our recommendation that funding enable agencies to accommodate people who have limited capacity to pay rent or service charges, DoCS' specific response was that it did not have responsibility for income support and it would not be appropriate for SAAP to assume this responsibility. We note that NSW standards and program guidance explicitly state that agencies should not exclude clients on the basis of incapacity to pay.

DoCs did not support two recommendations:

- That the revised SAAP standards should prescribe minimum standards in addition to articulating best practice aspirations. DoCS does not agree with this model, and argued that SAAP agencies broadly support a continuous quality improvement model. Our view is that whichever model is adopted, there must be clear benchmarks capable of enabling measurement of agency performance. This may be achieved by a continuous quality improvement model in association with clear requirements being identified in service specifications.

- That DoCS, through the Industry Reference Group, continue to pursue action to address the need for the provision of clear guidance and tools in relation to client

risk assessment and risk management for SAAP services. DoCS' view is that this matter is primarily a matter for Workcover, and the responsibility of SAAP agencies on the Industry Reference Group to advocate for such guidance. Our view is that as the funding body for SAAP agencies, DoCS does have some responsibility to ensure agencies have the resources available to ensure appropriate risk assessment and risk management. We note in this regard that DoCs has allocated resources to SAAP peak agencies for the development of a risk assessment tool for SAAP agencies.

On the matter of criticisms of the report made by certain agencies delivering SAAP services:

We acknowledge there are significant issues affecting the operation of SAAP that have been legitimately raised by some stakeholders, particularly peak agencies representing SAAP agencies. These issues include failures in other service systems which have some responsibility for assisting homeless people, limited resources and complexity of decision-making in a workplace environment, which must balance provision of equal access with occupational health and safety requirements.

In the context of the terms of reference for this investigation, these issues were adequately addressed in our report. Relevant recommendations were directed to review of protocols and interagency agreements between SAAP and other service systems (recommendation 8), negotiation with the Commonwealth for enhancement funding for the Program (recommendation 13), and the development clear guidance and tools in relation to client risk assessment and risk management (recommendations 9 and 10). The issues raised by peak agencies are critical to the future of SAAP and require further and specific consideration. Our view in undertaking this investigation was that it was crucial in the first instance to ensure that the program had the systems in place to ensure that it was assisting those people it should be assisting, based on legislative requirements and agreed program standards. Once the strategies proposed by DoCS to improve policies around access and exiting are in place, there will be greater clarity regarding those people who continue to be excluded because of resource issues and systemic failures in other service areas.

Special Report: DADHC - Services for children, young people and families

DADHC has provided timely and comprehensive updates to this office on its implementation of the action plan to address issues raised in the report. The department has also responded to questions seeking clarification of issues with full and detailed advice.

This office identified from the outset that DADHC's action plan was ambitious. This is proving to be the case, particularly in relation to the development of family based support services for children. Some timeframes have been revised, particularly in the area of development of new family based services.
In relation to evaluation, DADHC has provided this office with its project brief for the evaluation of the action plan. It has appointed an independent consultant to undertake the evaluation. The evaluation methodology appears sound and will address:

- The capacity of new policies to address issues identified by our investigation

- Departmental compliance with current policies in the provision of support to children and young people through the Service Access System

- The existence of appropriate service models, service access and use by their target group

- DADHC's processes for monitoring services for children and young people with a disability

Against this background, we note that significant progress has been made by DADHC in identifying staff training needs, addressing policy deficits in relation to service provision to children and their families, and reviewing the department's processes for policy development and implementation more generally (a particular issue identified by the investigation). They have also made significant progress in relation to their development of a monitoring framework in relation to agencies providing services to children with a disability, including those placed in care.
However, while significant work has been undertaken by the department in relation to developing family based models of out-of-home care for children and young people with a disability, much remains to be done in this area. We particularly note that:

- funding benchmarks for the purchase of these services are yet to be settled

- consultations between DADHC and the Association of Children's Welfare Agencies are ongoing

- responsibility for reviewing respite arrangements with the objective of improving the role of respite as a family support mechanism and improving coordination of access to respite provided through DoCS, NSW Health, the HACC and disability service programs has shifted from DADHC to The Cabinet Office.

3. Community Services

(i) The Annual Report details that five investigations were started in 2003-4 and six investigations were finalised. What factors prompted the Ombudsman to exercise his investigation powers in these instances?

In seven of these cases, there were significant child protection issues involved. These included:

- the planning and response to child protection/risk of harm reports
- the adequacy of case management practices
- the adequacy of out-of-home care services and support provided to children.

In all of these matters we were concerned about evidence of significant system failure.

The remaining investigations were in the disability field. One matter was about the Department of Ageing, Disability and Home Care's (DADHC) policies and services for

children and young people with a disability (see page 28 of the annual report). Another concerned DADHC's enforcement of its licensing conditions in boarding houses (see case study 10, page 30 of the annual report).

The remaining two were about non-government disability services. The first required us to exercise our formal powers to obtain documents relating to allegations that serious incidents had not been well managed. The second concerned the exiting of a client from a service in circumstances where there were inadequate grounds for exiting the client and inadequate plans to meet the client's future accommodation needs.

In all of these investigations, the people receiving the services were particularly vulnerable and we assessed that there would be evidence to either confirm or disprove the issues of concern.

(ii) Has the Office received the information requested from DOCS about the operation of its Helpline and what response has occurred with respect to the processing of risk-of-harm reports on which the Office had expressed concern (p.28)?

(a) Yes. DoCS has advised that it has established a dedicated fax team to address issues with the management and processing of risk of harm reports faxed to its Helpline. This team assesses all faxes within 30 minutes of receipt at the Helpline and that assessment ensures that urgent faxes are prioritised. DoCS believes that the strategies it implemented effectively dealt with the backlog of faxed risk of harm reports. Noting this advice, we continue to receive complaints about Helpline delays in acknowledging facsimile risk of harm reports.

The NSW Audit Office is currently conducting a performance audit of the Helpline. We have provided two briefings to them (September and October 2004) on Helpline issues that have come to our attention through our complaint and reviewable death functions.

(b) We raised our concerns with DoCS in relation to its 'Priority One' policy for managing and prioritising workloads. Given the number of risk of harm reports that DoCS closes with minimal assessment under this policy, we asked them to clarify whether they had implemented a state-wide system for reporting and monitoring the Priority One policy and whether the policy had been replaced with the Case Closure Policy, as recommended in 2003 by the NSW Parliamentary Standing Committee on Social Issues *Inquiry into Child Protection*.

DoCS advised us in May 2004 that it never fully implemented a statewide system for monitoring the impact of its Priority One policy. We most recently sought advice from DoCS in November 2004 on its current case closure policy. This advice was sought in relation to our reviewable death function. By omission, it appears that DoCS is yet to replace its Priority One policy with a case closure policy. This is an issue this office will address in our annual report to Parliament on reviewable deaths, due to be tabled in December 2004.

(iii) Has DoCS' fully implemented the recommendations arising from its internal review of case study 9 and the identified systemic issues relating to the investigation of risk of

harm reports, and the carer assessment process and probity checking of foster and kinship carers?

No. DoCS reports that it is currently (November, 2004) piloting its policy and practice framework for dealing with allegations against employees (this includes foster carers). It is yet to finalise drafting of regional protocols for the Foster Care Support Team (the subject of our investigation). Reportedly this work cannot be completed until DoCS has settled on its policy and practice framework for dealing with allegations against employees.
DoCS advises that it is currently developing a 'communication protocol framework to guide regions in developing regional protocols for working with Aboriginal clients, families and communities'.

DoCS also advises that it has engaged a 'contractor' to undertake consultations with Aboriginal young people who are clients of DoCS. A draft issues paper is to result from this work, which will be used to inform the 'Aboriginal State Conference'.

We have recently sought advice from DoCS about:

- when it anticipates its policy and practice framework for allegations against employees will be finalised and operational
- when it anticipates finalising its regional protocols regarding the roles and responsibilities of the foster care support team
- in the interim, what protocols are in place between the foster care support team and other out-of-home care.

We have requested a copy of the issues paper and communication protocol once the DoCS Executive has approved these in '2005' (more detailed timeframe not provided).

(iv) What action has followed DADHC's review of legislation governing the licensing of boarding houses and the subsequent preparation of an options paper for the Minister (p.30)?

The full consultant's report of the legislation governing the licensing of boarding houses, and the subsequent options paper developed by DADHC, were provided to the Minister. The Minister asked DADHC to seek public comment before the Government considers the recommendations from the consultant's report. The report is on the department's web site and comments are invited by cob 1 December 2004.

The department also advised there would be some additional independent consultation with stakeholders in September/October this year.

(v) Has DADHC adopted the Office's recommendation that the Department amend its policies and procedures for monitoring boarding houses, and that it review all boarding house files to ensure the inclusion of relevant documentation (see case study 10 - p.30)?

The Policy and Procedures Manual for monitoring boarding houses has been modified to incorporate the changes we suggested and the policy has been ratified. DADHC advised

that training in these procedures was scheduled to commence in October and would run for 12 months covering the identified topics in half-day sessions. We have been provided with the amendments to the manual.
We wrote to the department in October 2004, advising them we considered sufficient action had been taken in response to our recommendations and we have closed the file.

(vi) What has been the response of DADHC and the Department of Health to the Office's proposals concerning the provision of health and other services to people with a disability in care, following on from the Office's review of the death of 37 people who died with a disability in care between 1 July and 31 December 2002 (p.43)?

Both DADHC and the Department of Health have provided us with details of proposals to address the issues raised in our review. We are currently following up a number of these proposals in the context of our annual report to NSW Parliament on reviewable deaths, due to be tabled in December 2004.
DADHC advised that it is undertaking a review of the *Managing Client Health* policy. As part of the review, DADHC will:

- examine incorporation of the recommendations of the current Australian Immunisation Handbook in relation to groups with special vaccination requirements
- consider the inclusion of the policy principle that every resident in departmental accommodation services have a clearly identified person who has the role of integrating all health care services for an individual.

DADHC has further advised that it will make the policy available to the non-government sector following the policy review.

NSW Health advised that it will consult with relevant clinicians and clinical professional bodies regarding best practice in relation to:

- gastrostomy procedures for people with a disability
- monitoring the nutritional status of people with disabilities who are inpatients and who are maintained solely on intravenous fluids for longer than 5 days.

NSW Health has contracted the Centre for Developmental Disability Studies (University of Sydney) to develop an educational strategy aimed at general practitioners. The strategy will be directed at improving general practitioners' understanding of a number of issues relating to providing effective primary health care for people with disabilities, including the link between GORD and asthma. Furthermore, the Department has undertaken to ensure that advice regarding vaccinations is incorporated into the information and education strategies developed by the Centre.

The Oral Health Branch is discussing with area health services issues relating to the availability of theatre time for patients with a disability in care.

Two proposals suggested a joint DADHC/NSW Health response:

- We proposed that NSW Health, in conjunction DADHC, should consider extension of the oral health training program provided by the United Dental Hospital, to direct-care staff working in government and non-government residential services in NSW. NSW Health stated it is exploring a proposal to do this, in consultation with DADHC. DADHC supported inclusion of the training program as an option for consideration in training plans for direct care staff.

- We proposed NSW Health and DADHC should continue to actively work to clarify their respective responsibilities for the health and dental care of residents in disability accommodation services. DADHC indicated it will continue to clarify roles and responsibilities with NSW Health as the need arises. NSW Health stated it is working with DADHC through the Senior Officers Group and other relevant advisory and reference groups to clarify each department's respective responsibilities in this area.

(vii) What is the Office's initial assessment of its revised approach to the allocation of resources for the official community visitors scheme as outlined at p.32 of the Annual Report?

The Office's initial assessment of the visiting approach introduced in January 2004 is that the additional time for each visit and increased frequency of visits for children and young people, and people with disabilities living in larger residential facilities, enables Official Community Visitors to better identify, address and resolve issues for residents. However, the resources presently available for the Official Community Visitors scheme enable visits to only 80% of accommodation services to ensure a satisfactory level of visiting frequency and duration.

The office plans to review the current OCV Scheme visiting formula in March 2005, with a view to implementing any recommendations for change to the formula for the July - December 2005 visiting schedule. The review will consider the effectiveness and efficiency of the current visiting formula, considering the resource constraints.

(viii) Of the issues identified by official community visitors in 2003-2004, the number of issues resolved as a percentage of the number of issues identified fell below 50% in total and also in respect to each target group of services (see Figure 19 – p.34). Does the Ombudsman have any particular concerns or comment about this statistic?

It is important to note that many issues identified by Official Community Visitors are not able to be resolved – for instance, a change in circumstances may mean that the issue becomes irrelevant, some issues are complex or systemic and take a long time to fix, some issues are not open to resolution (for example, they may require significant resources to fix and those resources are unavailable, an issue relating to a resident may not be resolved prior to the resident leaving the service).
We continues to monitor the extent to which issues about visitable services are resolved and assist Visitors in their work with services. This includes formalising the reporting to services and negotiating with services to develop systems to use Visitors information to identify, track and resolve matters. We also provide training to Visitors and have allocated an additional staff member to support Visitors in their work.

(ix) Has the Office reported to DADHC on the systemic issues identified by audits of individual planning in non-government disability accommodation services (p.37)?

Yes. We have prepared a report for DADHC about the systemic issues identified by our audits.

The department was given an opportunity to comment on the report before we finalised and distributed it. The report included an audit tool, developed by this office that can be used by services to ensure effective individual planning is occurring. The report also highlighted that although it is a legislative requirement that DADHC, on behalf of the Minister for Disability Services, monitors agencies to ensure that they are delivering services in accordance with the *Disability Services Act,* this was not occurring on a regular and transparent basis.

We have met with the department in relation to this issue on more than one occasion, and have also provided them with a report on our observations of their attempts to put a service monitoring framework in place over a 10-year period. We are closely monitoring their current initiatives in this area, which include the development, piloting and implementation of an 'Integrated Monitoring System' (IMS). We have requested an update by 30 April 2005 on the implementation of the IMS, including advice on how the monitoring of services providing care to children and young people will link to the IMS.

In accordance with our function to educate services about standards for the delivery of community services (s11 (1)(a) of CS (CRAMA)), our report on our audit of individual planning has been distributed to all funded disability accommodation services in NSW.

(x) How does the Office propose to examine the progress of NSW government agencies in meeting the needs of people with intellectual disabilities who are in contact, or at risk of contact, with the criminal justice system (p.37)?

We initiated an investigation of DADHC as lead agency for the Senior Officer's Group (SOG) on Intellectual Disability and the Criminal Justice System. As part of the investigation, we sought advice from the respective heads of member agencies of the SOG (Departments of Juvenile Justice, Community Services, Corrective Services, Housing, Attorney General, Education and Training, NSW Police).

In summary, we found that while the terms of reference for the SOG (to develop and recommend a whole of government policy, underpinned by a clear understanding of agency roles and responsibilities and current services) reflected the urgent need of the client group for a systematic and coordinated approach to meeting their needs, the terms of reference of the SOG were not realised. In particular:

- The focus of the SOG changed over time from the development of whole of government policy to overseeing and reporting on a collection of interagency projects.
- DADHC as lead agency for the SOG failed to satisfactorily fulfil its responsibilities to promote the achievement of the outcomes and targets for the SOG
- The SOG lacked strong leadership and clear focus on the goals

- DADHC's lack of clear policy was a hindrance to DADHC as the lead agency
- A lack of project planning is likely to have contributed to the failure to progress or fully implement some projects carried out under the SOG's auspice.

DADHC has acknowledged the findings of the investigation and has implemented a range of strategies to address them. These include:

- appointing a deputy director general (DADHC) to chair the group
- negotiating with key agencies to ensure high level and consistent membership of the group
- reviewing the terms of reference and developing a strategic plan to implement them
- regularly report to Human Services CEOs to monitor the progress of the SOG.

We will monitor the implementation of these strategies over the next 12 months, and expect the department to advise us of the terms of reference and strategic plan by March 2005.

(xi) Is there any update on the response of agencies to those recommendations by the Office that are discussed at p.41 of the Annual Report?

In relation to Aboriginal children and young people in care

In October 2004 we sought further advice from DoCS about the progress of its review of the service known as Aboriginal Children's Services Inc. We asked for a copy of the review report if the review had been completed. We are yet to receive the requested information. The information provided by DoCS over the last three years has been disappointing to say the least.

We continue to monitor the matter given the service is the largest provider of family based out-of-home care services to Aboriginal children in NSW, and our work highlighted in 2001 that there were serious issues in relation to performance of its functions.

In relation to children under five years of age in out-of-home care

We are still awaiting advice from DoCS in relation to what performance indicators the department will use to evaluate the effectiveness of its out-of-home care program.

In relation to our review of people involved in the Boarding House Reform program

DADHC has provided us with the requested advice. The department has undertaken a review of the support needs of licensed residential centre (boarding house) residents. There are 37 people still resident in boarding houses identified as requiring relocation to community based supported accommodation. These residents are currently being monitored and assessments will be conducted to identify additional support needs while alternative accommodation options are explored. The department advises that a new assessment tool is likely to be completed by April 2005.

In relation to the establishment of benchmarks for supported housing, DADHC has advised that there are difficulties for organisations in obtaining guidance with benchmarks for administrative costs. It further advises of developments in relation to benchmarking and reports – it is doing a study on the Home and Community Care (HACC) area, which will be completed by the end of 2004. DADHC reports that this will be of benefit to a number of the department's program areas where non-government organisations are funded, including boarding house reform

4. Child Protection

(i) From 30 September 2004 the Ombudsman's child protection jurisdiction will be extended to include all family day care services, and mobile and home-based children's services (p.186). What impact is this extension expected to have on the Office's workload in the child protection area?

There are approximately 296 agencies that provide these types of services to children, including 102 family day care services, 162 home based children's services and 32 mobile services.

Many of the family day care services have been in jurisdiction since 1999 when Part 3A of the *Ombudsman Act 1974* commenced. At that time they came under the umbrella of a designated agency eg council, agencies providing substitute residential care and were therefore in jurisdiction. Those remaining agencies that are now in jurisdiction as a result of the commencement of the *Children's Services Regulation 2004* are low in numbers.

Our statistics show that the reporting patterns from family day care services has been low. Based on what we know at this time, we do not expect that this extension will have a significant impact on our work with family day care services.
We have not had any prior contact with the home based or mobile services.
However, we do not anticipate that the extension will have a significant impact on our work, but will monitor this closely.

To assist agencies understand their new responsibilities, we have provided them with information about the changes and with a copy of our new guidelines. We have also provided some training to their peak bodies.

(ii) The Annual Report notes that the Ombudsman's Office is of the view that the Catholic Commission for Employment Relations (CCER) "is not a viable head of agency for Catholic agencies in the future" and indicates that the Office has agreed to consult with representatives of the Catholic Church before finalising its view as to a suitable new head of agency (p.57). What view has the Office arrived at on this question and what has been the outcome of the Office's consultations with the representatives of the Catholic Church?

As a result of our investigations and audits of the CCER and diocesan agencies, we concluded that the current arrangement that specified the CCER as head of agency for most catholic agencies was no longer viable. We have had discussions with

representatives of the Catholic Church about a changed arrangement and have been advised that the New South Wales Bishops are willing to assume responsibility as head of agency for their respective dioceses. We will also be having discussions with the heads of Religious Congregations to make a suitable arrangement for them.

The bishops have established a working party convened by Bishop Toohey to work out the administrative details with us.

We are pleased with the bishop's decision to assume head of agency responsibilities and look forward to working constructively with them as we work towards ensuring that sound systems are in place for the protection of children and that employees are treated fairly when allegations are made against them.

Accordingly we have written to The Cabinet Office requesting a change to the *Ombudsman Regulation 1999* to give effect to this agreement.

(iii) Has the Office completed its audit of the 11 diocesan Catholic Education Offices, undertaken as a result of the failure of the CCER to conduct such an audit (p.50)?

We have concluded audits of nine diocesan offices and will complete the last two audits by mid December 2004.

(iv) Is the Office satisfied that the centralised complaint assessment and review branch established by DOCS has led to significant improvements in the handling of reportable allegations involving employees, eg delays in notifications to the Office of the Ombudsman (p.57)?

We are encouraged by DoCS' establishment of a central unit to manage the handling of reportable allegations against employees, and have seen some improvements in DoCS' compliance with its responsibilities in this area.

DoCS has recently provided us with the draft 'Allegations Against Employees Operating Framework' for comment. It has advised us that it will begin piloting these procedures in a number of its regions and will make any necessary changes to the procedures as they are identified. In addition, DoCS has indicated that it will be adopting some of the categories of findings used under the Ombudsman scheme for its investigations of allegations against employees.

We remain concerned about some aspects of DoCS' investigations, including the level of documentation provided to us regarding its decision-making, and the absence of written advice to foster carers who are the subject of reportable allegations in relation to the outcome of its investigations and DoCS' notifications to the Ombudsman and the Commission for Children and Young People.

We will continue to meet regularly with representatives from this unit, and will monitor its operation over the next 12 months.

(v) The Annual Report refers to a disagreement between the Department of Juvenile Justice and the Office about what constitutes sufficient evidence to determine that an

allegation is false and to concerns on the part of the Office about the lack of documentation provided by the Department about their decision-making (p.59). Has a consensus been reached between the Office and the Department on these matters?

It is our view that a finding of 'false' should only be applied to matters where an agency's investigation has shown that there is conclusive evidence that the alleged conduct did not occur or where there is no evidence of any weight that it did occur. If there is no such evidence, we advise agencies to make a finding of 'not sustained – insufficient evidence'. Matters that are found to be 'false' are not notifiable to the Commission for Children and Young People as relevant employment proceedings, whereas matters that are found to be 'sustained' or 'not sustained – insufficient evidence' are notifiable.

Although we have reached an agreement in principle with the Department of Juvenile Justice about the application of 'false' findings, we are still concerned about some decisions that the department is making. We understand that the department's investigators consider that the choice of findings open to them is limited to 'did occur' (sustained) or 'did not occur' (false), and that they do not consider a finding of 'not sustained – insufficient evidence' to be a consideration.

We are also concerned about the level of documentation that the department provides to us in relation to its decision-making. In particular, we have requested, but have been denied access to, some records considered by the Director-General in making decisions about employees. We also recently visited the department's offices to audit of some of its files relating to its investigations of reportable allegations. Several of the files we viewed did not have appropriate documentation regarding notifications to the Commission for Children and Young People of relevant employment proceedings.

We are currently investigating the department's systems for responding to reportable allegations against employees. As part of this investigation, we have asked the department to clarify its processes in relation to these issues and will continue to try to resolve them with the department.

(vi) What is involved in exercising the Ombudsman's function of examining whether or not an agency's decision to notify or not notify the Commission for Children and Young People is reasonable?

When we assess the adequacy of an agency's response to a reportable allegation against an employee, we look at how and what evidence an agency has collected and the finding it makes as a result of weighing up that evidence. We also assess the risk that the employee might pose to children.

If we are satisfied that the investigation was rigorous and that the finding was reasonable on the basis of the available evidence, we then check whether or not an agency's decision to report the matter to the Commission for Children and Young People is in accordance with the Working with Children Check Guidelines. If we disagree with the agency's decision about reporting, we advise the agency of our assessment, provide reasons for our view and request a review of the agency's decision.

As a matter of course where the allegation involves high risk behaviour, we advise the agency that the matter is one that requires reporting to the CCYP and request evidence that this has happened.

(vii) The child protection scheme places significant responsibility on agencies for internal investigation of complaints, risk assessment of staff and the conduct of disciplinary proceedings. The Annual Report provides some insight into these activities by agencies and the efforts by the Ombudsman's Office to provide guidance and instruction to agencies in these areas. How well do agencies understand the concepts and methodologies relevant to the conduct of investigations, risk assessments and disciplinary proceedings?

In general, agencies' handling of reportable allegations against employees have improved over the last five years. However, the level of improvement is variable across agencies and industries. Some agencies, such as the Department of Education and Training, have well-developed systems for investigating reportable allegations and generally conduct investigations to a high standard.

Other agencies continue to experience difficulties with the investigation of reportable allegations. In some agencies, the high level of staff turnover means that they have additional demands in inducting new employees and do not have a stable group of people available to conduct investigations. Other agencies, such as child care centres and agencies providing substitute residential care, have small staff numbers and limited access to external support and training in this area. This means that their understanding of the concepts relevant to investigations, such as information gathering, risk assessment and making findings can be limited and they have less well-developed procedures regarding investigations. These agencies often require our support whilst they are investigating allegations and we need to ensure that we provide continual training to these sectors.

(viii) To what extent have agencies taken up the Ombudsman's advice on policy, training and administrative measures that would assist them to undertake these activities?

Our experience is that agencies are generally willing to take up our advice in relation to the handling of reportable allegations against employees. Many smaller agencies telephone us when they first receive an allegation against an employee to gain advice about the steps that they should take to investigate the matter. We may also meet with agencies and maintain contact with them while they are conducting an investigation to discuss specific issues arising from the investigation. The documentation that we subsequently receive in relation to investigations generally reflects the agency's implementation of our advice.

Initial feedback in relation to our revised guidelines for employers (*Child Protection in the Workplace: responding to allegations against employees*, June 2004) has been positive, with agencies commenting on its clarity and usefulness.

(ix) In Carter v NSW Netball Association [2004] NSWSC 737, delivered on 17 August 2004, Palmer J drew attention to the fact that voluntary sporting bodies (such as the Defendant in this particular case i.e. the NSW Netball Association) are not designated

employers within Part 3A of the Ombudsman Act 1974 and, as a result, are not subject to the Ombudsman's monitoring of systems for handling and responding to allegations of conduct that would constitute child abuse. Does the Ombudsman have any views on the matters highlighted in the judgment, in particular, the proposed extension of the Office's jurisdiction to include associations such as voluntary sporting bodies?

While we appreciate the confidence in the effectiveness of our oversight function that is implicit in the comments of Palmer J at 152 in Carter v NSW Netball Association [2004] NSWSC 737, we do not have the resources to adequately manage the extension of our child protection jurisdiction to include voluntary sporting bodies and other community associations that provide various interests and activities for children.

Were we to obtain additional resources, we have identified areas where the need for our oversight is pressing, including voluntary sporting bodies. We are also concerned about 'home stay' and 'host family' arrangements, where children (generally from overseas) are billeted with families for periods of up to 6 months. We see such children as being particularly vulnerable, as they are without family support and are often unfamiliar with Australian mores, social customs and may have language limitations.

While we do have some coverage, when the placements are arranged by schools or by organisations that can be classed as providing substitute residential care, we believe that these placements are likely to be better supervised and managed than placements that are arranged privately. We are concerned that 'one-off' arrangements, often arranged by social service organisations on a 'sister club' basis incorporate very little supervision and that the children in such placements lack protection.

(x) The Annual Report notes that children who identify as an Aboriginal or Torres Strait Islander make up 1% of the total NSW children population but are identified as the alleged victim in 8% of notifications received during the year. Also, 16% of notifications identified children with a disability as the alleged victim. The Annual Report also states that the Office will continue to audit schools and agencies providing substitute residential care and foster care to monitor these issues (p.63). Does the Ombudsman intend to report on its monitoring of these issues and what initiatives can be undertaken to try to reduce the representation of these children in such notifications?

We have planned a series of visits to, and audits of, agencies providing services to children who identify as an Aboriginal or Torres Strait Islander or who have a disability. The purpose of our audits is to identify good practice in preventing child abuse and to make recommendations where we identify deficient practice. We have involved staff from our office's specialised Aboriginal Complaints Unit in our visits and audits and have found this to be an effective initiative in helping agencies providing services for Aboriginal children understand how to develop safe environments for those children.

Children with a disability are particularly vulnerable to physical or sexual assault because their care needs require some physical contact by an employee, for example, restraint for children with challenging behaviours, or assistance with personal care where children do not have the physical capacity to care for themselves. We believe that the provision of training about dealing with challenging behaviours, developing codes of

conduct about acceptable behaviour and developing individual care plans for children with disabilities are important initiatives in reducing the risk to children.

We will continue to monitor the way agencies provide safe environments to children and report our work in this area.

5. Legislative Reviews

(i) The Office made a submission to the review of the Police Act 1990 (p.131). What is the current status of this review and have any particular differences emerged between stakeholders on matters affecting the Ombudsman's jurisdiction and functions under the Act?

A "roundtable" meeting was held on 10 March 2004 to discuss possible amendments to Part 8A of the Police Act. This meeting was organised by the Ministry for Police and attended by representatives of this office, the PIC, NSW Police and the Police Association. Since that meeting, this office, the PIC and NSW Police have provided a number of further written submissions to the Ministry. The Ministry has recently advised us that it is finalising a draft report on the review, which will include suggested amendments to Part 8A of the Police Act. A draft of the report will be circulated to the parties to the roundtable discussions for their information and comment.

No differences have emerged between stakeholders on matters affecting the Ombudsman's jurisdiction and functions under Part 8A of the Police Act. The roundtable discussions and submissions have primarily been directed at streamlining and clarifying the operation of Part 8A.

Internally concealed drugs – NSW Police have suggested that:

- **the Police Powers (Internally Concealed Drugs) Act 2001 be amended to dispense with the need for medical imaging, or to allow a court to waive the requirement for medical imaging and authorise a suspect's detention for the retrieval of drugs;**

- **and medical staff be required to administer treatment to make a suspect regurgitate orally ingested drugs and be allowed to conduct searches of body cavities at the request of police.(p.128).**

(ii) What is the Ombudsman's view of these proposals?

In June 2004, we published a discussion paper for the purposes of consulting with a number of stakeholders, including MPs, government and community agencies and police, about the operation of the *Police Powers (Internally Concealed Drugs) Act 2001*. The paper provided some background to the legislation. It also invited submissions from stakeholders and interested parties on a number of issues, including the proposals by NSW Police that medical imaging be dispensed with and that suspects should be required to regurgitate drugs or undergo body cavity searches.

We are currently considering the submissions we received in response to our discussion paper. We expect to complete our report on the review of the legislation, including our consideration of submissions received, by March 2005.

Until our review is completed and tabled in Parliament, we are not in a position to provide a detailed answer to this question.

(iii) Drug detection dogs (pp.126-7) – What views have been expressed in the responses to the Office's discussion paper on the review of the Police Powers (Drug Detection Dogs) Act 2001?

The review of the *Police Powers (Drug Detection Dogs) Act 2001* Discussion Paper generated substantial interest from a range of organisations, individuals and the media.

To date a total of 55 private individuals and organisations have provided comment in response to the Discussion Paper. These have included submissions from parliamentarians, police, local councils, government agencies, business organisations and legal, welfare and other advocacy groups. This is a significant level of response.

Many of the submissions are detailed and some are backed by independent research. The range of views expressed in the responses reflects the breadth of organisations contributing to the review. A number of submissions provided comment on the following issues:

- Accuracy of drug detection dogs
- Forming reasonable suspicion based on drug dog indications
- Cost effectiveness
- Privacy issues and the experience of being searched in public
- Police record keeping
- Harm minimisation and drug diversion programs
- Disruption of drug markets
- Impact on young people
- Impact on people from different cultural and language backgrounds
- Impact on businesses

(iv) Has the Office formed any preliminary conclusions on the issues identified during the review?

As with the *Police Powers (Internally Concealed Drugs) Act 2001*, at this time we are currently considering the submissions we received in response to our discussion paper.

The discussion paper and the resulting submissions are only one component of our review. We have also conducted substantial research into the operation of the legislation using a range of sources and tools. The analysis of this research material is not yet finalised.

We expect to complete our report on the review of the legislation by mid 2005. Until our review is completed and tabled in Parliament, we are not in a position to provide a detailed answer to this question.

(v) Many of the statutory provisions requiring the Ombudsman to monitor legislation do not specify a time frame within which the relevant Minister is to table the Ombudsman's report in Parliament. The legislation often states that the Minister is to table the Ombudsman's report as soon as practicable after receiving it. What period of time usually lapses between furnishing a report to a Minister and the subsequent tabling of a report, and have there been any issues with the operation of the legislative review tabling provisions?

As noted, legislation establishing review functions generally requires a report to be prepared for the relevant Minister and head of agency following a specified period of time. The Minister is then generally required to table the report (along with any additional reviews required to be carried out by or for the Minister).

Since 1999 there have been four reports submitted in accordance with relevant Acts. The following table sets out the submission and tabling dates for these reports:

Act	**Relevant Minister**	**Provided to Minister**	**Tabled by Minister**
Crimes Legislation Amendment (Police and Public Safety) Act 1998	Minister for Police	11 November 1999	29 June 2000
Police Powers (Vehicles) Act 1999	Minister for Police	5 August 2000	19 December 2000
Police Powers (Vehicles) Act as amended by the *Police Powers (Vehicles) Amendment Act 2001*	Minister for Police	22 September 2003	As at 17 November 2004, this has not been tabled
Crimes (Forensic Procedures) Act 2000 – Interim report	Attorney General	21 September 2004	28 October 2004

No requirement to table the report

The amendments to the *Police Powers (Vehicles) Act 1999* made by the *Police Powers (Vehicles) Amendment Act 2001* required us to review the additional powers conferred by the amending Act and to report to the Minister for Police and the Commissioner of Police as soon as practicable after the end of the review. However, unlike most other reviews, the amended Act made no provision for the Minister to then table the report.

We provided this report to the Minister for Police and Commissioner of Police on 22 September 2003. The covering letter to the Minister noted that there was no legislative requirement to table the report, but given the nature of the findings and recommendations, we asked that he table the report at his earliest convenience so that the report might be made public.

We raised the delay in the tabling of this report with the Minister's office on 15 March and 30 August 2004. In a letter dated 15 October 2004 the Minister advised us that he intends to table the report "*in the near future".* The Minister also indicated that the NSW Police response to our report would form part of the broader proposals being considered in relation to the Act.

My clear preference in these matters is that the laws conferring a scrutiny function on the Ombudsman specifically provide for the report to be either tabled in Parliament, as with other reports of the Ombudsman, or tabled by the relevant Minister. Given that there has been a delay in tabling a number of these reports to date, we would suggest that if the legislation is to provide that the Minister is to table the report, a time period for the tabling process should also be specified.

Interim reports

In the case of the *Crimes (Forensic Procedures) Act 2000*, while the Act requires that the final report be submitted to the Attorney General, the Minister for Police and the Commissioner of Police, it only provides for the Attorney General to be given any interim report we might make.

As you will be aware, an interim report was prepared, dealing with Part 7 of the Act relating to the DNA sampling of serious indictable offenders. Given the substantial role of the Minister for Police and the Commissioner of Police in the administration of DNA sampling and analysis, we consider it anomalous that they were not required to be provided with any interim report.

We would suggest that any future legislation conferring a review function on this office should provide for interim reports to be provided to the same Ministers and heads of agency as are required to receive the final report.

6. Police

(i) As a result of the changes made to the class or kind agreement between the Ombudsman and PIC regarding the classification of police complaints, what complaints will the Office directly oversight and what complaints will be managed entirely by local commands (p.112)?

The primary goal of the new class and kind agreement, which commenced on 1 October 2004, was to provide greater clarity as to the types of matters that we oversight. We also aimed to provide a simpler agreement by reducing the number of categories of complaints from 9 to 3. The new agreement sets out the following categories:

- Category 1 complaints which are notifiable to the Police Integrity Commission (PIC) and the Ombudsman
- Category 2 complaints which are notifiable to the Ombudsman
- Complaints which are dealt with as local management issues and are not notifiable to the Ombudsman or the PIC.

It is hoped that the new agreement will allow police to spend less time on assessing categories of complaints, and more time on dealing with them.

We do not expect that the new agreement will significantly change the types of complaints that we oversight and those managed by local area commands.

Under the new agreement, the Ombudsman's oversight remains focussed on allegations of serious misconduct. For example, NSW Police is required to notify us of complaints (whether by police officers or members of the public) alleging:

- Criminal and corrupt conduct
- Serious incompetence
- Lack of integrity
- Matters that may result in removal from NSW Police or other stringent 'reviewable' management action
- Conduct resulting in serious outcomes – for example, death or injury or significant financial loss
- Inappropriate conduct relating to the search, arrest or custody of a person.

Local commanders will continue to manage minor complaints, such as complaints about rudeness or poor service, without notifying this office. However, we will continue to audit how NSW Police deals with these minor complaints.

The most significant change to the agreement is that it ensures that where a complainant who writes - to the police or the Ombudsman - that they are dissatisfied with NSW Police's handling of minor matter, the matter will be reviewed by the Ombudsman.

We have attended local area commander forums throughout the state to discuss the new agreement. To date, feedback from commanders and NSW Police generally has been positive – most have indicated that they find the new agreement much easier to apply.

We will closely monitor the new agreement over the next 12 months to examine its impact on complaints oversighted by the Ombudsman.

(ii) c@tsi - The Annual Report states that by December 2003 c@tsi was having a significant adverse impact on the effective functioning of the Office and that despite some developments NSW Police have not secured funding to fix the problems (p.124). Has any progress been made towards obtaining sufficient funds to remedy the problems with the system and what particular administrative and intelligence functions of the Office have been affected?

Impact on Ombudsman of scaled back use of c@tsi

In the 2003/2004 annual report we said

By December 2003, c@tsi was having a significant adverse impact on the effective functioning of our office. There was a sustained period when c@tsi was unreliable and there was a lack of basic reporting and other functions that it was supposed to deliver. Despite a number of very serious problems, NSW Police had not developed or funded a plan to fix c@tsi. We therefore reluctantly had to scale back our use to certain administrative and intelligence functions.

This office incurs significant administrative overheads as a result of having to maintain and support two complaint systems – c@tsi and our own case management system, Resolve.

While we use resources to support c@tsi, since December 2003, we have limited our use to receiving new complaints from NSW Police and providing NSW Police with our assessment as to how these new complaints should be handled. At this stage we cannot rely on c@tsi to perform other oversight functions.

We therefore continue to use Resolve as our core system for managing complaints about police. For example, Resolve is still used to register, track and report on complaints about police.

The overheads of using two systems particularly impact on our Assessment Section, which is responsible for processing and data entry of complaints received by our office. The process involves the double handling of complaints as each complaint is registered on both Resolve and c@tsi.

In addition, our intelligence team has not yet realised the benefits promised by the original project. These benefits include access to shared trend reports, ad hoc reporting data, and increased complaint data for profiling officers and commands of interest to the Ombudsman.

We have however taken steps to redress this by reviewing and improving reports available through our own information systems. This has ensured that we can continue to closely monitor complaint trends.

Funding for c@tsi

NSW Police developed a business case for additional funding for *The c@tsi Remediation Project.* NSW Police advised us on 21 October 2004 that Treasury had approved $1.46 million for the current financial year for completion of the project.

(iii) The Annual Report refers to 700 police complaints that might have been notifiable to the Ombudsman's Office but which were not notified because of a problem with the c@tsi system (p.117). Have the police commands completed assessing which complaints should have been notified to the Office?

The 722 complaints identified by NSW Police concern numerous local area commands (LACs). The Professional Standards Command (PSC) is coordinating the assessment of these matters by these LACs. This assessment began in July 2004. Each LAC has been asked by the PSC to send the Ombudsman a spreadsheet with details of their assessment.

To date we have received advice from the LACs about 531 of the 722 matters. The PSC is aiming to ensure that the assessment process is completed by 31 December 2004.

(iv) The Annual Report indicates that examination of officer profiles maintained by local commands were not up-to-date and failed to contain analysis that would assist complaint management teams in assessing new complaints or determining investigative strategies (p.112). What has been the NSW Police response to these concerns?

The PSC has advised that they are going to set up a working party to examine our concerns about the administration of officer profiles. We have arranged to meet with NSW Police on 25 November 2004 to ensure that our concerns are appropriately addressed by the working party. We have also requested that we be consulted before the finalisation of any new procedures that may be implemented.

7. Controlled Operations

(i) The Ministry's report on the review of the controlled operations legislation is dated February 2004 and was required to be tabled in Parliament by 1 December 2003. However, it was not tabled until 23 June 2004. According to the Annual Report, the Ombudsman's Office provided comment on a Cabinet Minute dealing with the report of the review of the Law Enforcement (Controlled Operations) Act 1997 (p.131). When did the Office provide its comment to Cabinet on the report and did this predate the tabling of the report in Parliament?

I was asked to comment on a cabinet minute that sought approval to (i) table the report of the review, (ii) accept the recommendations of the review and (iii) approve the development of a Bill arising from the recommendations contained within it. My comments were provided to Cabinet Office by letter dated 24 March 2004.

(ii) Has the Office been consulted concerning draft legislation to amend the controlled operations scheme and, if so, does the Ombudsman have any particular comment to make on the proposals being put forward?

My Assistant Ombudsman Greg Andrews and a Senior Investigation Officer who works directly to him on controlled operations and other security related issues attended a consultation meeting at the Ministry of Police on 15 September 2004 . At that meeting the Ministry for Police's preferred position (as supported by the Minister for Police) for a Tier 1/Tier 2 model was outlined to them. They were advised a draft bill would soon be developed and that the Ombudsman would be again consulted on that. To date, we have had no further advice from the Ministry or Cabinet Office on this proposal.

(iii) Will the changes to the scheme as proposed in the Ministry's review report impact significantly on the work of the Office and the performance of the Ombudsman's oversight functions under the legislation?

Until we see the actual details of the proposed amendments to the Act we are not in a position to provide this advice. Our understanding is that the proposal would remove possibly 90% of current controlled operations conducted by NSW Police into the streamlined Tier 1 category. It is proposed that the Ombudsman retains an oversight function over such approvals. However, in the absence of details of the specific proposed amendments and the operational procedures that will have to accompany them, it is not possible to determine how that oversight would operate and whether it would be meaningful.

(iv) Has NSW Police changed its view of the extent of the Ombudsman's jurisdiction in relation to the monitoring and review of controlled operations under Part 4 of the Law Enforcement (Controlled Operations) Act 1997?

The NSW Police eventually adopted our suggestions for modification of the application form used by NSW Police for approval of controlled operations. This resolved the dispute outlined in my 2003 Law Enforcement (Controlled Operations) Annual Report over the adequacy of the application template previously in use by NSW Police.

That report also set out a difference of opinion between the legal advice received by myself and the Commissioner about the extent of my jurisdiction and powers to ensure compliance with the legislation. This related to my ability to question the approval officer if need be. Since that time I have had no advice from the Commissioner to indicate he has changed his views which were based on the legal advice he had received. There has also been no occasion since that time that has required me to assert the power I believe I have to put the difference of opinion to the test. Our inspections have continued with the full co-operation of NSW Police and it has not been necessary to question any approval officer concerning a particular approval. However, in future, if it is considered necessary for the purposes of fulfilling my function under the Act to ascertain whether or not the requirements of the Act are being complied with, I will assert my powers to question relevant personnel in accordance with the legal advice I have received.

As part of the Review of the Act, I made submissions that the Act be amended to clarify Parliament' s intent in respect to the relevant provision which I suspect was the subject of an unintended drafting error. The Review, however, did not take up that suggestion.

8. Telecommunications interceptions (TI)

(i) For the purpose of exercising the Committee's functions under the *Police Integrity Commission Act 1996,* did the Ombudsman prepare a report for the Attorney General on the dissemination of TI and other surveillance material during Operation Florida conducted by the PIC?

Yes, I provided a report titled 'Release of lawfully obtained information by the NSW Crime Commission relating to Operation "Mascot" and by the Police Integrity Commission relating to Operation "Florida" to the Attorney General on 27 September 2002.

.....

[The rest of answer to question on notice no 8(i) is confidential pursuant to section 31H (1) of the Ombudsman Act 1974.]

.....

(ii) If so, was this done in accordance with the Ombudsman's functions under the Telecommunications (Interception)(NSW) Act 1987?

As the investigation arose from a statutory inspection under the Telecommunications (Interception) (New South Wales) Act, the report of the investigation was provided to the Attorney General and the heads of the agencies in accordance with section 11 of the Act.

(iii) Was a copy of the report made available to the Inspector of the PIC?

The report was not provided by me to the Inspector of the PIC as I had no authority to do so. Whether the Inspector obtained a copy of the report from the PIC I cannot say.

9. Protected Disclosures

(i) The Office made a submission to the Premier and Cabinet Office about the possibility that the Protected Disclosures Act may cover certain private sector agencies (p.131). What particular agencies did the submission refer to and what was the response to the submission?

The submission referred to those agencies that are able to be investigated by our office by virtue of certain provisions in the Ombudsman Act (in particular Part 3A) and the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (CS-CRAMA).

Those agencies that are able to be investigated by our office by virtue of certain provisions in the Ombudsman Act are those to which the definition of 'designated non-government agencies' (see section 25A(1)) applies, that is:

a. a non-government school within the meaning of the *Education Act 1990*

b. a designated agency within the meaning of the *Children and Young Persons (Care and Protection) Act 1998* (not being a department referred to in paragraph (a) of the definition of ***designated government agency*** in this subsection) or a licensed children's service within the meaning of that Act,

c. an agency providing substitute residential care for children,

d. any other body prescribed by the regulations for the purposes of this definition.

Those agencies that are able to be investigated by our office by virtue of certain provisions in the CS-CRAMA (in particular, see section 24) are those to which the definition of 'service providers' (see section 4) applies. Essentially these include any person or organisation in the private sector that is funded, authorised or licensed to provide a community service.

The Cabinet Office (TCO) responded to our concerns by writing to the Crown Solicitor's Office suggesting alternative narrower interpretations of the meaning of the terms 'public official', 'public official functions' and 'public authority'. We agree with TCO's view that these interpretations appeared to better promote the object of the Act as set out in s. 3(1), that is, 'to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector.'

The Office has found the following deficiencies with the Protected Disclosures Act:

- **there is no obligation on senior management to protect whistleblowers or establish procedures to protect whistleblowers;**
- **there is no central agency responsible for monitoring how well the scheme is working – this includes collecting data on how many protected disclosures are being made to particular agencies, how many have been made since the Act commenced, and how those disclosures are being handled;**
- **it is the only Australasian whistleblower legislation in which the whistleblowers themselves have no direct right to seek damages for detrimental action (p.106).**

The Committee has received the attached correspondence[3] from central agencies on the outcomes of its earlier two statutory reviews.

(ii) Does the Ombudsman have any comment to make on the views expressed in this correspondence?

I would like to comment on the statutory and administrative obligations on agencies in this area.

Confidentiality

The only statutory obligations that public authorities under the NSW scheme have are firstly, to keep confidential information that might identify or tend to identify a whistleblower, and secondly, to notify the whistleblower within 6 months of receiving a disclosure of what action they have or intend to take.

Set up an internal scheme to facilitate the making of disclosures and protect those who make a disclosure

[3] See Appendix 2 of this Report

Under the NSW Protected Disclosures Act CEOs do not have any explicit obligation to have in place a system for handling protected disclosures and protecting whistleblowers from detrimental action. There is also no obligation to take steps to make sure that employees act in a manner consistent with the objects of the scheme the Act sets out.

Section 20 of the Act makes it a criminal offence to take detrimental action against a person substantially in reprisal for the other person making a protected disclosure. However, the Act imposes no penalty on a public authority or CEO who has failed to take adequate steps to prevent such action being taken against a whistleblower.

Neither does the Act impose any penalty on a public authority that has not put in place systems to give its employees confidence that if they make a protected disclosure no detrimental action will be taken against them. Our experience is that without such a system, many employees will be too apprehensive to come forward, and those who do stand a higher chance of suffering detrimental action.

We are of the view that at least an administrative obligation should be placed on CEOs to establish such a system. We would also consider taking on a formal role of monitoring compliance with such an obligation.

It is important to note that under the equivalent legislation in the ACT, Queensland, Victoria and Western Australia, CEOs or agencies have a statutory obligation to protect whistleblowers and set up procedures to do so. In addition, in the three States that have most recently adopted whistleblower legislation (Victoria, Western Australia and Tasmania), public sector agencies must notify a central agency (such as the Ombudsman) of both disclosures and the outcomes of investigations relating to those disclosures. A similar role is proposed for the Northern Territory Ombudsman under their draft whistleblower legislation. The central agency is responsible for monitoring the implementation of the scheme.

Ensure employees are aware of procedures for making disclosures

CEOs of NSW public authorities do have an administrative obligation to ensure that employees are aware of procedures for making protected disclosures and the protections available under the Protected Disclosures Act. However, a series of surveys reported by the ICAC in their publication, *Profiling the NSW Public Sector: Functions, Risks and Corruption Resistance Strategies* (January 2003) indicated that levels of knowledge of the Act and the scheme among public sector staff are still disappointing low. It was also concerning that when staff were asked how well they thought their agency had informed them about the Act, 38% said their organisation had 'not done so at all' and 37% said 'not well enough' (see page 60).

We are not aware of any significant developments that have occurred since 2003 to suggest that levels of knowledge would have improved in that time.

Given that the scheme has been in place for almost 10 years, we are of the view that a stronger approach to enforcing the obligation to improve knowledge of the protected disclosures scheme with staff needs to be considered.

(iii) What submissions have been received in response to the Office's protected disclosures discussion paper?

None. The purpose of the issues paper was to raise issues for consideration in the next review of the Act. We therefore did not invite submissions. The issues paper concludes by calling for a comprehensive review of the Act and for that review to consider the issues that we have raised.

10. Freedom of Information

(i) What has been the response of the Commissioner of Police to the concerns raised by the Office re the funds available to deal with FOI applications, in light of the continuing increase in the number of applications received by NSW Police (p.102)?

The issue was discussed by the Ombudsman and Police Commissioner at a Joint Standing Committee meeting on 7 October 2004. A follow-up letter was sent by the Ombudsman to the Commissioner on 27 October asking the Commissioner to provide an up-date in relation to police dealings with FOI applications and the terms of reference for a proposed review of the NSW Police FOI process.

A response was received on 17 November 2004 indicating what steps were being taken to review the situation and advising that we would be informed of any decisions made following the review.

(ii) What has been the response to the Ombudsman's proposal that s.64 of the FOI Act be amended to provide absolute protection against defamation proceedings being brought against the author of a document sent to a government agency or Minister (p.102)

A response was received from the Director General of The Cabinet Office dated 6 October 2004 (see attachment B). In response to the invitation to make a further suggestion as to a particular class of documents provided to government that should attract a statutory protection from defamation, we suggested that the FOI Act be amended to provide absolute privilege for allegations concerning criminality, corruption, breaches of the law or serious misconduct made to an agency or Minister relating to a matter within the jurisdiction of that agency or Minister. It was also suggested that this could be balanced by the inclusion of a further provision making it an offence to wilfully make any false statement in any such allegation. See attachment C for a copy of that letter (dated 22 October 2003).

(iii) The Annual Report indicates that agency compliance with mandatory "summary of affairs" reporting requirements in June 2004 was at its lowest since the Office commenced audits in June 1997 (p.99). What incentives are there for agencies to improve on this requirement?

We are not aware of any incentives for agencies to comply with mandatory "summary of affairs" reporting requirements of the FOI Act.

(iv) Has the Ombudsman made a submission to the review of the Privacy and Personal Information Protection Act?

The Ombudsman made a submission to the review of the PPIP Act in April 2004. The submission was placed on our website at the time and a copy is attached for the information of the Committee (see attachment D).

11. Local Government

(i) What has been the response to the Ombudsman's proposal that s.12 of the Local Government Act be amended to make it clear that the information protection principles in the Privacy and Personal Information Protection Act are not an impediment to releasing information under that section (p.77)?

To date no response to the proposal has been received. A copy of our letter to the Minister in which the proposal was made (dated 8 June 2004) is attached (see attachment E).

(ii) Have Councils been provided with information to clarify the current situation regarding the tape recording of council meetings, their use and publication?

To our knowledge no such information has been provided to councils.

(iii) The Annual Report suggests advice that Councils could provide to minimise the potential for complaints (p.81). Can the Ombudsman give any indication as to the proportion of Councils that provide such advice?

The question relates to an item on councils' notification practices in relation to development applications. There is a wide variation in notification practices by councils. It would be impossible to quantify how many councils currently give advice along the lines suggested in the item.

However in dealing with complaints about councils' notification practices, where the complaint discloses evidence of deficiencies in those practices we will advise the council how they can be improved. In doing so however, it is important to keep in mind the diversity in the size of councils and the resources available to them and the differences in the geographical and demographic character of the areas they administer. It would therefore be inappropriate to seek to impose uniform notification practices on all councils. What may be appropriate practice for Woollahra Municipal Council may be unduly and unnecessarily onerous for Bourke Shire Council. Accordingly, it is often necessary for us to tailor our advice to suit a council's particular circumstances.

In the item in question we have simply sought to suggest minimum standards and to provide advice as to how the potential for complaints about a council's notification practices arising from unrealistic expectations can be minimised.

Attachment A

NSW Ombudsman

Statement of Corporate Purpose

This statement of corporate purpose provides an overview of what we do. It forms the basis for the development of detailed business plans that guide the day-to-day functioning of our office. Together they form our corporate plan.

The NSW Ombudsman is an independent and impartial watchdog body. Our job is to assist those public and private sector organisations and employees we watch over fulfil their functions properly and promote improvements to the way they operate. We are independent of the government of the day and accountable to the community through the NSW Parliament.

We want to see fair, accountable and responsive administrative practice and service delivery in NSW. We work to promote

- good conduct,
- fair decision making,
- protection of rights, and
- provision of quality services

in our own organisation and those we oversight.

Our Goals

We aim to:

1. Help organisations meet their obligations and responsibilities, and improve their delivery of services.
2. Promote improvements in, and standards for, the delivery of community services in NSW.
3. Deal effectively and fairly with complaints and work with organisations to improve their complaint handling systems.
4. Be a leading watchdog agency.
5. Be an effective organisation.

Our Values

We will

- provide the same high quality service that we encourage other organisations to offer.
- be fair, impartial and independent, and act with integrity and consistency.
-
-
-
- be accessible and responsive to all who approach us, and seek solutions and improvements that will benefit the broader NSW community.
- be a catalyst for change and a promoter of individuals' rights.

Our Guarantee of Service

We will

- consider each matter promptly and fairly, and provide clear reasons for our decisions.
- where we are unable to deal with a matter ourselves, explain why, and identify any other appropriate organisation where we can.
- Help those people who need assistance to make a complaint to the Ombudsman.
- add value through our work.

Our key functions

Our key functions are derived from a number of Acts, which require us to act in the public interest by

- resolving and investigating complaints
- assessing notifications, monitoring investigations and reviewing the handling of complaints
- keeping complaint handling systems under scrutiny
- inspecting records of organisations to ensure compliance with legislation and good practice
- dealing with inquiries or referring people to appropriate agencies
- reviewing the delivery of community services
- reviewing the implementation of new legislation
- reporting on findings and recommendations.

Attachment B
(Q. 10(ii))

Q.10(ii)

THE CABINET OFFICE

NEW SOUTH WALES

Mr B Barbour
NSW Ombudsman
Level 24
580 George Street
SYDNEY NSW 2000

06 OCT 2004

Dear Mr Barbour,

I refer to your letter to the Premier in which you requested consideration of an amendment to the *Freedom of Information Act* (the FOI Act) to expand the immunity from defamation contained in section 64 of that Act.

Your suggestion has been reviewed in detail and the advice of the Attorney General has also been obtained. A copy of that advice is attached, for your information.

As you can see from the Attorney General's letter, he does not favour an amendment to expand the immunity from defamation action that currently exists under the FOI Act. The Attorney General notes that a broad immunity for authors of correspondence or submissions to the Government would allow people to make unreasonable or malicious assertions about third parties to Ministers and agencies. The Attorney General believes that such statements should not be protected absolutely from defamation action.

The Attorney General also notes and agrees with the views of the Court of Appeal in the *Ainsworth* case that statements in documents provided to the Government that are not deliberately defamatory may already be protected sufficiently under the defence of qualified privilege.

I agree with the Attorney General that it would not be appropriate to protect the authors of all correspondence to the Government from defamation action simply because such correspondence may need to be released later under the FOI Act. People who wish to make statements about third parties to the Government should generally remain accountable for those statements if they prove to be defamatory and the defence of qualified privilege, or another defence, does not apply.

LEVEL 39, GOVERNOR MACQUARIE TOWER, 1 FARRER PLACE, SYDNEY 2000, AUSTRALIA. TEL: (02) 9228 5300 FAX: (02) 9228 3062
G.P.O. BOX 5341, SYDNEY 2001

The FOI Act already imposes a responsibility on agencies to consult with the author of a document where release could have an adverse impact on that author's personal or business affairs. The FOI Act also confers a right on the author to apply to the Administrative Decisions Tribunal if the author disagrees with the decision of an agency to release a document affecting his or her personal or business affairs, contrary to his or her wishes.

Section 64 also offers protection from defamation action in relation to the release of a document under the FOI Act to an applicant. As noted by the Attorney General, this ensures that the steps involved in processing FOI requests, which might otherwise be considered to involve "publication" under defamation law, cannot form the basis of a defamation claim.

If you consider that a particular class of document provided to the Government should attract a statutory protection from defamation, I would be happy to consider any further suggestion you may wish to make in this regard. I note that such protection already exists under the *Ombudsman Act* in relation to disclosures of information in accordance with child protection obligations. Protection from liability for defamation is also conferred in relation to protected disclosures.

Otherwise, while I share your concern that people generally feel able to bring important matters to the attention of Government, it appears that existing defamation law and the FOI Act already offer authors of documents appropriate comfort, without undermining the interests of third parties in protecting their reputation under defamation law.

Yours sincerely,

Roger B Wilkins
Director-General

L.G \Premier's

RECEIVED
17 AUG 2004
OFFICE

NEW SOUTH WALES

ATTORNEY GENERAL

The Hon R J Carr, MP
Premier, Minister for the Arts and
Minister for Citizenship
Level 40, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

04/3845

AA04/16969

Dear Premier

I refer to your request for consideration and advice concerning the scope of the protection against defamation in the *Freedom of Information Act 1989*. You forwarded the concerns of Mr Bruce Barbour, NSW Ombudsman.

I do not believe any change to the *Defamation Act* or the *Freedom of Information Act* is required. There is no justification for absolute protection from defamation proceedings for all submissions made to governments.

I agree with Mr Barbour to the extent that it is in the public interest that members of the public should be able to write to government agencies and Ministers, in good faith, raising issues they consider should be addressed. I disagree with his assertion that members of the public should be protected from defamation proceedings that may arise if a submission is released in any determination made under the *Freedom of Information Act*.

Such submissions attract qualified privilege under common law and under section 22 of the *Defamation Act*. Should qualified privilege not apply, such as when a submission is motivated by malice or is unreasonable in the circumstances, I do not believe defamation proceedings should be prevented. To allow otherwise would provide an opportunity for individuals to deliberately defame others in submissions to government.

I agree with the Court of Appeal Judges in *Ainsworth v Burden* [2003] NSWCA 90.

At paragraph 7 they stated: 'Members of the public writing to a Minister, public authority, or a public servant (herein public official) drawing attention to alleged crimes or other wrongdoing, or alleged abuses in public administration, may be protected by qualified privilege under common law or statute, subject to the conditions on which such privilege is conferred.' This continues to be appropriate.

Level 36, Governor Macquarie Tower,
1 Farrer Place, Sydney NSW 2000
Telephone: (02) 9228 3071

Postal: PO Box A290, Sydney South NSW 1232

Facsimile: (02) 9228 3166

The Court goes on to say, at paragraph 13, that '[t]he evident purpose of s 64 [of the *Defamation Act* 1974] was to ensure that the Act did not widen liability for defamation by a side wind. There is nothing in s 64 to indicate that it was intended to protect publications made independently of the Act.'

Yours faithfully

BOB DEBUS

Attachment C
(Q. 10(ii))

Q 10(ii)

NSW Ombudsman

Level 24 580 George Street
Sydney NSW 2000
Phone 02 9286 1000
Fax 02 9283 2911
Tollfree 1800 451 524
TTY 02 9264 8050
Web www.ombo.nsw.gov.au
ABN 76 325 886 267

22 October 2003

FAXED 22/10/04

Mr Roger B Wilkins
Director General
The Cabinet Office
Level 39, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Via Fax: 9228-3062

Dear Mr Wilkins

Re: Proposed amendment to the *Freedom of Information Act* (FOI Act)

Thank you for your letter of 6 October 2004 in response to my request to the Premier that consideration be given to an amendment to the FOI Act to expand the immunity from defamation contained in s.64 of that Act.

I note the advice you have received from the Attorney General, in line with the views expressed by the Court of Appeal in the *Ainsworth v Burden* case, that "*statements and documents provided to the government that are not deliberately defamatory may already be protected sufficiently under the defence of quality privilege*". Unfortunately, the series of cases involving Mr Burden and Mr Ainsworth would tend to indicate that such statements or documents may not in fact be sufficiently protected by qualified privilege.

I also note your comment that the "*FOI Act already imposes a responsibility on agencies to consult with the author of a document where release could have an adverse impact on the author's personal or business affairs. The FOI Act also confers a right on the author to apply to the Administrative Decisions Tribunal if the author disagrees with the decision of an agency to release a document affecting his or her personal or business affairs, contrary to his or her wishes.*" Unfortunately, Mr Burden was not consulted by NSW Police prior to the relevant document being released and was therefore unable to exercise his rights in the ADT.

I welcome your offer to consider any further suggestions in relation to particular classes of documents provided to government that should attract a statutory protection from defamation.

You refer to certain existing protections in the *Ombudsman Act* in relation to protected disclosures. You would also be aware that the protection of absolute privilege is provided in the *Defamation Act* in relation to, amongst many other things, matters relating to the Ombudsman (s.17A), matters relating to the Privacy Commissioner (s.17B), certain decisions of public health organisations under the *Health Services Act 1997* (s.17C), matters arising under the *Anti Discrimination Act 1977* (s.17D), matters arising under the *Legal Services Commission Act* (s.17F), matters arising under the *Medical Practice Act* (s.17FA), matters arising under the *Legal Profession Act* (s.17J), matters arising out of the ICAC Act (s.17K), matters arising under the *NSW Crime Commission Act* (s.17L), matters arising under the *Public Finance and Audit Act* (s.17Q), matters arising under the *Protected Disclosures Act* (s.17QA), matters arising under the *Health Care Complaints Act* (s.17R), and matters arising under the *Police Integrity Commission Act* (s.17S).

1

My primary concerns would be largely addressed if the FOI Act were amended to provide absolute privilege for allegations concerning criminality, corruption, breaches of the law or serious misconduct made to an agency or Minister relating to a matter within the jurisdiction of that agency or Minister. This could be balanced by the inclusion of a further provision making it an offence to wilfully make any false statement in any such allegation.

I am happy to discuss my suggestion if this would be of assistance.

Yours sincerely

B. A Barbour

Bruce Barbour
Ombudsman 22/10/04

2

Attachment D

(Q. 10(iv))

Q 10 (iv)

30 April 2004

The Director
Legislation & Policy Division
Attorney General's Department
GPO Box 8
SYDNEY NSW 2001

Dear Sir/Madam

Re: Review of the *Privacy and Personal Information Protection Act 1998*

I enclose a submission to the Review of the *Privacy and Personal Information Protection Act 1998* (PPIP Act).

This submission is in two parts. In Annexure A we propose a new approach to privacy regulation, including expanding the scope of the legislation to cover all major dimensions of privacy and changing the approach from procedural regulation to focus on outcomes (eg, the objectives to be achieved, the rights to protected or the problems to be avoided or addressed).

Alternatively, should the decision be made to retain the legislation in largely its present form, in Annexure B we set out a range of issues that need to be addressed for the PPIP Act to work more effectively.

Should you wish to discuss any aspect of this submission, please contact my Deputy, Chris Wheeler on 9286-1004.

Yours sincerely

Bruce Barbour
Ombudsman

Enc

Submission to the review of the

Privacy and Personal Information Protection Act 1998

Annexure A

A NEW APPROACH TO PRIVACY REGULATION

1. Introduction

The NSW Ombudsman proposes an extensive redraft of the *Privacy and Personal Information Protection Act 1998* (PPIP Act) to strengthen and at the same time simplify privacy protection in New South Wales.

This legislative review of the PPIP Act comes at a time when most people view the protection of personal privacy as a very high priority and the importance of privacy is one of the most broadly accepted concepts in our community. Twenty-four years since the *Privacy Committee Act 1975* (NSW) established the world's third permanent privacy protection body in NSW and five years from the assent of the PPIP Act, it is time to consider whether alternative regulatory approaches to the protection of personal privacy may be more effective than the approach adopted so far.

In our view, the PPIP Act is too limited in its scope, dealing primarily with data protection, while ignoring other important dimensions of privacy. The PPIP Act's coverage should be extended to deal with other privacy interests including the privacy of the person, of personal behaviour and personal communications. Accordingly, we believe this review should consider alternative regulatory approaches to the procedural based approach set out in the Information Privacy Principles (IPP's).

The PPIP Act's focus on 12 procedural principles is too complicated to be easily understood, remembered or implemented. Rather than an emphasis on procedural principles the Act should have a sharper focus on outcomes- the objectives to be achieved, the rights to be protected or the problems to be avoided or addressed. We therefore call for a paradigm shift in the approach taken in the PPIP Act toward a rules based approach that categorises the rights to privacy in particular situations. We believe that the better codification of privacy protections based on rules which members of the public can easily identify will improve understanding and therefore compliance.

An effective scheme for the protection of privacy must be understood and supported by the community. By maintaining the privacy principles, but overlaying them with more accessible and easily understood rules the PPIP Act could more effectively articulate the obligations of organisations and others to respect privacy expectations and protections. A rules based approach would make the PIPP Act more accessible to the public and more easily understood by those responsible for ensuring compliance with the privacy laws. If privacy regulation is too hard to understand or impractical to implement, it will not work.

2. What is privacy?

Privacy is an abstract and contentious notion, not easily defined. While the PPIP Act contains a definition of "personal information" (similar to the definition of this term in the Commonwealth and Victorian Privacy Acts) it does not contain a definition of "privacy". The PPIP Act's focus on privacy of personal information is at the expense of other privacy interests including the privacy of the person, of personal space, the privacy of personal behaviour and the privacy of personal communication.

Claims to privacy or concerns about invasion of privacy may arise in relation to a number of interests including:

- *privacy of personal space*: reflecting the individual's desire to control entry by others to their own personal space or territory
- *privacy of the person*: sometimes referred to as "bodily privacy". This is concerned with the integrity of the individual's body. Issues include the obtaining, use, and disposal of DNA, compulsory immunisation, blood transfusion without consent, compulsory provision of samples of body fluids and body tissue, and compulsory sterilisation
- *privacy of personal behaviour*: Relating to aspects of a person's behaviour, but especially to sensitive matters, such as sexual preferences and habits, political activities and religious practices, both in private and in public places
- *privacy of personal communication*: Individuals claim an interest in being able to communicate among themselves, using various media, without routine monitoring of their communications by other persons or organisations
- *privacy of personal information*: Data about individuals should not be automatically available to other individuals and organisations, and even where data is possessed by another party, the individual must be able to exercise a substantial degree of control over that data and its use. This is sometimes referred to as "data privacy" and "information privacy".

While all of these privacy claims are important, the PPIP Act's emphasis is only on the last of these - the privacy of personal data. The Act is silent with regard to privacy of the personal space, privacy of the person, privacy of personal behaviour and privacy of personal communication. Clearly privacy is broader than just data privacy and this submission recommends the PIPP Act be reviewed to deal more comprehensively with privacy interests.

3. International approaches to privacy protection

While international developments have strongly influenced the Australian approach to the regulation of privacy, in most overseas jurisdictions broadly comparable with Australia, privacy is protected in the context of either a constitutional or statutory bill of rights. For example the constitutions of Canada,[1] the United States,[2] South Africa,[3] and France[4] all contain specific provisions relevant to the protection of privacy. In the United Kingdom the *Human Rights Act 1998* (UK) in effect incorporates the European Convention on Human Rights into the UK constitutional framework, bringing with it strong privacy protection provisions.[5]

The *Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations on 10 December 1948, to which Australia is a signatory, recognised privacy as a basic human right. Article 12 of the *Universal Declaration* states:

> *"No one shall be subjected to arbitrary* ***interference with his privacy****, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

The *International Covenant on Civil and Political Rights*, adopted by the General Assembly in 1966 and in force from March 1976, also recognises privacy as a basic right. Article 17 of the *International Covenant* mirrors Article 12 of the *Universal Declaration* and states:

> *"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *2. Everyone has the right to the protection of the law against such interference or attacks."*

Further, General Comment 16 on the implementation of Article 17 contains the following comments:

> *"10. The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorised by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination."*

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[1] Canadian Charter of Rights and Freedoms s.8 (right not to be subject to "unreasonable search or seizure"). A search is permitted only if authorized by a reasonable law and carried out in a reasonable manner. *R. v. Collins*, [1987] 1 S.C.R. 265.

[2] United States Constitution: A narrow right has been recognized by the courts based upon Amendments 1, 3, 4 (search and seizure and warrants clauses), 5 (self-incrimination clause), and 9. The right is applicable only in the areas of reproduction and abortion, and marriage.

[3] South African Constitution s.14 (search of person, home, property; seizure of possessions; privacy of communications). See also s.12(2) (the right to bodily and physical integrity).

[4] French 1958 Constitution: The *Conseil Constitutionnel* has found that the right to privacy is a "fundamental principle" of constitutional status, pursuant to 1 of the Preamble to the 1946 Constitution.

[5] Article 8 of the European Convention on Human Rights provides "Everyone has the right to respect for his private and family life, his home and his correspondence".

In September 1980, the Organisation for Economic Cooperation and Development (OECD) issued "*Guidelines on the Protection of Privacy and Trans-border flows of Personal Data*".[6] These guidelines set out eight basic principles with the following headings:

1. Collection and Limitation Principle
2. Data Quality Principle
3. Purpose Specification Principle
4. Use Limitation Principle
5. Security Safeguards Principle
6. Openness Principle
7. Individual Participation Principle, and
8. Accountability Principle.

4. The Australian approach to privacy protection

The OECD principles formed the basis for the approach adopted in both the *Privacy Act (Cth) 1988* and the PPIP Act. The Commonwealth's *Privacy Act (Cth) 1988* gave effect to Australia's agreement to implement the OECD Guidelines and to obligations under Article 17 of the International Covenant on Civil and Political Rights (ICCPR). The 11 Information Protection Principles (IPPs), are based on the OECD guidelines.

The PPIP Act, which came into effect on 1 July 2000, established the Office of the NSW Privacy Commissioner giving it responsibility for privacy at the level of the NSW public sector. The PPIP Act contains 12 Information Protection Principles (IPPs). However these IPPs in Part 2 of the PPIP Act do not follow the Commonwealth Privacy Commissioner's "National Principles", unlike those in the Victorian and Commonwealth Acts.[7]

As a result we have a privacy protection regime focussed on detailed procedural requirements that regulate the collection, management, use and disclosure of personal information.

The Australian approach to the regulation of privacy protection, including the approach adopted by the PPIP Act, can be summarised as follows:

- establish general principles [referred to as "privacy principles"][8]
- apply these principles to organisations with some exceptions[9]
- develop codes of practice, consistent with the privacy principles, applying to specific industry sectors[10]
- establish dispute-resolution procedures at the levels of individual organisations and industry sectors,[11] and

[6] Quoted in full in **Appendix A-3** to this Annexure
[7] For a discussion see Greenleaf G (1988) 4 PLPR 165
[8] The *Privacy Act 1988* has 10 National Privacy Principles, the *PPIP Act 1998* has 12 Information Privacy Principles and the *Health Records and Information Privacy Act 2002* has 15 Health Privacy Principles (see **Appendix A-1**).
[9] For example, the *Privacy Act 1988* does not apply to small businesses with a turnover of less than $3 million, the small business exemption *does not* extend to providers of health services, and therefore *all* health services providers *are* covered by the *Privacy Act* (except in relation to their employee records). The limits of the *Commonwealth Constitution* leaves the Federal Government without a source of power to regulate, for example unincorporated organisations making it necessary for State governments, possessing the necessary constitutional power, to compliment and often duplicate Commonwealth Legislation.
[10] For example under the *Privacy Act* the health sector can create its own privacy codes, which can be submitted to the Federal Privacy Commissioner for approval. Once approved they become binding for that organisation instead of the NPPs located in the *Privacy Act*. To date only a few codes have been approved.

- create sanctions against non-compliance making the principles, codes and sanctions enforceable through quasi-judicial (tribunal) and court procedures.[12]

This approach follows the OECD approach with little thought being given to the Australian constitutional context or alternative approaches that might offer greater privacy protection. Given that neither the NSW or the Federal Constitution have an express provision dealing with privacy protection, and in the absence of a bill of rights, this approach has not served to protect the broad range of privacy interests as well as it should.

5. The limits of a procedural based approach to privacy

The present PPIP Act takes a procedural based approach for the collection, management, use and disclosure of personal information expressed in the form of Information Privacy Principles (IPP's). The PPIP Act's procedural based approach can be summarised as follows:

- *collection* of personal information must be lawful (s.8), transparent (ss.9-10) and appropriate (s.11)
- *disposal* of personal information must be authorised (s.12(b)), timely (s.12(a)) and secure (s.12(b) & (d))
- *holdings* of personal information must be secure (s.12(c)), open (s.13), accessible (s.14) and accurate (ss.15 & 16)
- *use* of personal information must be relevant (s.17), and
- *disclosure* of personal information must be limited (s.18) and restricted (s.19).

Broad procedural principles are confusing and little understood. "Privacy principles" are vague and create confusion among members of the public as they do not adequately describe the actual rights to privacy that people expect and should be entitled to, and the problems that most people believe should be either avoided or addressed.

If the new approach to privacy protection we propose is adopted, the existing privacy principles could be preserved as administrative guidelines.

6. Inconsistencies between privacy principles

There are also significant inconsistencies in the formulation of the basic procedural requirements or privacy principles in the Federal and NSW legislation that regulate privacy in NSW. For example there are:

- 10 National Privacy Principles (*Privacy Act* (Cth))
- 12 Information Privacy Principles (*PPIP Act* (NSW)), and
- 15 Health Privacy Principles (*HRIP Act* (NSW), not yet in force).

On commencement of the HRIP Act, three separate Acts will regulate privacy in NSW, one applying to public sector agencies that are not health service providers (PPIP Act), two applying to

[11] Complaints of breaches of the Information Protection Principles may be investigated by the NSW Privacy Commissioner, or reviewed internally by an agency. The Privacy Commissioner is required to attempt to conciliate on complaints, but complainants can appeal from internal reviews to the Administrative Decisions Tribunal (ADT).
[12] The ADT can award compensatory damages of up to $40,000 and can order remedial actions. Appeals from the ADT can be made to the NSW Court of Appeal however court filing fees and legal expenses make the utility of such an appeal of limited value.

public sector agencies that are health service providers (PPIP Act & HRIP Act), and two applying to private sector health service providers (*Privacy Act* & HRIP Act).

The inconsistencies and duplication is illustrated in the table below which compares the privacy principles of the *Privacy Act 1988* (Cth), the PPIP Act and the HRIP Act.

Comparison of privacy principles embodied in privacy legislation

Procedural principle	Privacy Act -Sch 3	PPIP Act	HRIP Act
	NPPs = 10	IPPs = 12	HPPs = 15
Collection	1	8,9,10,11	1,3,4
Use & disclosure	2	17,18	10,11
Data quality	3	16	2,9
Data security	4	12	5
Openness	5	13	6
Access and correction	6	14,15	7,8
Identifiers	7	-	12
Anonymity	8	-	13
Transborder data flows	9	19	14
Sensitive information	10	19	-

The complexity of these legislative schemes makes it difficult for regulated persons and bodies to understand and implement their privacy obligations and for members of the public to become informed about, understand and exercise their privacy rights. **Appendices A-1** and **A-2** to this Annexure compare and highlight the inconsistencies between the privacy principles in NSW and Commonwealth privacy legislation. This issue is discussed further in **Annexure B** to this submission (on page 23).

7. Categorising the rights to privacy in particular situations

The Ombudsman's Office believes that as part of this review it would be useful to catalogue all of the existing privacy related rights currently protected by both legislation and the common law. This could be used as a guide for the privacy rights that should be protected in legislation. For example, existing torts that deal with aspects of infringements on personal privacy[13] could be codified in legislation in much the same way that many aspects of the tort of negligence are codified in the *Civil Liability Act 2002.* Another apparently successful example is the *Workplace Video Surveillance Act 1988* which codifies the use of covert video surveillance of employees in New South Wales.[14]

While articulating all derivations of privacy rights is a complex undertaking, describing the more important ones is less difficult. Consideration should be given to codifying those aspects of the common law relating to privacy in the same way that many other important and often used principles in the common law have, over time, been codified in legislation.

[13] Such as the torts of nuisance, trespass, breach of confidence, passing off, defamation and the emerging privacy tort.
[14] There is no general law protecting the privacy of employees and the Act does not prohibit overt surveillance or telephone or computer monitoring.

The public has a reasonable expectation that their privacy will be protected and, where infringed, that they be able to seek redress. Yet discontinuity, differing jargon and different rules used to regulate privacy have created confusion. Those who strive to ensure their organisations comply with privacy laws, along with most members of the public, are understandably bewildered by the existing procedures approach to privacy regulation at both the State and Federal levels.

8. Developments in the common law and the evolution of privacy torts

A general tort of privacy did not develop in Australia, as it did in the United States of America and elsewhere, as a consequence of the High Court decision in *Victoria Park Racing and Recreation Grounds Co Ltd v. Taylor* (1952).[15] Nevertheless the recent High Court decision in *ABC v Lenah Game Meats Pty Ltd* (2001)[16] appears to leave the door open for the development of a common law tort of privacy under Australian law. In this case Justices Gummow and Hayne held that while the tort of privacy was not available to protect commercial interests of corporation they deliberately did not preclude the development of a tort of privacy for individuals.[17]

The subsequent decision in the Queensland District Court judgment in *Grosse v Purvis* [2003][18] appears to be the first Australian Court decision to recognise an "invasion of privacy". In this case damages of $178,000 were awarded to the plaintiff following stalking by the defendant, including damages for breach of the right to privacy. The court's findings in *Grosse v Purvis* were based on comments made by judges of the High Court in the above mentioned case of *ABC v Lenah Game Meats* (2001).

In the United States, an actionable tort based upon the right to privacy has long been recognised and is still evolving in response to encroachments upon privacy by the media and others.[19] United States law recognises four distinct privacy torts that allow a person whose privacy has been invaded to sue the invader for damages. These torts are:

1) intrusion upon seclusion or solitude, or into private affairs

2) public disclosure of embarrassing private facts

3) publicity which places a person in a false light in the public eye, and

4) appropriation of name or likeness.

In recognition of the developments in other countries and in response to comments of the High Court, this legislative review of the PPIP Act should consider the creation of a statutory tort of privacy in NSW.

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[15] 58 CLR 479
[16] 185 ALR 1
[17] *ABC v Lenah Game Meats* (2001) 185 ALR 1. The Court did however express a preference for extending action for breach of confidence over recognition of tort of privacy.
[18] QDC 151
[19] As noted by Callinana J in *ABC v Lenah Game Meats* (2001) 185 ALR 1

9. Alternative approaches to the regulation of privacy

There are alternative approaches to the regulation of privacy beyond categorising the rights of privacy in particular situations. As stated above the scope of the PPIP Act could be broadened to address each of the component parts of privacy with rules for handling personal information to address information privacy. The Act could also explicitly protect bodily privacy, by setting out rules of invasive procedures and safeguard the physical self by providing for privacy of communications such as mail, telephone conversations, email communication and the like;[20] and codify the right to territorial privacy by setting limits on intrusions into domestic and other environments.[21]

Alternatively privacy could be approached from the perspective of the rights to be protected, such as anonymity, solitude, or "to be left alone"[22] by expressly protecting an individuals rights *to control and participate* in decisions about access to and use of information or knowledge about, or images of, personal matters.[23]

On the other hand the PPIP Act could more directly address privacy problems or the more common interferences with privacy. For example imposing penalties and other consequences for intrusion upon the privacy, solitude or seclusion of another, such as by harassment, stalking, trespass, nuisance and bother. The PPIP Act could also directly address improper disclosure of private matters by, for example, breach of confidence, defamation, placing a person in a false light, and disclosure of private matters that could cause embarrassment. The Act could also be amended to prohibit the misuse of personal information, eg, use of likeness or image without consent or authorisation or for an improper purpose and identity theft.[24]

This review should give consideration to these everyday privacy issues with a view to providing clear rules addressing each of these common problems.

10. Privacy requires regular regulatory review

Clearly it is difficult for privacy legislation to keep pace with the obvious challenges to individual privacy posed by recent rapid developments in information technology and telecommunications, which have enabled the easy accumulation, storage, matching and distribution of massive quantities of personal information by governments and their agencies. For the foreseeable future privacy regulation will always require regular regulatory review. We therefore propose the PPIP Act be reviewed at least every five years, with amendments being made as necessary in response to privacy issues as they emerge, such as the increased use of mobile phones with digital cameras, a development that was not widely anticipated when the PPIP Act first came into effect.

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[20] As recently proposed by the NSW Government with respect to workplace e-mail privacy.

[21] based on concepts suggested by David Banisar, 2000, *Privacy and Human rights: an international survey of privacy laws and developments*, Electronic Privacy Information Centre, Washington, DC.

[22] As suggested by Judge Cooley in *Torts* (2nd Ed, 1888, p.29) and popularised by Samuel Warren and Louis Brodeis in *The Right to Privacy*, 4 Harvard Law Review 193, 1890.

[23] "Personal matters" include personal information, proof of identity and knowledge or images of private matters.

[24] This approach is based on the following summary of the United States tort of privacy by William L Prosser in Privacy (1960) *Californian Law Review* 48, 383: "1.The intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; 2. Public disclosure of embarrassing facts about the plaintiff; 3. Publicity which places the plaintiff in a false light in the public eye; 4. Appropriation for the defendant of advantage of the plaintiff's name or likeness."

Appendix A-1

Comparison between privacy principles in or made under the *Privacy Act 1988 (Cth)*, *Privacy and Personal Information Protection Act 1988 (NSW)* and *Health Records and Information Privacy Act 2002 (NSW)*

	Privacy Act (Cth)		PPIP Act		HRIP Act
Principles	NPPs (Sched 3)	IPPs (s.14)	IPPs (ss.8-19)	DPPs (s.36)	HPPs (Sched 1)
Collection	1	1,2,3(part)	8,9,10,11	1,2,3(part)	1,3,4
Use and disclosure	2	9,10,11	17,18	9,10	10,11
Data quality	3	3(part),8	16	3(part), 8	2,9
Data security	4	4	12	4	5
Openness	5	5	13	5	6
Access and correction	6	6,7	14,15	6,7	7,8
Identifiers	7	-	-	-	12
Anonymity	8	-	-	-	13
Transborder data flows	9	-	19	-	14
Sensitive information	10	-	19	11	-
Total number of principles	10	11	12	11	15
Sections of Act *	197		75		78
Parts of Act	11		8		8
Schedules to Act	3		4		3

* Not including various machinery provisions in each Act.

Appendix A-2

Comparison between IPPs in the *Privacy Act 1988 (Cth)* and DPPs made pursuant to s.36 of the PPIP Act (NSW)

Principle	IPP	DPP
Manner and purpose of collection of personal information	1	1
Solicitation of personal information from individual concerned	2 (a) (b) (c) (d) - - (e)	2 (a) (b) (c) (d) (f) (g) (h)
Solicitation of personal information generally	3	3
Storage and security of personal information	4 - - - - (a) (b)	4 (a) (b) (c) (d) (e) (f)
Information relating to records kept by record keeper	5 (1) (a) - (b) (2) (3) (a) - - (b) (c) (d) (e) (f) 4 (a) (b)	5 (1) (a) (b) (c) (2) (3) (a) (b) (c) (d) (e) (f) (g) (h) 4 (a) -
Access to records containing personal information	6	6
Alteration of records containing personal information	7 (1) - (2) (3)	7 (1) (2) (3) (4)
Record keeper to check accuracy, etc of personal information before use	8	8
Personal information to be used only for relevant purposes	9	-
Limits on use of personal information	10 (1) (a) (b)	9 (1) (a) (b)

Principle	IPP	DPP
	(c)	(c)
	(d)	-
	(e)	-
	(2)	-
Limits on disclosure of personal information	11	10
	(1)	(1)
	(a)	(a)
	(b)	(b)
	(c)	(c)
	(d)	(d)
	(e)	-
	(2)	-
	(3)	(2)
Sensitive information	-	11

Appendix A-3

BASIC PRINCIPLES OF NATIONAL APPLICATION

(OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data, September 1980)

Collection Limitation Principle

1. There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

Data Quality Principle

2. Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

Purpose Specification Principle

3. The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfilment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.

Use Limitation Principle

4. Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with Paragraph 3 except:
   a) with the consent of the data subject; or
   b) by the authority of law.

Security Safeguards Principle

5. Personal date should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data.

Openness Principle

6. There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

Individual Participation Principle

7. An individual should have the right:
   a) to obtain from a data controller, or otherwise, confirmation of whether or not the date controller has data relating to him;
   b) to have communicated to him, data relating to him
      i) within a reasonable time;
      ii) at a charge, if any, that is not excessive;
      iii) in a reasonable manner; and
      iv) in a form that is readily intelligible to him;

   c) to be given reasons if a request made under subparagraphs (a) and (b) is denied, and to be able to challenge such denial; and

   d) to challenge data relating to him and, if the challenge is successful, to have the date erased, rectified, completed or amended.

Accountability Principle

8. A data controller should be accountable for complying with measures which give effect to the principles stated above.

Submission to the review of the

Privacy and Personal Information Protection Act 1998

Annexure B

REVIEW OF THE PRIVACY AND PERSONAL INFORMATION PROTECTION ACT 1998

1. Introduction

In our view, there are a range of issues that need to be addressed by any review of the *Privacy and Personal Information Protection Act 1998* (PPIP Act). These include:

- duplication and inconsistencies between the requirements of ss.13-15 of the PPIP Act and Parts 2-4 of the FOI Act
- application of the PPIP Act to non-recorded/documented information
- inconsistencies between the privacy principles in the PPIP Act and the equivalent principles in related legislation
- inconsistencies between the complaint handling and review provisions in the PPIP Act, and the equivalent provisions in the FOI Act
- the unnecessary complexity of the regulatory scheme
- the restriction on agencies providing personal information to complaint handling bodies in response to preliminary/informal inquiries for information for the purpose of resolving or otherwise dealing with complaints
- amalgamation of the oversight of privacy and FOI, and
- the over-complexity of the definition of "*personal information*".

2. Duplication and inconsistencies between certain provisions of the PPIP Act and FOI Act

Duplication

In jurisdictions which have adopted the 1980s OECD model for privacy legislation (for example NSW and the Commonwealth), privacy principles include restrictions on disclosure of access to and correction of personal information.

Three of the 12 information protection principles in the PPIP Act relate to disclosure of, access to and correction of personal information – the three key elements of the *Freedom of Information Act* (FOI Act):

Topic	PPIP Act	FOI Act
Disclosure of information	s.13 – *Information about personal information held by agencies*	Part 2 – *Publication of certain information*
Access to information	s.14 – *Access to personal information held by agencies*	Part 3 – *Access to documents*
Correction of information	s.15 – *Alteration of personal information*	Part 4 – *Amendment of records*

It is open to question whether all of the information privacy principles need to be implemented solely under the provisions of the PPIP Act or whether the three principles in question could validly be implemented through the provisions of the FOI Act (with or without any appropriate amendment to that Act). The approach that these three principles must also be implemented under the PPIP Act has resulted in avoidable over-complexity as well as inconsistencies and duplication with the equivalent provisions of the FOI Act.

The proliferation of access to information regimes has been an issue this Office has been raising for some time, starting with the following comments set out in our 1999/2000 Annual Report:

> "*With the introduction of Part 2 of the Privacy and Personal Information Protection Act, there are now three separate regimes in New South Wales for seeking access to, and amendment of, documents held by certain public sector agencies. In the state government sector, it will be possible to access information about personal affairs or documents containing personal information under both the FOI Act and the Privacy and Personal Information Protection Act. In local government, the access to information provisions in the Local Government Act establishes a third mechanism.*
>
> *The existence of three separate systems has created considerable confusion for both users and the public officials responsible for administering the relevant legislation.*

The three regimes are largely incompatible. There are significant differences in the definitions of what is covered, the procedures that must be followed by applicants and agencies, the exemptions that can be claimed by agencies, the fees that can be charged, the protections available to the agency and the time in which applications must be dealt with. These differences, and the potential for confusion, are illustrated in [**Annexure B-1** to this submission], *which attempts to compare the relevant provisions of the Freedom of Information Act, the Privacy and Personal Information Protection Act (PPIP Act) and the Local Government Act.*

Looking at the three access regimes, some preliminary general observations can be made. Firstly, applicants for simple, non-complex or non-contentious information are probably better off applying under the PPIP Act because it has hardly any procedural requirements.

By contrast, applicants for information held by state government agencies that is extensive, complex or in any way contentious, should use the FOI Act because:

- *as the application is in writing, there is proof that an application was made at a certain date and that particular documents were covered by the application*
- *the agency must give written reasons for refusal of access which should help the applicant decide whether and on what basis to seek a review or an appeal*
- *the applicant has a choice as to the form in which access is to be provided*
- *there is a fixed time period in which the application must be dealt with, after which the applicant has a right of appeal or review*
- *in any appeal to the Administrative Decisions Tribunal, the onus of proof is on the agency whereas under the PPIP Act the onus is on the applicant.*

If state government agencies can choose which access regime they will use to process an application, or if they are able to suggest to an applicant which regime to use, they should be aware that:

- *there are no protections for agencies under the PPIP Act compared to strong protections under the FOI Act*
- *when dealing with applications under the PPIP Act, agencies are not restricted to the charging regime imposed under the FOI Act and regulations*
- *there is no need to give reasons for determinations made under the PPIP Act, unless there is an appeal to the ADT*
- *there are few mandatory procedures that must be followed when dealing with applications under the PPIP Act*
- *the onus of proof is on the applicant in any appeal to the ADT from a decision made by an agency under the PPIP Act whereas the onus is on the agency under the FOI Act.*

Applicants for information held by councils would generally be better off applying under the Local Government Act because the options and discretions available to councils under that Act to refuse access to information are far more limited than under the FOI Act.

On the other hand, if a member of the public seeks advice from a council as to how to obtain access to information held by the council, it would generally be in the interests of the council to suggest that the person applies under the FOI Act because:

- *the applicant must document their request for information, reducing the possibility of confusion or disagreement*
- *the council can charge fees and, where applicable, advance deposits for providing the information*
- *there are greater legal protections available for the council under the FOI Act than under either the Local Government Act or the PPIP Act.*

Needless to say, the confusion created by these separate and entirely different access to information regimes is not in the public interest and should be addressed as a matter of urgency."

Concerns about over complexity have also been raised by the former Privacy Commissioner, Mr Chris Puplick, who stated at the *Open Government Forum* held at Parliament House in Sydney on 10 December 2001 that:

"It is now, a situation in NSW, that we have a number of pieces of state legislation which have been written without due regard to their impact on each other. It is simply not possible for a government bureaucrat or officer, to obey the Privacy and Personal Information Act, the Freedom of Information Act, and the State Records Act, at the same time. The provisions in those three pieces of legislation are in fact, in a number of key respects, insufficiently compatible, that an officer will have to be in breach of one of them at some stage.

Seeing that the Parliament created this mess, and seeing in particular that the amendments made in the Legislative Council particularly buggered up the whole system, we do in fact, look to the Parliamentary Committee and to Members of Parliament to solve this dilemma and to stop blaming the bureaucrats and everybody else for your mistakes."

Depending on the nature of the information sought, the agency from which it is sought and the age of the record in which the information is contained, a range of alternative avenues to seek access to information or documents may be available. These include the avenues listed below.

Nature of information	State government	Local government
Personal information/personal affairs	1. Voluntary disclosure on request to the person the information concerns 2. Rights to inspect in relevant statutes 3. FOI Act (s.16) 4. PPIP Act (s.14) 5. SR Act (Part 6	1. Voluntary disclosure on request to the person the information concerns 2. Rights to inspect in relevant statutes 3. FOI Act (s.16) 4. LG Act (s.12(6)) 5. PPIP Act (s.14) 6. SR Act (Part 6
Other information	1. Voluntary disclosure on request 2. Rights to inspect in relevant statutes 3. FOI Act (s.16) 4. SR Act (Part 6)	1. Voluntary disclosure on request 2. Rights to inspect in relevant statutes 3. FOI Act (s.16) 4. LG Act (s.12(6)) 5. SR Act (Part 6)

Note: LG Act: *Local Government Act 1993;* SR Act: *State Records Act 1998.*

The alternative avenues for access to information can be summarised as follows:

1. most public sector agencies are able to voluntarily release certain information on request, for example giving people access to copies of each policy document adopted by the agency and giving staff access to their own personnel files

2. there are provisions in a wide range of legislation which state that certain documents held by an agency must be made available for inspection by members of the public on request during business hours (normally registers and the like, although the range of documents covered is far more extensive under the LG Act

3. members of the public have a legally enforceable right to be given access to a public sector agency's documents in accordance with the FOI Act (Part 3)

4. public sector agencies that hold personal information must, at the request of the individual to whom the information relates, provide the individual with access to that information in accordance with the PPIP Act (s.14)

5. members of the public have a right to request access to documents held by local councils, in accordance with the LG Act (s.12(6) & (7)), and

6. any person can inspect records over 30 years old that are the subject of an open to public access direction, or can apply for an open access direction for a record that is over 30 years old where no such direction has been made in accordance with the SR Act (Part 6).

Inconsistencies

The significant inconsistencies between the statutory access to information regimes established under the FOI Act, PPIP Act and LG Act are highlighted in Annexure A. These inconsistencies have led to considerable confusion amongst FOI/Privacy practitioners, not to mention other public officials and members of the public.

The differences between the FOI Act and PPIP Act (ss.13-15) are summarised below:

DIFFERENCES IN COVERAGE	
FOI Act	**PPIP Act**
Applies to documents (s.16)	Applies to information, whether or not in documentary form [the requirement in the SR Act to make and retain full and accurate records should in practice result in this difference being minimal] (s.4).
Applies to personal affairs [as well as to all other types of information in documents held by government] (s.16).	Applies to personal information [other than any of the types of information listed in s.4(3)] (s.4).
Agencies are required to publish information about: • the various kinds of documents that are usually held by the agency • the arrangements in place to enable members of the public to obtain access to the agency's documents and to seek amendment of agency records concerning his or her personal affairs • procedures of the agency in relation to the giving of access to documents and the amendment of the agency's records, and • the identity of each of the agency's policy documents (s.14).	Agencies are required to take reasonable steps to enable any person to ascertain: • whether the agency holds personal information relating to that person, and • if so its nature, the purposes for which it is used and the person's entitlement to gain access to it (s.13).
Members of the public have the right to apply for amendment of agency records if in the person's opinion the information is: • incomplete • incorrect • out of date, or • misleading (s.39).	Members of the public have the right to seek alteration of personal information to ensure that the information is: • complete • accurate • up to date • relevant, and • not misleading (s.14(1)).
Where records are not amended, if the agency is going to disclose that information it must disclose any notation required to be added by the applicant (s.46(3)).	Where records are amended, the applicant is entitled, if it is reasonably practicable, to have previous recipients of the unamended information notified of the amendments made by the agency (s.15(3)).

Confusion in implementation

The PPIP Act expressly provides that it does not affect the operation of the FOI Act (s.5). Further it states that ss.13-15 do not affect any conditions or limitations in the FOI Act, and that those conditions or limitations apply as if they were part of the PPIP Act (s.20(5)). It appears that this provision means that an agency can rely on any condition or limitation in the FOI Act to refuse notification, access or correction rights under ss.13-15 of the PPIP Act. Section 20(5) is ambiguous as to how exactly the access and correction provisions of the PPIP Act relate to the FOI Act.

Where alternative statutory avenues are available to a potential applicant seeking access to information held by an agency, the agency has no right to determine which avenue will be used by the applicant. However, if a written application is received which complies with the various requirements of s.17 of the FOI Act, the agency is entitled to deal with the application under that Act whether or not the applicant has expressed any intention to make their application under that Act.

From a practical perspective there are advantages and disadvantages in using each of the alternative avenues available for accessing information. For example:

1. where the information sought is simple, non-complex or non-contentious information concerning the applicant, it is better for both applicant and agency concerned if the application is made under the PPIP Act as it has few procedural requirements

2. if the information sought is held by a State government agency:

   (a) from the applicant's perspective if the information is extensive, complex or in any way contentious, an application should be made under the FOI Act because:

   - as the application is required to be in writing there is proof that an application was made at a certain date and the particular documents were covered by the application
   - the agency must give written reasons for refusal of access which should help the applicant decide whether and on what basis to seek a review of that decision
   - the applicant has a choice as to the form in which access is to be provided
   - there is a fixed time period in which the application must be dealt with, after which the applicant has a right of appeal or review
   - in any review application to the Administrative Decision Tribunal, the onus of proof is on the agency whereas in any appeal from a decision made under the PPIP Act the onus is on the applicant,

   (b) from the agency's perspective:

   - prior to the commencement of the HRIP Act, there are no protections for agencies under the PPIP Act compared to strong protections under the FOI Act

- prior to the commencement of the HRIP Act, when dealing with applications under the PPIP Act agencies are not restricted to a charging regime
- there is no need to give reasons for determinations made under the PPIP Act, unless there is an internal review under the PPIP Act or a review by the ADT
- there are few mandatory procedures that must be followed when dealing with applications under the PPIP Act
- the onus of proof is on the applicant in any review application to the ADT from a decision made by an agency under the PPIP Act, whereas the onus is on the agency under the FOI Act in such situations.

3. if the information sought is held by a local council:

(a) from the applicant's perspective they may be better off applying under the *Local Government Act* because the options and discretions available to councils under the Act to refuse access to information are far more limited than under the FOI Act

(b) from a local council's perspective it would generally be in its interest to suggest that persons seeking information held by the council make a formal application under the FOI Act because:

- the applicant must document their request for information, reducing the possibility of confusion or disagreement
- the council can charge fees and, where applicable, advanced deposits, for providing the information, and
- there are greater legal protections available for the council under the FOI Act than under the *Local Government Act*.

Note: When comparing the FOI Act and the PPIP Act, it is important to note that if access to a document could be validly refused under the FOI Act (pursuant to Schedules 1 or 2), access can be refused to the same document under the PPIP Act. This is because s.20(5) of the PPIP Act provides, in effect, that the provisions of the FOI Act that impose conditions or limitations (however expressed) with respect to access to or alteration of personal information continue to apply in relation to any such matter as if those provisions were part of the PPIP Act.

Recommendations

The simplest way to address the proliferation of access to information regimes and to help simplify the current complex regulatory environment would be to:

1) repeal s.20(5) of the PPIP Act

2) *as originally proposed in the Bill* [PPIP Bill] *that went to Parliament, amend ss.13-15 and/or s.20 of the PPIP Act to provide that the information protection principles set out in ss.13-15 do not apply to agencies to which the FOI Act apply and that in relation to those agencies those principles are implemented through the relevant provisions of the FOI Act, and*

3) *if considered necessary, amend the FOI Act to put beyond doubt that agencies can adopt informal methods of release personal information to the person concerned.*

3. Application of PPIP Act to non-recorded/documented information

The PPIP Act applies to personal information collected, held, used or disclosed by agencies, whether or not in or intended to be in a recorded/documented form. This means that the Act applies to information obtained by or known to ("held" by) the staff of an agency, whether or not they have or intend to make some record of that information (in effect to undocumented 'corporate knowledge').

This makes compliance with various procedural requirements of the information protection principles very problematic if not impossible. For example, in relation to undocumented 'corporate knowledge', compliance with the following principles will be particularly problematic:

- s.12 – *retention and security of personal information* – eg, not keeping such information for longer than is necessary, disposing of such, information securely and protecting such information by taking 'security safeguards'

- s.13 – *information about personal information held by agencies* – eg, identifying what undocumented personal information is 'held' by staff generally, enabling any person to ascertain whether personal information is about them is held by any particular member(s) of staff, and if so the nature of that information

- s.14 – *access to personal information held by agencies* – eg, providing an individual with access to undocumented personal information 'held' by any member(s) of staff

- s.15 – *alteration of personal information* – eg, altering/correcting of information known to individual members of staff that is not in a documented form, and

- s.16 – *agency must check accuracy of personal information before use* – eg, being aware of and checking the accuracy of undocumented personal information 'held' by any member(s) of staff.

It is interesting to note that, with very few exceptions, the Commonwealth *Privacy Act* applies to the collection of personal information by an organisation **only** if the information is collected for inclusion in a record or a generally available publication, and to personal information that is being collected by an organisation only if the information is to be held by the organisation in a record (see s.16B). This is a similar approach to that adopted in all other Australian States with privacy legislation in place or proposed, ie, Victoria, Northern Territory, Tasmania and Western Australia.

In relation to ss.13-15 of the PPIP Act, it is also relevant that the provisions of the FOI Act only apply to documents (see s.16).

Recommendation

4) The PPIP Act should be amended to limit its application to recorded information, or information being collected that is to be held in a record (possibly through a provision similar to s.16B of the Privacy Act (Cth)).

4. Inconsistencies between the privacy principles in the PPIP Act and the equivalent principles in related legislation

There are significant inconsistencies between the Information Privacy Principles (IPPs) set out in ss.8-19 of the PPIP Act, the Data Protection Principles adopted and used by NSW Privacy pursuant to s.36 of the PPIP Act, the Health Privacy Principles set out in Schedule 1 to the *Health Records and Information Privacy Act*, the National Privacy Principles set out in Schedule 3 to the *Privacy Act* (Cth) and the Information Protection Principles set out in s.14 to that Act.

The PPIP Act contains **12** IPPs setting out rules for the collection, holding, access to, alteration, accuracy, use and disclosure of personal information. However, when considering privacy issues for organisations not covered by the PPIP Act, NSW Privacy bases its assessment on the **11** Data Protection Principles (which, while covering largely the same ground, do not mirror the IPPs). On commencement of the HRIP Act health service providers and others will be required to comply with the **15** Health Privacy Principles (which also do not mirror the IPPs). Under the *Privacy Act* (Cth) there are **10** National Privacy Principles and **11** Information Protection Principles (neither of which mirror the IPPs).

A table looking at equivalencies between the privacy principles in or made under various legislation, is set out below:

Privacy principles in or used pursuant to Commonwealth and NSW privacy legislation

	Privacy Act (Cth)		**PPIP Act**		**HRIP Act**
Principles	NPPs (Sched 3)	IPPs (s.14)	IPPs (ss.8-19)	DPPs (s.36)	HPPs (Sched 1)
Collection	1	1,2,3(part)	8,9,10,11	1,2,3(part)	1,3,4
Use and disclosure	2	9,10,11	17,18	9,10	10,11
Data quality	3	3(part),8	16	3(part), 8	2,9
Data security	4	4	12	4	5
Openness	5	5	13	5	6
Access and correction	6	6,7	14,15	6,7	7,8
Identifiers	7	-	-	-	12
Anonymity	8	-	-	-	13
Transborder data flows	9	-	19	-	14
Sensitive information	10	-	19	11	-
Linkage of health records	-	-	-	-	15
Total number of principles	10	11	12	11	15

Recommendation

5) *There should be a comprehensive review of the Information Protection Principles in the PPIP Act, the Data Protection Principles adopted by the NSW Privacy and the Health Privacy Principles in the HRIP Act with the aim of:*

(a) standardising the principles common to each, and

(b) bringing them into line with the National Privacy Principles in the Privacy Act (Cth).

5. Inconsistencies between the external review mechanisms in the PPIP Act and the FOI Act

External reviews under the PPIP Act

There are two avenues by which a person who considers that a public sector agency has interfered with their privacy can seek a remedy.

Firstly, they may make a complaint to the Privacy Commissioner. Such complaints may relate to any alleged "violation of, or interference with, the [individual's] privacy. The Commissioner must attempt to resolve the complaint by conciliation, but may investigate and make reports and recommendations.

The second avenue for an individual is to complain under Part 5 to the agency concerned about a breach of the IPPs, or a code of practice, and the agency must then conduct an internal review. The agency must notify the Privacy Commissioner, and may request the Commissioner to undertake the internal review on the agency's behalf.

If the complainant is dissatisfied by the outcome of this internal review they may apply to the Administrative Decisions Tribunal (ADT) for a review of the conduct. The Privacy Commissioner must be notified by the Tribunal of any applications for review that is receives. The Privacy Commissioner has a right to appear at such proceedings.

The Privacy Commissioner has the power to investigate and conciliate complaints about breaches of privacy by other organisations and individuals as well, however, to date we are unaware of any significant outcomes from complaints to Privacy NSW about non-public sector agencies.

Inconsistencies between the complaint handling and review provisions in the PPIP Act and FOI Act

There are significant inconsistencies between the complaint handling and review provisions in Parts 4 (Division 3) and 5 of the PPIP Act and the equivalent provisions in Part 5 of the FOI Act. These inconsistencies are highlighted in **Annexures B-2** and **B-3** which compare the external review provisions and options available to aggrieved persons.

One major difference between the two models is that while an aggrieved person under the FOI Act, who has made a complaint to the Ombudsman, can then make a review application to the ADT if still dissatisfied, an aggrieved person under the PPIP Act has no such right once they have made a complaint to the Privacy Commissioner.

Another difference is that a complaint to the Privacy Commissioner under Part 4 of the PPIP Act about conduct to which Part 5 applies can only be made about the conduct of a "public sector

agency", whereas a complaint to the Ombudsman under Part 5 of the FOI Act can be about the conduct of "any person or body".

A further problem relates to the role of the ADT under the PPIP Act. This role is to review the "conduct" of public sector agencies in relation to alleged contraventions of information protection principles or privacy codes of practice, or the disclosure of personal information kept in a public register. The effectiveness of such a role is problematic given that:

- the ADT does not have investigatory powers
- the only internal agency information that will be available to the applicant is likely to be the findings of the internal review, and
- onus of proof in such proceedings is most likely to be on the applicant.

This could be one reason why very few of the privacy related cases heard before the ADT to date have been successful.

Applications for review under the PPIP Act

As at 19 April 2004 we are aware of a total of 25 decisions by the ADT (22) and ADT (Appeal Panel (3) in relation to review applications made pursuant to the PPIP Act. From a quick review of these 25 decisions, it appears the applicant was successful in only **two** cases in relation to the substantive issue the subject of the review application. Of these two cases, one decision was overturned on appeal ([2003] NSW ADT 78) and in the other case the ADT decided to take no action ([2004] NSW ADT 7).

Of a further four cases where it appears the applicant was successful in relation to a preliminary procedural or jurisdictional issue, in one the applicant was later unsuccessful in relation to the substantive issue ([2003] NSW ADT 150), in another the decision was overturned by the Supreme Court ([2003] NSW ADT 103), and a third does not appear to have proceeded ([2003] NSW ADT 132).

The nature of the issues considered in the cases heard by the ADT, and the minimal success rate of applicants in relation to the substantive issues the subject of review applications, demonstrate the problems faced by aggrieved members of the public should they decide to seek external review through the Tribunal.

A further problem is that people in real need of privacy protection are unlikely to exercise their rights through a tribunal (or a court). While courts and tribunals can provide enforceable remedies to those with sufficient resources, only a privacy watchdog body with adequate complaint handling powers and resources could look further than just whether or not there was an infringement of privacy in an individual case (ie, at systemic issues and conduct surrounding privacy breaches).

Recommendation

6) Consideration should be given to modifying the external review provisions in the PPIP Act to:

a) place more emphasis on the role of the Privacy Commissioner to review allegations about conduct

b) give the Privacy Commissioner the power to investigate the conduct of individual public officials, and

c) give aggrieved persons the right to make an application to the ADT if dissatisfied with the outcome of a complaint to the Privacy Commissioner.

6. The unnecessary complexity of the regulatory scheme under the PPIP Act

The regulatory scheme established under the PPIP Act is unnecessarily complex and is not user-friendly.

To understand the application of the Act to any particular agency and circumstance it is necessary for practitioners and aggrieved members of the public to be aware of and consider:

- the applicable provisions of the PPIP Act
- whether, and if so how, the PPIP Regulation applies (which contains information about circumstances where a privacy management plan can cover more than one agency and the names of certain agencies that are exempt from certain provisions of the PPIP Act)
- whether any of the 12 current privacy codes of practice are applicable (a further nine are in the course of preparation)
- whether any of the current nine directions made by the Privacy Commissioner pursuant to s.41 of the PPIP Act apply, and
- the provisions of the relevant agencies' privacy management plan (for assistance as to how to exercise their rights under the Act, make a complaint or request internal review).

This level of complexity is an impediment to appropriate compliance by agencies and public officials with relevant privacy requirements and is an impediment to members of the public understanding and exercising their rights under the Act.

Recommendations

7) Consideration should be given to incorporating the operative provisions in the various privacy codes of practice and s.41 directions either:

(a) into a single document, or
(b) into the PPIP Regulation.

8) *The PPIP Act should be amended to rationalise the regulating scheme.*

7. Restrictions on agencies providing personal information to complaint handling bodies in response to preliminary/informal inquiries

The Crown Solicitor has provided advice to the Department of Housing about its ability to disclose personal information to the Ombudsman in response to preliminary/informal inquiries made pursuant to s.13AA of the *Ombudsman Act*. The Crown Solicitor advised that he doubted s.13AA attracts the exemption in s.25(b) of the PPIP Act. On this basis he is of the view that a disclosure by the Department of Housing to the Ombudsman in response to an inquiry made pursuant to s.13AA of the *Ombudsman Act* must comply with s.18 of the PPIP Act.

If correct this means that agencies are prevented from disclosing "personal information" to the Ombudsman, or to any other complaint handling body, in response to informal/ preliminary inquiries – the approach adopted to address most of the complaints dealt with in the general and community services jurisdictions of the Ombudsman. The "personal information" that agencies are prevented from disclosing includes not only information about a complainant but also any information that identifies staff of the agency who had any involvement in a matter.

This has significant implications not only for the Office of the Ombudsman but also for other watchdog bodies who either attempt to resolve matters informally or who have limited statutory powers to require answers to questions.

Recommendations

9) That s.4(3) of the PPIP Act be amended by:

(a) including a provision which mirrors the judgment of the NSW Court of Appeal in the Commissioner of Police v The District Court of NSW and Perrin (1993) 31 NSWLR 606 in relation to information about a public sector official arising out of or relating to the performance of official functions (which would result in a consistent approach under both the PPIP Act and FOI Act); and

(b) expanding s.4(3)(h) to include complaints or notifications made or referred to an "investigative agency" under an Act.

10) Alternatively, including a further exemption clause in the PPIP Act or a relevant provision in the PPIP Regulation which provides that public sector agencies are not required to comply with s.18 if the information concerned is disclosed to an investigative agency for the purposes of enabling it to exercise its complaint handling or investigative functions.

8. Amalgamation of the oversight of privacy and FOI

Privacy NSW is a business unit of the Attorney General's Department, not a separate and independent agency. The staff are employees of that Department and the Department performs the corporate service functions for Privacy NSW, including budget, accounts, payroll, personnel, etc. Further, Privacy NSW uses the Department's IT system. This situation is particularly problematic given that the Department is within the jurisdiction of Privacy NSW in relation to privacy issues.

With less than nine permanent staff, Privacy NSW is not viable as a stand-alone agency.

There are strong arguments in favour of having one organisation with the dual roles of protecting privacy and facilitating Freedom of Information. Such an approach would provide a more integrated and coherent approach to information handling, fostering a better balance between the right to privacy with the need for a safe and open government. It would also reduce duplication, complexity, and confusion for the public and agencies.

The Ombudsman already has considerable expertise in the area of privacy arising out of the Ombudsman's roles in relation to police, community services, telecommunications interception, etc. Further, as the NSW Ombudsman is a complaint handling agency that has jurisdiction in the related area of FOI, integration of Privacy NSW into the Ombudsman would provide an opportunity to properly coordinate and integrate FOI and privacy practice, procedures and regulation.

Another reason why it makes sense to combine the FOI and privacy roles within the Office of the Ombudsman is that it appears that a majority of agencies have delegated their FOI and privacy responsibilities to the same staff. Research commissioned by the Federal Privacy Commissioner and set out in a document entitled "*Privacy and the Community*" (July 2001) indicates that a very low percentage of the public appeared to know where to make a complaint about privacy, and it was far more likely for a member of the public to assume they can complain to an Ombudsman about a breach of privacy than to a Privacy Commissioner. The relevant findings included:

> "*While over one-quarter of the population (26%) knew of the Privacy Commissioner, only 5% mentioned the Commissioner when asked who they would report a privacy breach to. The Ombudsman was most commonly mentioned when asked...who they'd report a privacy breach to, followed by the organisation involved, Consumer Affairs, a lawyer, an MP, and the police – all who received more mentions than the Privacy Commissioner.*" (on page 6)
>
> "*4.21* ***Reporting misuse of personal information***
>
> *When asked to whom they'd report the misuse of their personal information, approximately one quarter of the population (24%) said they didn't know who they'd report it to. The remaining three quarters, however, mentioned the following authorities or organisation, with 5% mentioning the Privacy Commissioner:*
>
> - *Ombudsman (22%)*
> - *...*
> - *the Privacy Commissioner (5%)*" at page 30

The report also compared these figures to the answers to the same questions in a 1994 survey where 14% mentioned the Ombudsman and 2% mentioned the Privacy Commissioner.

It is also relevant to note in relation to this issue that in recent years other Australian States have decided or are proposing to adopt the approach of combining the FOI and privacy functions (for example the Northern Territory, Tasmania and now Western Australia). Further, this appears to be the approach adopted in the various Canadian jurisdictions and is the proposed approach in the United Kingdom.

If Privacy NSW was amalgamated into the Ombudsman's Office, a separate specialist Privacy/FOI team could be established within the Office.

If for whatever reason it is decided that Privacy NSW should not be amalgamated with the Ombudsman, then in our view consideration should still be given to combining the responsibility for FOI and Privacy and establishing a separate agency. However, this alternative approach has several serious shortcomings, for example:

- such a separate agency is unlikely to be viable on its own as it would only have a full time permanent staff of approximately 12 persons

- there will be continuing and significant overlap in the jurisdiction of that body with the NSW Ombudsman in relation to maladministration, particularly concerning conduct of any person in relation to FOI determinations - there would therefore need to be adequate

provision to enable that agency and the Ombudsman to share information, refer complaints or the issues arising out of complaints, coordinate concurrent investigations into related issues, etc.

Recommendation

11) Privacy NSW should be amalgamated with the NSW Ombudsman, including:

a) the transfer to the Ombudsman of the full staff and budget of Privacy NSW, and

b) the establishment of a specialist access to information and privacy team within the NSW Ombudsman's Office.

9. Over-complexity of the definition of "*personal information*"

The definition of 'personal information' in s.4 of the PPIP Act is subject to a list of 12 separate exclusions. This results in an overly complicated definition which is a barrier to effective understanding and implementation of the Act.

Of these 12 exclusions:

- paragraphs (c), (d), (f) and (h) would be unnecessary if the NSW Ombudsman was included under s.27 of PPIP Act with the ICAC, NSW Police, PIC, Inspector of the PIC and NSW Crime Commission as an agency not required to comply with information protection principles, or included in clause 6 of the PPIP Regulation with the Council of the Law Society and the Council of the Bar Association as a body except from the provisions of the Act (discussed further at 10 below)

- paragraph (e) appears to be unnecessary given the provisions of s.20(5) of the PPIP Act (or the amendment proposed in recommendation 2) above) and the provisions of clause 20(d) of Schedule 1 to the FOI Act

- paragraph (i) appears to be unnecessary given the provisions of s.20(5) of the PPIP Act (or the proposed amendment) and the provisions of Division 1 of Schedule 1 to the FOI Act, and

- paragraph (ja) may not be necessary given the provisions of s.20(5) of the PPIP Act (or the proposed amendment), provided a suitable amendment was made to clause 20(c) of Schedule 1 to the FOI Act.

Recommendation

12) The exclusions from the definition of 'personal information' in s.4(3) of the PPIP Act should be reviewed and necessary steps taken to reduce their number to a minimum.

10. Exclusion of the complaint handling, investigation and reporting functions of the NSW Ombudsman and Privacy NSW from compliance with the IPPs

The complaint handling, investigation and reporting functions of the NSW Ombudsman and Privacy Commissioner are for good reason exempt from the operation of the FOI Act (Schedule 2, FOI Act). Given the nature of these roles, both organisations (if they remain separate) should be excluded from the operation of the IPPs in the PPIP Act in the same way as the ICAC, PIC, PIC Inspector, Crime Commissioner and NSW Police are excluded (see s.27, PPIP Act) or the Councils of the Law Society and Bar Association are excluded (see cl.6 of the PPIP Regulation).

The inclusion of the Ombudsman into s.27 of the Act or clause 6 of the Regulation would have minimal impact on the rights of members of the public under that Act in relation to the Ombudsman. Most of the information protection principles in the PPIP Act already either do not apply to the work of the Ombudsman, or the Ombudsman has a specific exemption from any obligation to comply. For example:

- the Ombudsman has a complete exemption under s.24(6) from the provisions of ss.9 & 10 of the PPIP Act (ie, IPPs 2 and 3)
- given the provisions of s.20(5) and s.25, the Ombudsman effectively has complete exemption from ss.13, 14 and 15 (ie, IPPs 6, 7 & 8)
- given the provisions of ss.24(2), 25 and 28(3), and the fact that information is not "*collected*" for the purposes of the Act if it is unsolicited (eg, complaints), the Ombudsman is largely exempted from the provisions of s.17 (ie, IPP 10)
- given the provisions of ss.24(3), 25, 26(2) and 28(3), and the fact that information is not "*collected*" for the purposes of the PPIP Act if it is unsolicited (eg, complaints), the Ombudsman is largely exempt from the provisions of s.18 (ie, IPP 11)
- given the provisions of ss.25 and 28(1), the Ombudsman has a complete exemption from the provisions of s.19 (ie, IPP 12)

Effectively, therefore, the Ombudsman is only subject to four IPPs which basically set out obligations that should be complied with by all public sector agencies in any case, ie:

- s.8 about collection for a lawful purpose of information that is reasonably necessary for that purpose
- s.11 about collection of information relevant to the purpose without intruding to an unreasonable extent on the personal affairs of the individual
- s.12 which relates to the appropriate retention, security and disposal of personal information, and
- s.16 about checking the accuracy of personal information before use.

Recommendation

13) The NSW Ombudsman should be added to the list of agencies in s.27 of the PPIP Act.

11. Exemptions from the Information Privacy Principles

Under the PPIP Act, with the approval of the Privacy Commissioner and Minister, an agency can make a Code of Practice to allow an exemption from, or modification to, any of the IPP's in the Act. Such Codes of Practice effectively repeal or amend parts of the IPP's as they apply to the relevant agency. The PPIP Act does not set any standards to which the Minister must comply when making codes, other than the general statement in s.29(1) that codes may be made "*for the purpose of protecting the privacy of individuals*" (as distinct from weakening that protection). In other words Codes cannot impose a standard higher than the IPPs (s.29(7)(b)).

Recommendation

14) The PPIP Act should provide clearer guidelines for the making of Codes of Practice.

NAVIGATING THE MAZE:
A GUIDE TO THE ALTERNATIVE REGIMES FOR ACCESS TO PERSONAL INFORMATION IN NSW

FOI ACT	PPIP ACT	LG ACT
Application: Documents	**Application:** Information	**Application:** Documents
Scope: All documents, including personal affairs (i.e. matters of private concern to an individual, or information which concerns or affects a person as an individual, whether it is known to other persons or not)	**Scope:** Personal information only (i.e. information or an opinion about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion)	**Scope:** • All documents, including personnel matters and personal hardship of residents and ratepayers
Exclusions from coverage: • Agencies listed in Schedule 2 to the FOI Act (s.9) • Judicial functions of courts and tribunals (s.10) • Matters subject of a Ministerial Certificate (s.25(3))	**Exclusions from coverage:** • Matters excluded from definition of personal information (s.4(3)) • Courts, tribunals and royal commissions (s.6) • Information collected prior to commencement of Part 2 (s.20(3)) [1 July 2000] • Certain functions of agencies listed in s.27	**Exclusions from coverage:** • Correspondence and reports relating to a matter received or discussed at, or laid on the table or submitted to, a meeting when closed to the public (s.11(2)) [this probably overrides ss.12(1) & 12(6)] • Correspondence or reports relating to a matter laid on the table or submitted to a meeting open to the public where the council or committee resolves that they are to be treated as confidential (s.11(3)) • Business papers for matters considered when part of a meeting is closed to the public (s.12(1)) • Minutes of any parts of a council or committee meeting closed to the public (other than resolutions and recommendations) (s.12(1)) Certain parts of DAs or other applications for approval to erect a building (s.12(1A))
Exemptions:	**Exemptions:**	**Exemptions:**

APPENDIX B-1

FOI ACT	PPIP ACT	LG ACT
• Exempt documents (s.25(1) and Schedule) • Substantial and unreasonable diversion of resources (s.25(1)) • Documents available for inspection or purchase (s.25(1)) • Advance deposits not paid (s.22)	• Exempt documents referred to in Schedule 1 to the FOI Act [s.25(1), FOI Act] (s.20(5)) • Information (not in documentary form) that is exempt matter for the purposes of the FOI Act (s.20(5)) • Documents available for inspection or purchase [s.25(1) of the FOI Act] (s.20(5)) • Law enforcement and related matters (s.23) • Certain functions of investigative agencies (s.24) • Lawful authorisation or requirement (s.25) • Benefit to the individual concerned (s.25) • Other exemptions (s.28)	• Allowing inspection would be contrary to the public interest (s.12(6)) • Personnel matters concerning particular individuals (s.12(7)) • Personal hardship of any resident or rate payer (s.12(7)) • Trade secrets (s.12(7)) • Matter the disclosure of which would: – constitute an offence against an Act; or – found an action for breach of confidence (s.12(7)) • Information disclosing a person's place of living if council satisfied that disclosure would place the personal safety of the person or family at risk (s.739) • Marked ballot papers (cl.122, Elections Reg.)
Consultation prior to release: Consultation required prior to releasing documents affecting personal affairs (s.31)	**Consultation prior to release:** • Consultation required prior to releasing documents containing information (and possibly information not in documentary form) affecting personal affairs [s.31, FOI Act] (s.20(5)) • Consultation required where personal information is to be used by the agency for a purpose other than for which it was collected (s.17(a))	**Consultation prior to release:** No consultation required
Documentation: • Applications must be in writing (s.12) • Determinations must be in writing (s.28)	**Documentation:** • Applications need not be in writing • Determinations need not be in writing	**Documentation:** • Applications need not be in writing • Determinations need not be in writing

FOI ACT	PPIP ACT	LG ACT
Forms of access: Applicant can choose form of access (s.27)	**Forms of access:** Applicant cannot choose form of access	**Forms of access:** • Applicant cannot choose form of access • Inspection free of charge (s.12(1)-(3)) • Copies can be made or obtained from the council (ss.9(2), 12B) [except for electoral rolls, candidate information sheets and building certificates]
Fees and advance deposits: Fees and advance deposits can be required or charged subject to the regulations (s.21, 22 & 67)	**Fees and advance deposits:** No provision [prior to commencement of HRIP Act]	**Fees and advance deposits:** No provision [other than a reasonable copying charge for documents to be taken away (s.12B(3))]
Protections for agencies and staff • Protection in respect of actions for defamation or breach of confidence (s.64) • Protection in respect of certain criminal actions (s.65) Protection in relation to personal liability (s.66)	**Protections for agencies and staff:** No protection for agencies or staff [prior to commencement of HRIP Act]	**Protections for councils and staff:** Protection in respect of actions, liabilities, claims or demands if matters or things done in good faith for the purpose of executing any Act (s.731)
Procedures for dealing with applications for access to or amendment of documents:	**Procedures for dealing with applications for access to or amendment of information:**	**Procedures for dealing with applications for access to or amendment of information:**

FOI ACT	PPIP ACT	LG ACT
• Applications (s.17) • Persons who are to deal with applications (s.18) • Incomplete or wrongly directed applications (s.19) • Transfer of applications (s.20) • Advance deposits (ss.21-22) • Information stored in computer systems (s.23) • Determination of applications (s.24) • Refusal of access (s.25) • Deferral of access (s.26) • Forms of access (s.27) • Notices of determination (s.28) • Consultation (ss.30-33) • Applications for amendment of records (s.40) • Persons who are to deal with such applications (s.41) • Incomplete applications (s.42) • Determination of applications (s.43) • Refusal to amend records (s.44) • Notices of determination (s.45) • Notations to be added to records (s.46)	• Consultation (s.31, FOI Act - per s.20(5), PPIP Act)	• No procedures for dealing with applications for access to documents [other than reasons being given to council and public for refusal of access (s.12A)] • No provision in the Act for the amendment of documents [other than for amendment of particulars in electoral rolls – s.303]
Limits on disclosures of personal affairs to 3rd parties:	**Limits on disclosures of personal affairs to 3rd parties:**	**Limits on disclosures of personal affairs to 3rd parties:**

FOI ACT	PPIP ACT	LG ACT
Disclosure unless: – disclosure would involve the unreasonable disclosure of information concerning the personal affairs of any person (cl.6, Schedule 1); or – the document is otherwise exempt under a clause of Schedule 1 to the FOI Act	No disclosure of 'personal information' unless: – disclosure directly related to the purpose for which the information was collected and the agency has no reason to believe that the individual concerned would object to the disclosure; – where personal information requested by the applicant includes information about a 3rd person: ☯ the 3rd person is or is reasonably likely to be aware that information of that kind is usually disclosed to the applicant; or ☯ the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the 3rd person (section 18) – the document is not an exempt document under a clause of Schedule 1 to the FOI Act (s.20(5)); or – the information (not in documentary form) is not exempt matter for the purposes of the FOI Act (s.20(5))	Discretionary disclosure of parts of documents dealing with: – personnel matters; or – personal hardship of any resident or ratepayer (ss.12(6), (7))

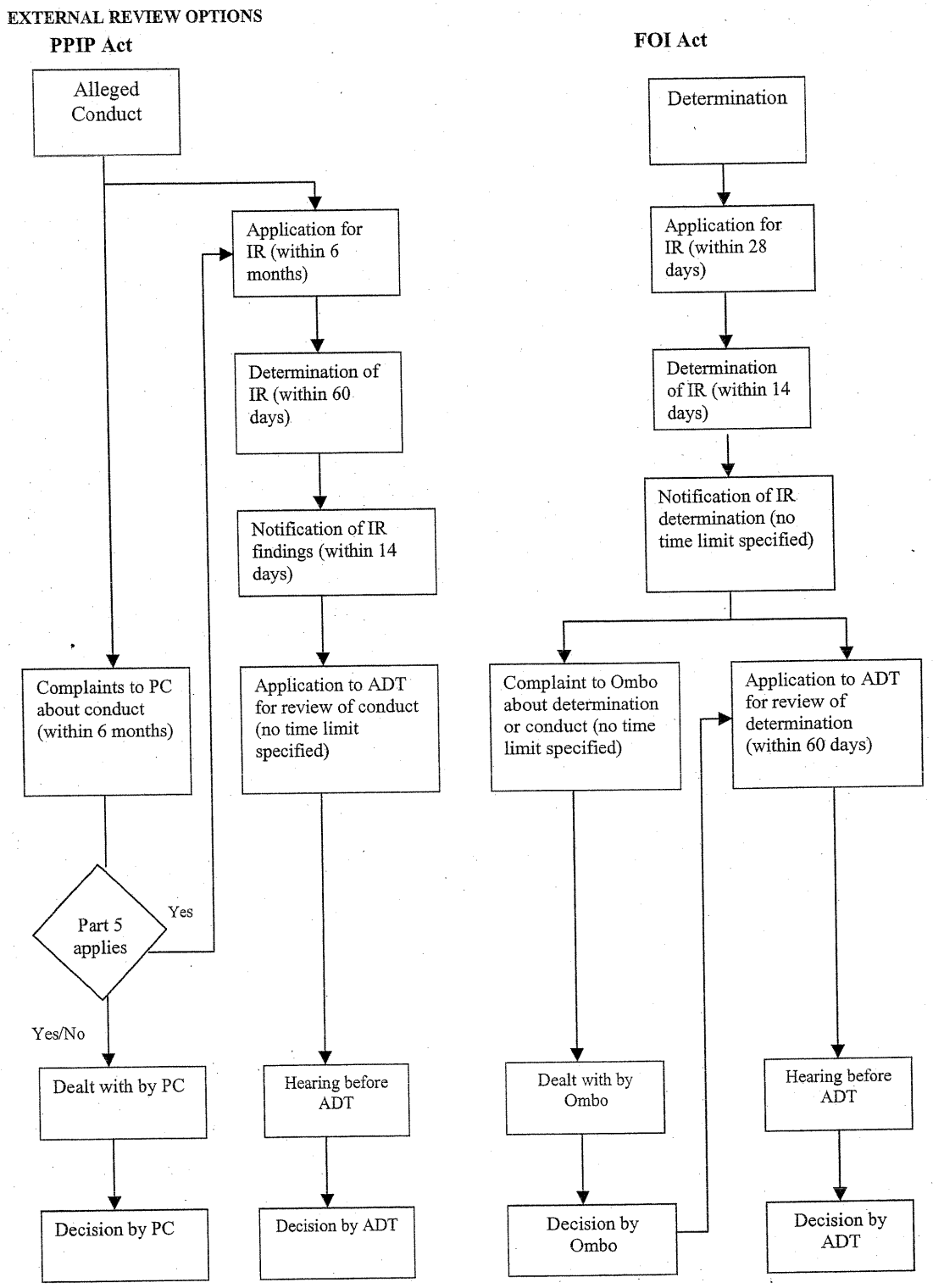
FOI ACT	PPIP ACT	LG ACT
Reasons: Reasons for refusal of access must be given to applicant (s.28(2)(e))	**Reasons:** No reasons required (unless there is a subsequent appeal to the ADT)	**Reasons:** No reasons required to be given directly to applicant (reasons for refusal of access must be given to the council and made publicly available (s.12A))
Deemed refusals: • Initial applications – 21 days (s.24(2)) [subject to extension in certain circumstances – s.59B] • Internal reviews – 14 days (s.34(6))	**Deemed refusals:** • Initial applications – no provision • Internal reviews – 60 days (s.53(6))	**Deemed refusals:** Requests – no provision
Complaint handling: NSW Ombudsman (ss.52 - 52A)	**Complaint handling:** NSW Privacy (ss.45 - 51)	**Complaint handling:** • NSW Ombudsman • Department of Local Government
Merit review: • ADT (ss.52B - 58) • Onus of proof on agency/respondent (s.61)	**Merit review:** • ADT (s.55) • Onus of proof on applicant	**Merit review:** • No provision for review by external body • Council must review any restriction on access to information within 3 months and then every subsequent 3 months on request (s.12A) • Persons may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act (s.674)

APPENDIX B-2

COMPARISON OF EXTERNAL REVIEW PROVISIONS

	PPIP Act	FOI Act
Complaint handling body:	Privacy Commissioner	Ombudsman
Complaints can be made by:	Any person or on own motion of PC (s.45(1))	Any person or on own motion of Ombudsman (s.52(1))
Complaints can be made about:	Alleged violation of, or interference with, the privacy of an individual (s.45(1)) Conduct to which Part 5 applies, being: • the contravention by an agency of: - an IPP; or - a Privacy Code of Practice; • the disclosure of personal information kept in a public register (s.52(1))	Conduct of any person or body in relation to a determination made by an agency under the FOI Act (s.52(1))
Preconditions for complaints to watchdog:	Nil	• Internal review or determination by CEO • No application to ADT (s.52(2))
Time limits	• 6 months re internal reviews (s.53(3)) • 6 months re complaints (s.45(5)) • Nil specified in PPIP Act re review applications	• 28 days re internal reviews (s.34(2)) • Nil re complaints • 60 days of determination by agency or decision by Ombudsman re review applications (s.54)
Role of watchdog body re internal reviews	Must be notified of IR applications. Must be kept informed of progress of IR and outcome. Can make submission to agency re the application (s.54(1))	Nil
Complaints to watchdog and review applications to ADT	Can be made concurrently	Can not be made concurrently (ss.52(2) & 53(2))
Role of watchdog body re reviews by ADT	Right to appear and be heard (s.55(7))	Nil
Onus of proof before ADT	On applicant (probably)	On respondent (s.61)
Subject matter of review by ADT	Conduct (the subject of IR application to an agency)	Determinations (made by an agency or Minister)

APPENDIX B-3



Submission to Review of PPIP Act – April 2004

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Attachment E
(Q. 11(i) and (ii))

Q.11(i) & (ii)

8 June 2004

NSW Ombudsman

Level 24 580 George Street
Sydney NSW 2000
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Web www.ombo.nsw.gov.au

The Hon A B Kelly, MLC
Minister for Local Government
Level 34, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Re: Tape recording of council meetings

In May 2004 Privacy NSW published a *User Manual* about the disclosure of tape recordings of council meetings. The purpose of this document was to assist councils to interpret the *Privacy and Personal Information Protection Act* (PPIP Act).

We are concerned that the advice in the *User Manual* will lead to confusion and uncertainty, and inappropriate decision-making by councils.

The document refers extensively to the Information Protection Principles (IPPs) in the PPIP Act and to the requirements of ss.10, 11 and 12 of *The Local Government Act* (LG Act). Our concern is that the document ignores the related obligations on councils under the *Freedom of Information Act* (FOI Act), other than a passing reference to "*the FOI Act*" in parenthesis on the final page.

In relation to the scope of the *User Manual*, while there is a statement in the introduction that its purpose is to answer a particular set of questions, the way the document is written it is clearly reasonable for a reader to assume that it sets out a complete picture in relation to the taping of meetings and access to such tape recordings – in the absence of any reference to any consideration of FOI, this is clearly misleading.

When considering the advice contained in the *User Manual*, it is important that councils should keep in mind their obligations under the FOI Act. In this regard s.5 of the PPIP Act provides that the provisions of the FOI Act are not affected by the PPIP Act. It is also relevant that s.25 of the PPIP Act provides an exemption from IPPs where non-compliance is lawfully authorised or required. The IPPs in the PPIP Act are therefore no impediment to the release of information by councils pursuant to an obligation under the FOI Act. Additionally, the IPPs in the PPIP Act do not lessen any obligation on a public sector agency or rights of an FOI applicant under the FOI Act. This issue was recently addressed by the ADT in *Waite v General Manager, Hornsby Shire Council* [2004] NSW ADT 93 where Judicial Member Higgins commented:

> *"In this case, the tape recording is a recording of a public meeting of Council, an elected body where the participants at that meeting knew it was being recorded. However, the purpose of the recording was to make accurate minutes of the meeting. Another stated reason was for the purpose of resolving any future dispute about the exact terms of what was or was not resolved at a meeting. Having regard to these factors alone, in the opinion of the Tribunal, the public interest in favour of disclosure outweighs the public interest in not disclosing it. There is clearly a public interest in the transparency of decision-making by an elected body of government. It was for this reason the meeting was a public meeting. At the same time it cannot be said that disclosure of a contemporaneous record of that meeting would jeopardise the integrity of Council's decision-making process as all members of the public were invited to attend and address the Council should they wish to."*

In relation to the issue as to the reasons why councils tape record their meetings, we are aware that various councils do so for a range of reasons, including:

- to assist in the preparation of the minutes of the meeting
- to provide a full and accurate record of the debates or discussions that took place at a meeting, and
- to record the reasons why decisions were made, for example to assist staff to identify reasons why development applications were refused or particular conditions of consent were imposed in circumstances where such decisions were made by council in the absence of or contrary to recommendations contained in reports produced by staff.

We are also aware that tape recordings of council meetings have provided evidence for persons who believe their reputations have been damaged by statements made at a meeting. In this regard the taping of meetings helps to ensure that participants in such meetings are careful about the comments they make that could affect the reputations of others.

The *User Manual* also seems to ignore the implications of s.4(3)(b) & (5) of the PPIP Act. When considering a request for access to the tape recording of a council meeting, a relevant matter for councils to consider is the provisions of s.4(3)(b) of the PPIP Act which exclude from the definition of "*personal information*" under that Act "*information about an individual that is contained in a publicly available publication*". While there have been no court or tribunal decisions on this point, it may well be that the minutes of and business papers for council meetings, relevant notices in local newspapers, etc would be considered information in publicly available publications for the purposes of that definition.

In their consideration of the tape recording issue, it is also relevant for councils to note that IPPs 1-4 and 10-11 (set out in ss.8 – 11 & 17 – 18, PPIP Act) only apply to personal information that is "*collected*" by the agency concerned (see the decision of the Administrative Decisions Tribunal in *KD v Registrar, NSW Medical Board* [2004] NSWADT 5). In this regard s.4(5) of the PPIP Act provides that "*personal information is not **collected** by a public sector agency if receipt of the information by the agency is unsolicited*". In other words, for the purposes of the PPIP Act "*personal information*" is not "*collected*" where the "*information or an opinion about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion*" is unsolicited (ie, not sought or requested) by the agency concerned. A clear distinction can be drawn between a council inviting persons to attend and speak on issues flagged in an agenda, and a council inviting persons to attend a meeting for the purpose of providing "*information or an opinion...about **an individual** whose identity is apparent or can reasonably be ascertained from the information or opinion*" (s.4(1), PPIP Act) (emphasis added). It is also relevant to this issue that councils are required by law to allow the public to attend council meetings, other than in certain very limited circumstances (ss.9-10D, LG Act).

With reference to s.12(6) of the LG Act, it can certainly be argued that it is drafted in such a way as to reasonably permit or contemplate non-compliance with the requirements of the relevant sections of the PPIP Act (per s.25, PPIP Act). This argument is supported by the fact that the exceptions from the requirement to comply with s.12(6) (which are set out in that sub-section and sub-sections (7) and (8)) specifically address privacy and related issues such as personnel matters, personal hardship, breaches of confidence, embarrassment, etc.

In summary:

- the IPPs in the PPIP Act do not restrict or limit the obligations on a council under the FOI Act where an FOI application is made for a copy or a transcript of a tape recording of a council meeting

- when councils are considering an application for access to personal information under the PPIP Act, for the purposes of that Act information about an individual contained in a publicly available publication is not "*personal information*", and personal information is not "*collected*" for the purposes of IPPs 1-4 & 10-11 (ie, ss.8-11 & 17-18) if receipt of the information was unsolicited by the council, and

- when councils are considering a request for access to documents under s.12(6) of the LG Act, it may well be that s.25 of the PPIP Act exempts them from the need to comply with IPPs 2-3, 6-8 & 10-12 (ie, ss.9-10, 13-15 & 17-19).

I suggest that consideration be given to:

- the provision of information to councils to clarify the current situation, and

- amending s.12 of the *Local Government Act* to put beyond doubt that the IPPs in the PPIP Act are not an impediment to releasing information under that section.

Yours sincerely

Bruce Barbour
Ombudsman

cc: Mr Garry Payne
Director General
Department of Local Government
Locked Bag 3015
NOWRA NSW 2541

Chapter Four - Transcript of Proceedings

REPORT OF PROCEEDINGS BEFORE

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

INQUIRY INTO TWELTH GENERAL MEETING WITH THE NEW SOUTH WALES OMBUDSMAN

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At Sydney on 30 November 2004

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The Committee met at 2.00 p.m.

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PRESENT

Mr P. G. Lynch (Chair)

Legislative Council	**Legislative Assembly**
The Hon. P. J. Breen	Mr G. Corrigan
The Hon. J. C. Burnswoods	Ms N. Hay
The Hon. D. Clarke	Mr M. J. Kerr

BRUCE ALEXANDER BARBOUR, New South Wales Ombudsman, Office of the Ombudsman, 580 George Street, Sydney,

CHRISTOPHER CHARLES WHEELER, Deputy Ombudsman, Office of the Ombudsman, 580 George Street, Sydney,

STEPHEN JOHN KINMOND, Deputy Ombudsman (Community Services Division) and Community and Disability Services Commissioner, Office of the Ombudsman, 580 George Street, Sydney,

GREGORY ROBERT ANDREWS, Assistant Ombudsman, General Team, Office of the Ombudsman, 580 George Street, Sydney, and

SIMON JUSTIN COHEN, Assistant Ombudsman, Police Team, affirmed and examined:

ANNE PATRICIA BARWICK, Assistant Ombudsman, Children and Young People, Office of the Ombudsman, 580 George Street, Sydney, sworn and examined:

CHAIR: Welcome to this Committee hearing. I particularly welcome you, Mr Cohen. I think this is the first time you have appeared before the Committee.

Mr COHEN: Thank you.

CHAIR: Mr Barbour, the Committee has received a submission from you in the form of answers to some questions on notice. I take it that you seek to have those answers incorporated as part of the evidence.

Mr BARBOUR: Thank you.

CHAIR: I also formally table the letter from the Premier to this Committee, dated 13 October 2004, which has been referred to in one of the answers.

Document tabled.

Mr Barbour, do you wish to make an opening statement?

Mr BARBOUR: Yes, thank you. As you have correctly pointed out, the Committee is meeting Simon Cohen for the first time today. He now holds the position of Assistant Ombudsman in our police area, which was previously held by Steve Kinmond. Steve, who was the Assistant Ombudsman for police for seven years, is the new Deputy Ombudsman, Community Services. As a consequence, he also holds the position of Community and Disability Services Commissioner. Robert Fitzgerald, who previously held that position, left the office to take up a position with the Productivity Commission. I take this opportunity to publicly recognise his considerable contribution not only to improving the provision of community services in this State but also to the successful amalgamation of the Community Services Commission with the New South Wales Ombudsman's Office.

As the Committee has seen from the detail contained in the most recent annual report, our office continues to be very busy. I do not propose to duplicate this afternoon what is set out in the annual report or in the extensive answers that we have provided to the Committee in response to its questions on notice. However, I will mention some highlights in relation to the work we have undertaken since our last meeting with the Committee. We finalised more than 9,000 formal matters in 2003-04. This included dealing with more than 3,000 complaints about police officers and more than 1,600 allegations notified to our office pursuant to our child protection jurisdiction. We also dealt with more than 26,500 informal matters, wherever possible striving to provide quick and effective resolution or advice to those seeking our assistance. In the five months since 30 June not covered by our annual report, we have received more than 3,400 additional complaints, including approximately 1,700 about police officers and more than 600 notifications of reportable allegations to our child protection area. We have in this period handled more than 10,000 matters informally.

Over recent years, we have substantially increased the number of formal investigations that we have undertaken. Since July 2001, we have finalised more than 150, 42 of which were in 2003-04. These are generally large projects that are both time consuming and resource intensive. As honourable members know, we made a strategic decision to conduct more formal investigations several years ago. In the majority of cases our recommendations made at the conclusion of those investigations have been implemented. We also have a high success rate in resolving complaints without the need for a formal investigation. These are cases in which we may have some written correspondence with an agency to ask questions, clarify issues or explain obligations. In more than 60 per cent of the complaints we received about the public sector the agency concerned made a new decision, apologised to the complainant or took some other action to address the concerns raised.

We have made two special reports to Parliament in the past 12 months. One related to those people particularly vulnerable who require assistance from the supported accommodation assistance program and who in our view were being improperly excluded from those services. We made extensive recommendations on how agencies could improve their policies and practices and how the Department of Community Services [DOCS] should support that change. The other special report to Parliament raised our concerns about the inadequacy of services being provided by the Department of Ageing, Disability and Home Care [DADHC] to family with children and young people with a disability. In our answers to the Committee's questions on notice we have supplied an update on the progress we have made with both DOCS and DADHC to address the problems highlighted in both of those reports.

We have also continued to make our presence felt in regional New South Wales. In 2003-04 we have made almost 50 visits to correctional centres and juvenile justice centres and we have conducted more than 70 workshops and briefings, making more than 80 presentations and speeches, many of them throughout regional New South Wales. In addition, we have distributed more than 14,000 information kits, guidelines and newsletters. This work is particularly important for those who are isolated because they are either incarcerated or because they live in remote parts of New South Wales. We endeavour to ensure that our services are easily accessible to all people within the State.

This year we also published a range of reports, including discussion papers relating to four of our 12 legislative reviews: Police Powers (Drug Detection Dogs) Act; Police Powers

(Internally Concealed Drugs) Act; the Children (Criminal Proceedings) Amendment (Adult Detainees) Act; and firearm and explosive and detection dogs legislation. I have available for the Committee copies of our most recent brochure on our current legislative reviews, which will provide the Committee with full and updated information on the progress of each of these reviews. We have also published this year two issues papers, one on the Protected Disclosures Act based on the experience that we have in interpreting and trying to implement the scheme and from our interaction with staff in other public sector agencies, and the other on complaint handling in universities, which utilised the results of surveys conducted of each New South Wales university in respect to their own complaint handling practices and procedures.

Clearly, it is the public interest that underpins our work. We feel that it is important at times to put ideas out in a discussion format to facilitate debate and to encourage discussion on significant policy issues that affect many people. As honourable members are also aware, we now prepare four annual reports: our traditional annual report, which looks at the work of the entire office; a report on the work of the official community visitors, which is about to be tabled; a report on our role in respect of controlled operations, which has been tabled; and on our newest function, reviewing the deaths of certain children and young people and people with a disability. Our report in relation to reviewable deaths I expect to table in Parliament next week. This jurisdiction has led to the review of the deaths of 247 people until the end of December 2003. Given that this is the newest function of the office, I thought it might be appropriate to provide a little more information about this role.

Since December 2002, we have had the responsibility for reviewing the deaths of people with a disability in care and certain children. Children's deaths that are reviewable are those where the child or their siblings was reported to the Department of Community Services within three years of their death, the child died while in care or in detention, or the child may have died from abuse or neglect or in suspicious circumstances. The deaths of people with a disability are reviewable if the person died while living or temporarily absent from residential care or a licensed boarding house. Our work in this area focuses largely on systemic issues and recommending changes to policies and practices that might prevent or reduce untimely deaths. We also have the capacity to review and as necessary inquire into the circumstances of individual deaths. This new function, as honourable members can imagine, has provided some significant challenges to the office. Unlike other areas of our work, our role in this area is supported by two specialist advisory committees.

On the corporate front we have reviewed our corporate plan this year and in its place have developed a new statement of corporate purpose, a copy of which has been provided to the Committee with the questions on notice. The statement of corporate purpose sets out the purpose of our organisation and reflects our functions and work in improving the provision of community services. We are currently in the process of finalising team plans and action plans that will underpin this statement and which will together create our corporate plan.

You will see from the statement of corporate purpose that we maintain our core focus on promoting better administration and provision of services for people in New South Wales. One of our goals is also, however, to be a leading watchdog agency. I believe that in part our progress in achieving this goal is demonstrated by the regard in which our office is held around Australia and, to some surprise I discovered earlier this year, around the world. Since our last meeting with the Committee we have experienced a significant increase in requests

for technical advice and support from other ombudsman offices around the country as well as from other State and Territorial governments. Our expertise in the areas of protected disclosures, non-criminal investigatory practices, complaint handling and good administrative practice as well as with ombudsman legislation generally, appears to be well recognised and entrenched throughout Australia.

As you know, we have a significant publications program to provide guidance not only to agencies within New South Wales but which also we now see are used outside of New South Wales. We are the largest ombudsman office in Australia and I believe there is significant benefit in our maintaining close relations and a supportive relationship with other offices. This year I attended the quadrennial conference of the International Ombudsman Institute. That conference had over 400 delegates representing over 100 ombudsman offices from around the world. During the conference I was pleased to be re-elected the Regional Vice President for that institute, and was pleasantly surprised to hear very positive comments from a number of people attending about our publications and the fact that they were used by many agencies overseas as templates or model guidelines for agencies within their own jurisdiction.

We have also continued to host this year a number of visiting international delegations. We continue to do this on a cost-recovery basis and we charge an appropriate fee for the use of our services. In my view there is little point in organisations reinventing the wheel where their functions and practices are largely the same as ours. If other offices are able to use our material it is a further indication that we are getting it right here in New South Wales and that we continue to help improve public administration beyond our own jurisdiction. It is a credit to the staff of our office, both past and present, that we have developed this reputation and are in such good standing.

We have also commenced work this year on what is likely to be a long-term project designed to assist ombudsman offices in the south-west Pacific. The Committee members who were on our Committee at the time will recall that our office hosted the 20th Australasian and Pacific Ombudsman Regional Conference here in Parliament House in November 2002. At that conference it was decided that formal arrangements were needed to provide smaller Pacific ombudsman offices with support to give them an opportunity to share experiences and to improve in terms of their involvement with their particular countries. That discussion led to the formation of a new group called the Pacific Islands Ombudsman Forum and a proposal from that group that Australia should undertake and assist those member countries with an institutional strengthening project to help their offices.

Because of the unique cultural, social and political realities facing each of those offices, the first stage of this project is identifying each of those office's precise needs. We are working with the Commonwealth Ombudsman's office, which has funding approved by AusAID, to finance the first stage of this project. Clearly, strong ombudsman offices in the region will help promote good governance in their respective countries and contribute to regional stability, an important goal not only for Australia but also for New South Wales.

I would also like to update the Committee on some of the work that we have done to address an issue that I specifically raised with the Committee at our last meeting. You may recall that I talked about my developing concern that some people in the community, including members of Parliament, did not have as good an understanding of the role and

functions of our office as I would have liked. Some of the things that we have done to try to address this include doing considerable work on our web site to not only redesign it and make it more user-friendly but also to allow more information to be placed on the site and to make it more comprehensive and easy for people to use. We have also created a new newsletter called *Communicate*. All of you would have received several copies of that by now. Its focus is to provide information about our work in the community sector. We have a circulation list of 6,000 for that particular publication.

As I indicated earlier, we have continued to make regular presentations to community and other interest groups about our office, and we have recently held two briefing sessions for staff of members of Parliament, giving them information about our work, what we do and how we do it, and providing them with sufficient contact information should they need our assistance. Most of the attendees were electorate staff and we understand from feedback received to date that they have found that process very beneficial.

I mentioned in one of my earlier addresses to the Committee that one of the things I have learnt as Ombudsman over the years is to always expect the unexpected. Regrettably, one of the challenges that we have had to face this year, which was unexpected, was a budget cut of approximately 3 per cent, or $500,000. This cut was not only applied to our office but was also applied largely and reasonably uniformly across most agencies in the State. As the Committee knows, the majority of our budget is directly related to salary cost for our staff and as a relatively small organisation, a cut of this magnitude means that we must develop strategies for both the short and long term to manage the shortfall. Unfortunately, those strategies have included a reduction of staff in the office through not filling contracts that conclude, and in some cases not replacing staff when they leave.

We will, as always, continue to evaluate the way in which we do our work to try to achieve continuing efficiencies, but in the business of handling complaints and the oversight of government and non-government agencies, a budget cut of this size will mean that in the longer term we will have to cut down in some areas the work that we currently do. One of the strategies that we may need to employ will be to decline more complaints that we receive at first instance. Of course, I am reluctant to do this and I will only do it if it becomes absolutely necessary to do so.

Lastly, an opportunity like this in the public arena provides me with the facility to talk about the good work and achievements of my office, not because of me as such but really because of the continuing and significant support and work of my staff. I commend them to the Committee for their continued effort and enthusiasm, which they bring unfailingly to this difficult work. Thank you for the opportunity to make that address, Mr Chair. Myself and senior staff are most happy to answer any questions the Committee has.

CHAIR: Just a couple of issues arising out of your opening address. You indicated the decision to increase the number of formal investigations. What was the basis of that change in approach, and has it been justified? Have the aims you hoped would be achieved been achieved?

Mr BARBOUR: I think we have developed a more strategic approach to investigations. I think that until the latter part of the 1990s investigations were traditionally done as a last resort and where we were not able to achieve particular outcomes that we were seeking

through informal means. That was partly due to the fact that they required a great deal of additional resources and there was a question about the validity of them. My view, and the view of my senior staff, has been over the last few years that there are significant benefits in doing investigations, particularly in areas where we identify systemic issues. So the focus, in a strategic sense, has been on being very clear about identifying cases or matters that are brought to our attention through any number of areas of our jurisdiction and targeting those areas so that we do very targeted investigation work.

You will have seen in our annual report that we provide a lot of detail about the investigations undertaken this year and some of the ones that were concluded last year, and those give a flavour, I think, for the very strategic approach to those particular investigations.

CHAIR: One of the other issues you raised in your opening remarks related to the legislative reviews carried out of the various bits of legislation. As I read the answers you provided to the questions on notice, the best turnaround time between a review going to a Minister and it being tabled in Parliament was about a month; there was one where there was a four-month delay, one where there was a seven-month delay, and one where it still has not been tabled some considerable time since. I am wondering whether you think there is some merit in having all of those legislative reviews done on a standardised basis, that is, that there be a statutory period in which it must be tabled in Parliament? I am also wondering whether you were given any reasons as to why there were delays of four months and seven months in some of them finding their way to being tabled?

Mr BARBOUR: Certainly our preference is for any legislative review that we undertake to have within the legislation that provides for that review, provision for the report to be tabled in Parliament as soon as possible. My preferred position would be for the Ombudsman to table it in Parliament once it is concluded. We always conduct appropriate discussion and communication with those parties that have an interest in the matter. So by the time we finalise our report there will have been a copy of our provisional thinking and our provisional report provided to those agencies and/or Minister relevant for the particular task.

If our preference is not met then certainly I think the next preferable course would be for there to be a time period set out in the legislation under which the Minister ought table the report in Parliament. Ideally I would think that would be within a 28-day period. In relation to some reports I can see there being a benefit for the Minister to obtain advice and to be in a position to be able to respond to the issues that are raised in the final report. So that would be my second preference. We have been provided with reasons why the reports have not been tabled expeditiously; those reasons are not necessarily reasons that I would believe necessarily preclude the tabling of the report more expeditiously.

CHAIR: While we are talking about reports being tabled and given to Ministers, in those cases where you directly table the report in Parliament are they often given to Ministers prior to that?

Mr BARBOUR: You mean a standard report to Parliament?

CHAIR: Yes.

Mr BARBOUR: Generally, if the report is a report which has come out of an investigatory process, under the Ombudsman Act we are obliged, where we have done an investigation, to provide a draft report to the Minister and provide an opportunity to the Minister for a consultation. So if a report to Parliament has come out of that process then the Minister is certainly aware of the matters the subject of the report. It is my general practice prior to tabling a report to Parliament to advise the relevant Minister that we are proposing to do that and our practice with our full annual report, and also with other reports, is to provide a copy of that only shortly before we table it.

CHAIR: And it is a copy of the final report?

Mr BARBOUR: That is correct.

CHAIR: That cannot possibly be altered and it is more as a matter of courtesy that it is given to a Minister shortly before it is tabled?

Mr BARBOUR: That is correct. If we were under any concerns about content in the report and we believed that the Minister was an appropriate person to consult about that content, then I would have no hesitation in doing that. But, generally, that would not be the case.

CHAIR: I think the only other thing I wanted to raise out of your opening comments was about the 3 per cent budget cut. What impact has that had to date?

Mr BARBOUR: It has had a fairly significant impact. This particular budget cut comes after a range of small cuts and also unfunded salary increases to employees within the office. The net effect of these has meant that over the past three years our budget, in net terms, has been decreased by in excess of $1 million. That is a significant cut. To date, we have managed the budget cut by not renewing contracts for some contract staff that we have had in to do specific projects, and also with any temporary staff or people that are leaving particular positions we assess whether or not those positions are vital to particular work we are doing before we automatically refill the positions.

At this stage we are managing, but my concern is that as we get more and more work, which is traditionally the role of the Ombudsman now, and also as these cuts across the public sector perhaps bite into other agencies, we might see them in themselves causing an increase in the work referred to us, which will place us in a more difficult position again.

CHAIR: I take it these concerns have been relayed to the Government prior to this?

Mr BARBOUR: Yes, they have. However, I have not taken the view, to date, that I should mount a significant campaign against them because they were cuts that were applied to all public sector agencies with very few exceptions. However, if they become more significant in terms of consequences, certainly we will raise the issue more formally and seek some sort of budgetary supplementation.

CHAIR: When you say they were applied to all government agencies, were they applied also to the other investigative agencies?

Mr BARBOUR: My understanding is that they were applied to all investigative agencies. With the larger agencies it is a much more significant impost. For example, NSW Police had to find savings of about $30 million, which meant a significant number of staff were not reappointed.

CHAIR: I do not pretend to be an expert on that, but my recollection was that that related particularly to administrative staff within NSW Police, which means that you could be a bit more specific in those cuts and a bit more targeted than they seemed to have been with the Ombudsman.

Mr BARBOUR: Clearly large agencies have a lot more flexibility in how they apply the cuts. In an agency like us, where our administrative costs are very lean, the significant cost is salaries, as I said in my opening. They represent usually between 70 and 80 per cent of our total budget. It is very difficult with the remaining 20 per cent, which is already very lean, to find additional savings. That means that those sorts of cuts, of necessity, translate to staffing positions.

CHAIR: Question on notice No. 2 relates to special reports to Parliament. With regard to the report on assisting homeless people, you have indicated that the Department of Community Services [DOCS] did not support the recommendation that the revised Supported Accommodation Assistance Program [SAAP] standards should prescribe minimum standards in addition to articulating best practice solutions. How does the recommended model differ from the continuous quality improvement model supported by SAAP agencies? Has DOCS moved towards identifying clear requirements in service specifications?

Mr BARBOUR: I suggest that Mr Kinmond answer that.

Mr KINMOND: We are reasonably comfortable with their response in the sense that we simply said that there should be minimum benchmarks. They have come back and said that they propose a continuous improvement process. Essentially we have said that our position in that regard, provided that there are some basic minimum standards, the idea that services will be assessed against whether they are improving over time is probably an acceptable process. But the devil will be in the detail and we will need to follow up that issue to see how it works in practice.

Mr BARBOUR: Also, this is a particularly problematic area because the SAAP agencies, DOCS, a range of advocacy groups and our own office do not necessarily agree on the way forward. There is no doubt that there needs to be some greater degree of co-operation with the Commonwealth, which is involved in this process, also the SAAP agencies in terms of ensuring that the group that we largely focused on are appropriately supported, whether it be in SAAP agencies or in some other form of assisted accommodation.

CHAIR: One of your answers was that DOCS had allocated resources to SAAP peak agencies for the development of a risk assessment tool for SAAP agencies. Which agencies are the SAAP peak agencies? How many SAAP agencies would be expected to utilise such a tool? Will you be monitoring the success or otherwise of that initiative?

Mr KINMOND: There are the women's refuges, and the representative of the youth agencies, which might well be Youth Action and Policy Association of New South Wales

[YAPA], and also the agency that represents the general SAAP agencies. Essentially they have set aside $40,000 for the development of a risk assessment tool. We see that as an important step, because it will be able to be rolled out to all agencies so that they can make an informed decision as to whether they should exclude an individual from a SAAP service. So it should be a much more rigorous process.

Mr BARBOUR: There was a, if you like, a chicken and egg situation. SAAP services felt that because of occupational health and safety, lack of training of staff and various other issues they needed to have a policy in place which basically did not drill down the actual risk of a person. They were judged, if you like, superficially. That process will allow a more sophisticated approach to assessing whether someone who can be described as having, for example, a mental illness really has a mental illness which will cause difficulties for other residents or staff in a particular program.

Mr MALCOLM KERR: You mentioned that there was no agreement in relation to the way forward. Have people identified the paths that they want to follow?

Mr BARBOUR: The difficulty in this area is that the nature of the people for whom SAAP are providing accommodation do not easily or comfortably fit within one particular area of responsibility. There are women who are escaping from abusive households, people living on the streets, people with mental illness and so on. The reason it is difficult to get agreement on the way forward is because it is difficult to get agreement on who is ultimately responsible for each category and where their support ought properly arise. One of the really interesting consequences and outcomes of our report to Parliament and the work we have done in this area is that we have been able to bring parties together much more, to sit down and work through some issues. As I said earlier, we need to engage the Commonwealth to some extent, because it provides a great deal of funding to support those programs.

Mr MALCOLM KERR: Do the parties advocate different directions forward?

Mr BARBOUR: They provide different views around what ought to be the priorities and what the models are. As we indicated in our answer is to the questions, DOCS has suggested that there needs to be a program to improve the way in which those places are managed, rather than actually deal with some of the existing problems. Others have different views. I am not sure whether there is necessarily a right or wrong way of doing it. The really positive thing for us is that everyone is talking and we are now able to move forward on some of those disagreements.

CHAIR: Question on notice No. 3 deals with the DOCS Helpline. Despite the measures taken by DOCS to address the issues with the management and processing of risk of harm reports faxed to its Helpline, the Ombudsman has continued to receive complaints about Helpline delays in acknowledging facsimile risk of harm reports. Are you concerned about those delays? What has been DOCS' response to those complaints? Is the Audit Office carrying out an audit? Are you involved in that audit? Will you get the final audit report?

Mr KINMOND: We have had several meetings with the Audit Office. Our current view is that as the Audit Office will do an extensive audit of that particular area, it should be well placed to comment on delays in relation to the Helpline and also to look at a whole range of systems issues dealing with the assessment of notifications that come in. The approach we

have taken is to give the Audit Office a good briefing on the information we have to hand and then the timetable is that probably in March or April next year the Audit Office should be in a position to have completed its work.

Mr BARBOUR: We are assisting the Audit Office with those matters.

CHAIR: In relation to DOCS policy for managing and prioritising workloads, I infer from your answer is that DOCS is yet to replace its "Priority One" policy with a case-closure policy. How did that happen? What was the nature of DOCS most recent advice on the current position of that?

Mr BARBOUR: As we understand it, DOCS is trialling, commencing next month, December, a new case-closure policy in three CSCs, and it is also using targeted CSCs to roll out a range of new initiatives, including staff levels and case-management practices. We do not have a significant amount of detail about the new policy at this stage. We understand that it has recognised the concerns raised not only by the Social Issues Parliamentary Committee but also by us in relation to a number of the reports that we directed at "Priority One". My understanding is that it will not deal only with the level one matters in assessing matters, but will actually deal with matters at a lower level as well, and different priorities will be in place.

Mr KINMOND: This is an important area and we are keen to see how DOCS moves on this.

Mr BARBOUR: It will be an area that we will touch on in the annual report we are to present to Parliament next week in relation to our reviewable death function. Clearly this particular policy has come up in relation to our reviews in particular cases.

CHAIR: DOCS has reported to your office that it cannot draft regional protocols for the Foster Care Support Team until it has settled on its policy and practice framework for dealing with allegations against employees. Are those two issues as inter-dependent as DOCS seems to suggest? In your answers you indicate that advice has been sought from DOCS about the likely date for the completion of those initiatives? Where is that up to?

Mr BARBOUR: On the face of it, it does not seem as though there is a link, but there is. For the purposes of our child protection legislation, foster carers are employees of the Department of Community Services. There have been ongoing challenges for DOCS in relation to how it addresses complaints about foster carers, particularly when they come within the terms of our legislation. The process DOCS has put in place to improve systems for dealing with allegations about employees, they have set up a centralised unit that is headed by a person who previously was a member of staff of the Ombudsman's Office. I hope that augurs well for it. That unit is actively developing practice and procedure for the proper investigation of allegations against employees. We have had a great deal of input into that process and we are receiving feedback about its development. To date we are pleased that it is heading in the right direction.

Ms BARWICK: We have a copy of the draft framework and are looking at it at the moment. It looks good. I guess the challenge is putting it into practice. We are seeing small

changes which we are pleased about. There are still a few sticking points and we hope to continually discuss those, particularly around making a finding.

Mr BARBOUR: One of the challenges that DOCS has put forward is that it already has difficulties maintaining numbers of foster carers and attracting people to be foster carers. They want to ensure that not only do they meet their obligations in terms of having a proper system in place, but that they do not make it so onerous or so intrusive or so unpalatable to foster carers that it reduces the number of people prepared to take on that very difficult role. We clearly have indicated to them that they must have effective systems in place, but we recognise that there is a tension there. We will continue to assist them to ensure that they have proper procedures in place.

Ms BARWICK: Certainly the value of the centralised unit that we are seeing now is a reduction in delays in receiving information. The centralised unit is actually chasing up with the areas the information we require. We are seeing improvements there.

CHAIR: In your answers you have indicated that the resources presently available for the Official Community Visitor Scheme enables visits to only 80 per cent of accommodation services to ensure a satisfactory level of visiting frequency and duration. How many services do the non-visited 20 per cent represent? What level of additional resources would be needed to enable all accommodation services to be visited to a satisfactory level?

Mr BARBOUR: I will get Steve to give you the precise number, but I think there are approximately 900. We will check that. It is in our annual report. I recently put forward a submission to Treasury to have the funding for the official community visitor program increased. I have done that on previous occasions unsuccessfully. One of the benefits we have in relation to the visitor services is that many of them are run by the same agency. They are umbrella organisations. So we try strategically to ensure that when we are not visiting services as regularly as we would like, nonetheless we are visiting services run by the same organisation, so there is still a presence felt and we are still going to an appropriate range of organisations. Recently the hourly rate of the official community visitors was also increased, not by a significant amount, but that also is potentially going to have an impact on the number of visits we can do unless we are successful with our application to Treasury.

Mr KINMOND: The number of services visited is 1,169. That is a report of the visits. That represents 80 per cent of the services.

Mr BARBOUR: I am happy to provide the Committee with more details on that. I do not have a copy of the official community visitors annual report so I am not comfortable to give you an actual figure. But I am happy to take that on notice and provide you with those details if you would like.

CHAIR: Yes, thank you.

Mr KINMOND: With each of the services that are visited, the visiting time is four hours. If they are going to be visiting a service during that year, if it is a designated service, they try to have two visits every six months so they get a bit of a feel for the issues.

CHAIR: You indicated in the answers that the focus of the senior officers group on intellectual disability and the criminal justice system has changed in developing a whole-of-government policy to overseeing and reporting on a collection of interagency projects. Why do you think that has occurred? What do you think its significance is and is it a good idea?

Mr BARBOUR: This investigation has been conducted by Steve, so I am happy to hand over to him.

Mr KINMOND: The view we have taken is that the whole-of-government approach to dealing with people with intellectual disability in the criminal justice system was a good approach. Probably due to a range of other issues that DADHC was dealing with at the time, 12 months into the establishment of the process the whole-of-government approach had not been developed. Instead, it was more a matter of individual agencies coming along and providing a report card on their individual activities. So, we took the view that the preferred approach was to go back to the whole-of-government approach so the agencies could in a seamless way look at delivering services to people with an intellectual disability involved in the criminal justice system. In response, DADHC has indicated that it wants to revitalise the activities of the Committee and to review the terms of reference. We hope that they head back down the original path, which is to look at a seamless, integrated approach to a group within the community that is particularly vulnerable.

Mr BARBOUR: Mr Chair, I do have those figures for OCV visits available, if you would like them.

CHAIR: Yes.

Mr BARBOUR: The total number of services is 1,169, comprising 111 children and young people; 62 young people with disabilities; 37 children, young people and adults with disabilities; and 959 for adults with disabilities, and that includes boarding houses. In respect to those numbers of services, there were a little over 6,500 residents, and the number of visits undertaken last year was 3,121.

CHAIR: Does the Ombudsman know whether DOCS has completed its review of the service known as Aboriginal Children's Services Inc? If that review is complete, have you been provided with a copy of the report? What was the nature of the serious issues in relation to the performance of the service's functions identified by the office in 2001?

Mr KINMOND: It is my understanding that that review has not been completed. That is an issue we have taken up with them and indicated we are disappointed at this stage that things have not been taken further. We see it as an important issue because they are the major providers of out of home care for Aboriginal children, so it is obviously a service that will need to be reviewed. We believe it is a service that needs to be well supported.

Mr MALCOLM KERR: You indicated you were disappointed. Did they say when they would complete the report? Are they going to complete the report?

Mr KINMOND: It is my understanding that they intend in that situation to undertake a review. There have been issues to do with funding, and so on, that needed to be worked through. So, at this stage they have not moved on that.

Mr MALCOLM KERR: Those issues with funding have not been resolved?

Mr KINMOND: I think it is also to do with funding related to changes to the Aboriginal and Torres Strait Islander Commission in the Commonwealth sphere and to enter into discussions on the Commonwealth level as well. Beyond that I would need to take that question on notice.

Mr MALCOLM KERR: Perhaps the question on notice would be will the review be completed and, if so, when will it be completed? At the moment there is a great deal of uncertainty, I would have thought?

Mr KINMOND: I understand they have indicated the review will be completed. As to why they have not been able to move I would like to provide more particulars at a later stage.

CHAIR: Absolutely. Moving on to question 4, in relation to an alternative to the Catholic Commission for Employment Relations [CCER], what progress has been made by the working party convened by the Bishop Toohey? Have you received a positive response from the Cabinet office to the request for a change to the Ombudsman Regulation to give effect to the agreement of New South Wales bishops?

Mr BARBOUR: The working party has only met once, as I understand it. I understand that things are working very effectively. I had a report on that. We were very pleased with the decision taken by the bishops to accept responsibility as head of agency rather than CCER. We think that it is a significant step forward in appropriate accountability under our legislation. The challenge for us will be to ensure that we now proceed in that vein appropriately and that we work effectively with them. I think the working party is an indication of goodwill on the part of the church to meet our concerns and to ensure that the system that is put in place is effective. We have notified the Cabinet office. We have not received a direct response but it was not a notification that would require a response as such. The regulation was up for review. We asked the Cabinet office to delay that while these negotiations were under way. We advised them once the negotiations were concluded that there was agreement about the way forward and we recommended the wording to be used in the amendment to the regulation. We imagine that will be just a formality.

CHAIR: In relation to audits of Catholic education offices, what findings were arrived at as a result of the nine audits of diocesan offices that have been concluded? I think there are still two more to come by mid-December?

Mr BARBOUR: That is right. Those audits have been conducted under the supervision of Ms Barwick. I might ask her to answer the question.

Ms BARWICK: We were looking at two aspects. One was the role of CCER in particular in supporting the agencies, but also the systems the agencies had in place. The findings regarding CCER's role as head of agency, we found they were providing pretty much a telephone service. They were advising agencies who rang them about the way forward but policy development, training and auditing the agencies had been lacking. Hence, we looked at an alternative model for head of agency.

With the dioceses there are varying findings. There were some excellent practices in two dioceses in particular, and they were dioceses that were looking at child protection and developing appropriate practices even before the Wood royal commission, so they had significant work and we were very pleased that we were able to identify good practice. It was disappointing that that had not happened before, because that sort of good news should have been spread across the other dioceses. In other areas there were fundamental problems. For example, as mentioned in the annual report, we entered into extensive discussion with CCER about matters that were not required to be notified to the Ombudsman, and that was seen to be a relief for employees who were the subject of low-risk matters. We found that employees were being advised, despite the fact that the matters were not notified to us, that the matter had been notified to us. So our attempts to defuse anxiety for some employees were not exactly working, so that was some concern.

Another area was around reporting matters to the Commission for Children and Young People and there were some that had not been notified. They would be the most significant. In summary, there was some excellent practice down to some rudimentary mistakes being made. We made some significant recommendations. They are all being addressed and we will be revisiting those dioceses to do a compliance audit.

Mr BARBOUR: If I could add to that. It might be helpful to the Committee for me to explain a little bit of background here. On the face of it one would assume a centralised body assisting a large agency in its responsibility in this area would be desirable. That was certainly the theory behind CCER being identified early on as the central agency for Catholic schools. What transpired, though, and what we saw and identified was that they were not performing their role effectively. There was a duality of reasons for that, one reason being that they were not doing what they ought to have been doing, but secondly that they had no real power to implement processes and to call to account particular dioceses, because for each diocese the Bishop who headed that diocese was the person who was responsible.

So, that is what has led to us seeing in the different dioceses different quality systems. In some dioceses, where this issue has been taken very seriously, they have employed good staff and put in place good systems. We are seeing first-rate best practice in some of them. In others there is next to nothing there. That demonstrates to us really that CCER as a central body has not had the impact or the outcomes it was intended to achieve. That is the reason, in part, why we are moving away from that. However, a centralised model in the Department of Education and Training works extremely well because that body is able to direct how school principals and other staff within the department relate to that agency and they are able to direct what systems are employed by all staff, so there is consistency of practice.

The Hon. JAN BURNSWOODS: I notice that you say you are also going to be having discussions with the heads of religious congregations. I cannot remember whether the CCER covered independent schools or those where the congregations ran them and the bishops had very little authority. Could you clarify that for us?

Mr BARBOUR: There is a range of parties that are involved in terms of responsibility.

Ms BARWICK: Most of the religious orders delegated head of agency authority to the CCER and we will be talking to the heads of religious orders to change that arrangement so that they will become head of agency for that particular order.

The Hon. JAN BURNSWOODS: So that will mean 11 diocesan bodies?

Ms BARWICK: And the religious orders, yes.

The Hon. JAN BURNSWOODS: Some of which will be quite small?

Ms BARWICK: Yes.

The Hon. JAN BURNSWOODS: Does that create likely problems?

Ms BARWICK: It will be more work in the first instance, but I think it is an effective way to go, long term. We have expended significant time working with the CCER, this year in particular, through the audits and through a number of investigations. We believe that we can, notwithstanding the problems that the Ombudsman has articulated or identified, better use the resources we have for better outcomes with a changed head of agency arrangement. I might also say that the number of notifications from the independent schools is quite low, so we are not expecting a huge volume of work. I think it will be a more efficient way to go. Where we have had direct contact with agencies, we have seen improvement and growth in their practice over time, and we believe that having that direct contact with the religious orders will achieve that same improvement.

Mr BARBOUR: One of the other things we are exploring in the working party framework is to provide for, within the church itself and perhaps from some of the dioceses that have effective systems in place, a mentoring and advisory role as well, so that it is not simply us that is providing advice, where necessary; but where there is good practice and clear understanding of the principles related to child protection, that within the church it can be understood who they should approach within particular dioceses to get assistance and support information. So that will be another important part of that process.

Mr GEOFF CORRIGAN: I note in today's paper, either the *Daily Telegraph* or the *Sydney Morning Herald*, there is a story about a case overseas where a young girl of 15 was allegedly raped, and she complained to the teachers who did not take any notice of that. Would that be a matter that would be of interest to you?

Mr BARBOUR: It would not necessarily fall within our jurisdiction because it is not an allegation against a teacher, as such, and of course it is complicated by the particular circumstances. However, I suppose, arguably, if there was psychological trauma or something of that sort caused by the conduct of the teacher, then there may be the capacity to make allegations, but on its face, it would not be the sort of matter caught by our legislation, no.

Mr MALCOLM KERR: I think that is a court case at the present time.

Mr GEOFF CORRIGAN: Yes, that is right.

Mr MALCOLM KERR: That may well be the basis of the cause of action in terms of the trauma because of the failure of the school to exercise its duty of care.

CHAIR: Perhaps I should remind everyone that that is technically sub judice. I do not know that we should be spending too much time talking about it in open session.

Mr MALCOLM KERR: There are probably not too many jurors here, actually.

CHAIR: Yes, but it may well be reported, as you would well know, Mr Kerr.

Mr MALCOLM KERR: I do not know. I think you overemphasise the profile of this Committee. But, anyway, if I might move on: I think Ms Barwick mentioned in terms of two dioceses, their excellent practices at one end of the scale, but fundamental mistakes that were made at the other end of the scale—I am sorry, rudimentary mistakes, I think was the expression you used.

Ms BARWICK: I think that was in respect of the incorrect information being given to employees who in fact had not been notified to the office, and notifications to the Commissioner for Children and Young People, and I think just some basic issues around file keeping, security of files, et cetera, security of evidence—very basic information that they should have had many years ago.

Mr MALCOLM KERR: Those have all been corrected?

Ms BARWICK: They have.

Mr MALCOLM KERR: And I think you mentioned apprehension by staff, too. Has that been addressed?

Ms BARWICK: That is around the class or kind, so there is some nervousness around low-risk matters being notified to us, yes. We made a recommendation that those staff who had been advised that the matter had been notified to us should be sent correspondence correcting the mistake, and that has been done.

Mr GEOFF CORRIGAN: I was interested to read your comments in relation to *Carter v New South Wales Netball Association* at the bottom of the reply. You talked about homestay and so on. Is this showing any implications for groups such as Rotary and Lions which organise overseas visits and look after young people? My experience of sporting organisations these days is that they are very careful in ensuring that all coaches are aware that they have to go through the child protection checks. Obviously there is a balance between what you can do and what those community groups can do. Do you believe that we need to provide more guidelines for those groups, or do you need to increase the power of the Ombudsman to investigate?

Mr BARBOUR: The comments made in that particular case—and of course a lot of public discussion around a range of activities that currently do not come within a formal scheme such as ours but would simply be in terms of notifying the Department of Community Services [DOCS], for example, if somebody comes to attention—raise a range of significant issues. I think in answer to this question we have tried not only to talk about what would be

necessary in terms of resources to deal with this but also to give a few examples of some of the areas that we have been made aware of which raise particular concerns for us because they are perhaps not as obvious as the matters that you are suggesting. I think there is a much greater awareness within sporting areas—within Scouts, Girl Guides, and those sorts of areas than in things like homestay, billeting, and those sorts of activities. So it is really alerting the Committee to the fact that there is probably a significant range of areas that one could look at, without wishing to be interpreted as advocating that we ought get those responsibilities.

Ms BARWICK: Could I just add that the issue around Carter was around the way the investigation was undertaken and a lack of experience that organisations like sporting associations have in dealing with these matters, so that was quite an important aspect of that case—hence the suggestion that we might come in and look at it, and not so much because they do not have good preventive strategies in place. It is more because, when they do get an allegation, the capacity to investigate just is not there because they do not have the expertise, and similarly with the other organisations that we have mentioned.

CHAIR: In relation to the dispute between the Ombudsman and the Department of Juvenile Justice about what constitutes sufficient evidence to determine an allegation is false, the department says that it is not an option to make a finding that an allegation against an employee is not sustained due to insufficient evidence; that is, they only wanted one of two options rather than make it an immediate option. Does that mean that a significant proportion of allegations about employees would fall within that middle category and are not being notified to the Commission for Children and Young People [CCYP] as relevant employment proceedings for the purpose of the screening functions?

Mr BARBOUR: I will deal with the latter part first. We are unaware of too many cases where the consequences of this particular view have led to an outcome of concern. What we are concerned about, however, is the view that the agency believes that unless you can definitively prove a particular allegation, then there ought be no continued assessment or opportunity to assess the behaviour of the individual, the subject of the allegations, or any risk that they might present. As the Committee would well know, in areas of child protection, often children recant their allegations, notwithstanding that they in fact believe wholeheartedly what they are saying. Secondly, sometimes it is very difficult to get sufficient evidence to prove a matter beyond doubt, but that does not mean that there may not be a further risk presented in relation to a particular employee.

Our concern around this practice was not only the conclusion that was being drawn but that, in those circumstances, it would mean that they would not have to report those matters to the CCYP, thereby ensuring that if an employee moved to a different area of work, they would be screened appropriately, as they should in the circumstances. But I do not believe that we have dealt with a significant number of matters where there has been a particular cause for concern. We have tried to deal with it very quickly once the department started to develop this policy. Is there anything you want to add to that?

Ms BARWICK: No. I think that is adequate.

CHAIR: If there are no other questions from Committee members, I will turn to police. Is c@tsi ever going to work?

Mr BARBOUR: Good question. We remain optimistic, we do. There is a significant additional sum of money that has been provided by Treasury to support further work on it. We remain committed to participating in that process and using c@tsi once it delivers what it is supposed to deliver. As we have indicated in answer to these questions, we cannot afford the resource wastage inherent with using two systems when one is not working the way it should. We have been very supportive of police throughout the process. We have articulated very clearly what it is not delivering and what it was intended to deliver and there is further action in train as a result of the additional funding to police to try to deal with some of these problems. But I do not have a crystal ball and I wish I could say that it is definitely going to be fixed, but we are not in a position to do that, though we remain optimistic.

CHAIR: It is just extraordinary. I remember being a member of this Committee before I was Chair and being told how wonderful this new information technology system was going to be for the police because the Ombudsman and everybody else could get everything they would need out of it and it has tremendous anti-corruption benefits. And years later—

Mr BARBOUR: Yes.

CHAIR: Anyway, was the Ombudsman's office satisfied with the progress made by the working party on the administration of police officer profiles? There was a meeting, I think, with the police on 25 November. Where is all that going?

Mr COHEN: The Professional Standards Command has primary responsibility in terms of progressing that project and has given an undertaking to complete it at the end of this calendar year—by December of this year—and we understand that a draft report should be made available in early 2005. My latest report is that there has been some very significant progress recently on it and some of the outcomes of it are likely to be quite positive for NSW Police.

Mr BARBOUR: I raised my concern at the last Standing Committee meeting with the Commissioner about the time it was taking and was assured that these time lines would be met and they appear now to be in train. The most recent delay was occasioned by the need for somebody involved in this project to travel overseas and to get some additional information from overseas, and that has happened. I understand that information has been factored into the processes now.

CHAIR: Turning to controlled operations, has the Ombudsman's office received and been consulted upon the draft bill to amend the controlled operations legislation?

Mr BARBOUR: The last meeting we had in relation to this particular matter was on 15 September when a number of the proposals were discussed. Since that time, it is my understanding we have not received any further information. But Mr Andrews was at that meeting and he can perhaps provide you with a further update.

Mr ANDREWS: We were simply advised that the bill was in preparation and it was with the Parliamentary Counsel at that time. The general outline of what the police favoured was put to us, which was basically what was in the report of the review that had been tabled in Parliament, and we really have no further information.

CHAIR: So you are not in a position to make any further comments about the desirability of what has been proposed?

Mr BARBOUR: No. As we have indicated in our answers to questions from the Committee, we raised a number of concerns in respect to what was being proposed, but we have no idea whether they are going to be proceeded with or not.

CHAIR: Are there any further questions from Committee members? I have one further point about freedom of information [FOI] and the police. You indicated that the Commissioner of Police had set out what steps had been taken towards the proposed review of the NSW Police FOI process. Did the NSW Police indicate what issues it considered should be part of the review? When are they expecting the review to be undertaken?

Mr BARBOUR: The background to that particular issue is easily explained by the extraordinary increase in the number of FOI applications to NSW Police. Without a doubt, our figures suggest that they now receive more FOI applications than any other agency in this State by a long shot.

The Hon. PETER BREEN: That is because they provide so little information: you have no choice.

Mr BARBOUR: There is a range of reasons for it but certainly the proclivity of people seeking criminal records information has escalated significantly. The strategy that has been looked at by police encompasses a range of things from additional staff through to what is anticipated to be the situation once Crimtrack is up and running, and various other initiatives. Dick Adams, who is executive director, corporate services, has responsibility for managing this review and that particular area, and he has advised us where they are at at this stage. However, we do not have details of the broader review at this stage.

Mr MALCOLM KERR: Following on from Mr Breen's question, is one of the options being considered by the police providing information?

The Hon. PETER BREEN: When Michael Costa was Minister I used to do FOI claims to get replies to my letters.

Mr GEOFF CORRIGAN: Those days are long gone for Michael.

The Hon. PETER BREEN: I do not have much to do with railways.

CHAIR: Are there any more sensible questions?

The Hon. PETER BREEN: There was a very interesting reference in the annual report to an inspection of the HRMU. I was very pleased to see that. Getting information about the HRMU is a bit like getting information out of the police. The fact that the Ombudsman is carrying out an inspection or some kind of report would suggest that I am not the only person that is concerned about the HRMU. Are you able to provide information about whether the inspection was prompted by inmates or by some other group?

Mr BARBOUR: As the Committee is aware, we have jurisdiction over all prisons and juvenile justice within the State. Part of our practice is to visit all correctional facilities, usually at least twice a year. We certainly do that with the HRMU. We go down and we visit and inspect. HRMU prisoners, just as all prisoners within the State, are entitled to complain to our office about any of the issues they believe we are able to assist them with. Certainly we get complaints from prisoners that are housed within the HRMU. It is my understanding that the particular matters that we are investigating were the subject of complaint by prisoners, not from somebody outside. The department is assisting us with that investigation and providing us with appropriate information.

The Hon. PETER BREEN: It is not likely that your report will be made public, is it?

Mr BARBOUR: No.

The Hon. PETER BREEN: On that basis, may I ask you a question about your inspection and the information you have provided in your annual report? At page 90 of the annual report it states that the HRMU is different from other correctional centres. Then it says that the routine is very strict. On page 88 it says that across correctional centres generally most complaints, both written and oral, relate to what is called the daily routine. Given that that is also identified as the main problem at the HRMU, can you just explain what that problem is? It is not something that is self-evident.

Mr BARBOUR: A significant number of subsets would be categorised into daily routine. It would cover a significant range of complaints. I will ask Greg Andrews to answer in detail because he has recently visited the HRMU. It would cover a whole range of things—whether they get enough exercise and so on right through the daily spectrum. All prisons are run under very tight and strict procedures and practices. It is not surprising that prisoners will complain about those if they think that they are not fair or they are not being operated appropriately. The HRMU, of course, houses those prisoners that are considered to be some of the most significant prisoners within the State correctional system, and the practices there are even stricter as a consequence, as well as the building and the design of the building and facilities and so on. Greg, do you want to add anything to that from your perspective?

Mr ANDREWS: Complaints about daily routine are usually about access to facilities. They may be about delivery of mail—all the usual sorts of things that would happen on a day-to-day basis.

The Hon. PETER BREEN: Does it include complaints about lockdowns?

Mr ANDREWS: Yes. Over the last few years there has been an increase in complaints about lockdowns because it has become an institutionalised part of the industrial system in the correctional system. Part of the corrective service's new way forward, which is a current industrial proposal, is that they better manage, in their terms, correctional centres by having serial let goes in the morning. There certainly has been an increase over the last few years of regular lockdowns in order to provide opportunities for staff training days and things like that.

The Hon. PETER BREEN: Getting back to the HRMU, you mention in the annual report that prisoners are incarcerated entirely in air-conditioning unless they open the door to the outside. You indicated that many of them do not open the door. So they live in an air-

conditioned environment. My understanding is that even when they go outside they are still in a concrete environment with a cage-type barrier over the yard, which means that they do not get any access to grass. There is no real access to anything except concrete and wire. Is that a problem for prisoners?

Mr ANDREWS: At the HRMU there is a grassed area right in the middle of the unit which has a running track around it. Depending on your level of privilege you get access to that area.

The Hon. PETER BREEN: Of the 60-odd prisoners there, how many would have access to that area?

Mr ANDREWS: I could not answer that at this stage.

The Hon. PETER BREEN: When you inspected the unit were you concerned about air-conditioning, about light, about natural air?

Mr ANDREWS: A number of complaints have been floating around to our office and to various MPs and other bodies about some of the basic conditions at the HRMU. Some of those complaints alleged that there was insufficient natural light and problems with air-conditioning and so forth. I was at the HRMU only two months ago. It is actually quite a light place. All the inmates that I saw that day were in cells where the doors to the outside caged areas were open and there was lots of light coming in. In certain areas in the day rooms that are attached to the cells they can see through corridors and in some sections they can see also through glass I think into the outside grassed area. I am not quite certain of that; you would have to be in the cells to double check. The reality is that this is the most high-security gaol in this State, if not in Australia, and there are restricted movements and restricted access. There is a program in place of a hierarchy of privileges, and that determines how often you get to associate with other prisoners, the number of other prisoners you can associate with, and also your access to different facilities including the sports—there is a half tennis court. It includes access to that and access to the running track in the grassed area.

The Hon. PETER BREEN: That is very helpful, because it is difficult to get information about the HRMU. In your issues paper that was published earlier this year you made the observation that two out of three of the core objectives of the Protected Disclosures Act are not being achieved. Has the issue come up about the prospect of having a designated officer in your department to deal with protected disclosures?

Mr BARBOUR: We do have designated staff that deal with protected disclosures. Chris Wheeler is not only the chair of the New South Wales Protected Disclosures Steering Committee but also co-ordinates our functions in respect of protected disclosures. We have a number of staff that are trained up to be specifically available for people who call in to seek advice about the legislation. That seems to work very effectively. There is no doubt that we are used extensively by those people who are uncertain about how the legislation operates, particularly those that need to investigate or handle particular matters. We provide a facility of providing information to assist them wherever possible.

The Hon. PETER BREEN: I think people would agree that the protected disclosures legislation does not seem to be working very well. I remember that during the contempt proceedings in the ICAC Assistant Commissioner Clarke referred the nurses complaints on to the Ombudsman and it was reported in the paper. I know it did not actually arrive because the Ombudsman does not have jurisdiction over a complaint involving a Minister, but the Assistant Commissioner did refer it on as if he were under the impression that it was a matter for the Ombudsman. It seems to me that it is not generally known in the community that the Ombudsman is and ought to be the first port of call for people with protected disclosures problems.

Mr BARBOUR: It does not have to be. There are several agencies that have the same status as us under the Act. It is just that we are probably the only agency that provides a generalist service to assist wherever possible—the ICAC, the Auditor-General and so on are in a similar position. Depending on the nature of the protected disclosures and what advice was required, it may well be appropriate to refer it to one of those agencies rather than to us. But certainly I agree with your observation about the Act. We prepared the discussion paper to stimulate discussion and to also recommend that the Act, which is supposed to be reviewed every two years, be reviewed. It has not been reviewed for some time and we think it ought to be.

The Hon. PETER BREEN: Is someone looking at the question of whether or not the HRMU is duplicating the problems of Katingal?

Mr ANDREWS: I do not think there is any easy answer to that question. Having been to both of those places, I think if you are going to be incarcerated in a maximum security gaol you would probably prefer to be in the HRMU. It is modern. The facilities are bigger. Each cell has attached to it a caged yard which is open to fresh air, and on the other side it has another room which they refer to as a day room. Those day rooms are of various sizes. Depending on the security risks and the privilege level that each inmate attains, they are moved around from cell to cell at different times so that they have access to larger day rooms, and the larger day rooms are also open to other cells. My understanding is that the program is that when you first arrive at the HRMU you go through an assessment period where they do a risk assessment and so forth. You then go on to the bottom level, which allows you access to a day room by yourself. Progressively you move up the privilege level and you have access rights to fraternise with other inmates who want to fraternise with you. In order to do that they may change the cell where you are being housed so that you can access a room that is open to two cells or more.

The Hon. PETER BREEN: So it is better than Katingal, in your observation?

Mr ANDREWS: Far better. Katingal was a very small, claustrophobic facility.

CHAIR: I visited Katingal some time ago and what you have described sounds significantly better than that. I think that is the end of the formal questions. However, one item has been distributed only recent to Committee members, which is a confidential item. If members have questions we will need to go in camera. Members may not have had a chance to look at the document, so it might be better if we deal with the matter by way of questions on notice.

Mr MALCOLM KERR: That would be preferable.

CHAIR: I had hoped that the document would be distributed at the beginning of the meeting, but that did not eventuate.

The Hon. DAVID CLARKE: What volume of complaints do you get regarding local government?

Mr BARBOUR: In our annual report we have got very extensive statistics around local government. We had an 8.5 per cent increase last year, received 840 formal matters and a total of just over 3,000 informal complaints.

The Hon. DAVID CLARKE: Were many of those directed against councillors?

Mr BARBOUR: No. I think the majority well and truly fit within the customer service category and probably the next most significant area would be around development and enforcement. It is very rare that we get complaints specifically about councillor behaviour and, indeed, councillors, I think, strenuously reject whenever we tend to be involved in that particular area. Greg, do you have a sense of how many? It would predominantly be around conflict of interest issues.

Mr ANDREWS: Yes. I cannot give you a figure offhand, but there are a small percentage of complaints about councillors and we certainly get complaints from councillors about other councillors or the general manager or something to do with the operation of the council.

The Hon. DAVID CLARKE: How do you approach these matters where it is claimed that there is a conflict of interest involving councillors?

Mr BARBOUR: Well, it would depend on the particular matter, but we would approach it like any other complaint. If we believe that it is something that we should make inquiries into, we would seek information in relation to that.

Mr GEOFF CORRIGAN: Would it not be referred to the Department of Local Government Pecuniary Interest Tribunal in the majority of matters?

Mr BARBOUR: It would depend. Some matters may well be appropriately referred to Local Government. Some matters might be referred to the ICAC if there is an issue of corruption involved, but without actually getting enough information, it is difficult to know what area it specifically falls into.

The Hon. DAVID CLARKE: If you found that there was a conflict of interest involving a councillor, what would you see as the powers available to you?

Mr BARBOUR: Well, as you know, our powers are only recommendatory and, indeed, the most recent example of a significant conflict of interest that we took through the investigation process we outlined in our annual report, which related to conduct of particular councillors in Mosman and we actually recommended in that case that we thought the councillors ought to consider resignation of their positions on council. As a result of that

particular investigation and our recommendations, our views have subsequently been endorsed by the conduct of the council itself, which has censured those particular councillors and also removed them from particular committees on the council.

Mr ANDREWS: Sorry, could I give an update. I was alerted earlier this morning that at least one of those councillors involved succeeded last night in putting a motion through the council that rescinded that decision.

Mr MALCOLM KERR: So they rescinded that decision.

Mr GEOFF CORRIGAN: Liberals behaving badly.

Mr MALCOLM KERR: It is peer judgment, I take it, and, as the Ombudsman said earlier, it is a matter for the council.

Mr BARBOUR: Well, ultimately we indeed say that to many people who complain about the behaviour of council; that there are just some matters that properly rest with the elected officials in the area, and we might take a different view to it, but at the end of the day they are the people who have been elected.

Mr MALCOLM KERR: In the case of those two councillors who considered resignation and decided not to resign, I take it that would be the end of the matter so far as you are concerned?

Mr ANDREWS: That was the recommendation that we made to the councillors and they considered that. There were two recommendations. One was that one councillor actually resign, which he refused to do. The other was that the other councillor consider that, which she did, and decided not to. The thing I wanted to add is that you would be aware that the Local Government Act was recently amended to provide a new system of discipline for councillors who seriously breach codes of conduct or codes of meeting procedure.

That provides that the Director-General of the Department of Local Government can suspend councillors for a one-month period in certain cases and/or refer a matter to the newly named Pecuniary Interest and Disciplinary Tribunal, which has a range of sanctions, including suspension up to a period of six months. The amendments also provide that the Ombudsman, if they investigate a case, would be able to forward the report to the director-general, who can then refer it on to the tribunal. The Mosman case is a good example. If that law had been available at the time I made the report, that would probably be the recommendation I would have made.

The Hon. DAVID CLARKE: Is the Mosman council case the first occasion that you have suggested to councillors that they consider resigning?

Mr ANDREWS: I think it is, yes.

The Hon. DAVID CLARKE: It is the first, so, therefore, you would say that the circumstances in the Mosman case were far more serious than any other case that you have had involving councillors?

Mr ANDREWS: This was a case of a non-pecuniary conflict of interest. In my view, it was serious and it did corrupt the decision making of the council in relation to the particular development applications that were involved. In cases of pecuniary interest, the Department of Local Government has built up a special expertise and we have a protocol with them that if we receive complaints of pecuniary interest, we generally refer them to the department because they are matters that usually get prosecuted in the tribunal and Ombudsman officers are not competent or compellable witnesses, so there is a problem for us if we are the sole investigator in a matter like that.

The Hon. DAVID CLARKE: So the Mosman situation is the only case where there has been a non-pecuniary interest situation where you have suggested that a councillor consider resigning?

Mr ANDREWS: I think it is the only report that I have made where I have recommended that.

The Hon. DAVID CLARKE: Does that mean, therefore, as it is the only case where you have recommended resignation, that it is, in fact, the most serious case? Would that therefore follow?

Mr ANDREWS: I do not think it necessarily follows. That recommendation was made in the light of available sanctions.

The Hon. DAVID CLARKE: There could be other cases that were more serious than this particular one where you did not recommend that the councillor consider resigning?

Mr ANDREWS: I cannot think of one offhand.

Mr MALCOLM KERR: I think Sutherland Shire Council set up an ombudsman and your office was involved in that. Have any other councils have set up their own internal ombudsman?

Mr GEOFF CORRIGAN: Yes, we met them at their third national investigation symposium. Warringah has.

Mr BARBOUR: We have had advice that Parramatta and Auburn are thinking of a joint ombudsman process and, of course, some universities have ombudsmen, and so on. It is a bit of a dilemma and there is a bit of tension. On the one hand, we see it as being a very good practice for them introducing an effective complaints handling system but, on the other hand, we do not want them to be named in a way that is going to cause confusion in the public about where they ought to go. So we try to be persuasive where ever we can for them to come up with a different title because we do not want people to be confused out there about exactly whom they are going to.

Mr ANDREWS: Wollongong City Council also set up an ombudsman some years ago but it has now decided not to proceed with that.

(The witnesses withdrew)

(The Committee adjourned at 3.40 p.m.)

Chapter Five - Response to question taken on notice

The following is the answer to a further question posed by the Committee on 30 November 2004:

Will the review (of Aboriginal Children's Services Inc) be completed and if so, when?

On 9 March 2004, Ombudsman staff met with DoCS staff to establish whether the review of Aboriginal Children's Services Inc had been completed in accordance with a recommendation made by the Community Services Commission in 2001. The Department advised that while it had provided one-off funding support to ACS to enable the service to conduct a review (of the 300 children in the service's care; the service's structures; the service's policies and procedures with a view to rewriting these as required) this work was not completed to a standard acceptable to DoCS. The Department advised that as a consequence of this, and other concerns relating to the service; it would facilitate an external review of the service in order to effect improvement with the service.

On 31 March 2004, we wrote to DoCS and requested the terms of reference for the review, advice on who was conducting the review, the proposed timeframe for the review, and a copy of the review report on its completion.

On 4 May 2004, DoCS provided us with a copy of Terms of Reference for the review, noting that the abolition of ATSIC would impact on the review timeframes.

On 14 October 2004, we wrote to DoCS requesting an update on the progress of the review.

On 17 November 2004, DoCS advised us that it has adopted the lead role to facilitate the review of ACS; that it has formed a review steering committee consisting of representatives from FACS, C'Wealth AG's Department and DoCS. The initial steering meeting was scheduled for 25/11/04. We are advised by DoCS that at this meeting they would consider the project brief and proceed to seek appropriate consultants to conduct the review. We are further advised that the timeframe for the review will be negotiated with the successful consultants. DoCS anticipates the review will be completed by the end of the financial year.

Appendix 1: Committee Minutes

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission
Tuesday 30 November 2004 at 2.00pm
Room 814/815, Parliament House

Members Present
Mr Lynch (Chair), Mr Breen, Ms Burnswoods (Vice-Chair), Mr Clarke, Mr Corrigan, Ms Hay and Mr Kerr

In attendance: Helen Minnican, Hilary Parker, Pru Sheaves

TWELFTH GENERAL MEETING WITH THE NSW OMBUDSMAN

The Chair opened the public hearing at 2.05pm.

Mr Bruce Alexander Barbour, New South Wales Ombudsman; Mr Christopher Charles Wheeler, Deputy Ombudsman; Mr Stephen John Kinmond, Deputy Ombudsman (Community Services Division) and Community and Disability Services Commissioner;
Mr Gregory Robert Andrews, Assistant Ombudsman (General); and Mr Simon Justin Cohen, Assistant Ombudsman (Police), affirmed. Ms Anne Patricia Barwick, Assistant Ombudsman (Children and Young People) took the oath. The Ombudsman made an opening statement. The Ombudsman's answers to questions on notice, excluding the confidential section of his answer to Question 8(i), were tabled as part of the sworn evidence. The Ombudsman also tabled the brochure *Legislative Review and the NSW Ombudsman* (November 2004).

In order to assist discussion of the Committee's Question on Notice No 9 concerning the Protected Disclosures Act, the Committee tabled a copy of the Premier's correspondence to the Committee re the review of the Act, dated 13 October 2004. The Chair, followed by other Members of the Committee, questioned the Ombudsman and his executive officers.

Questioning concluded, the Chairman thanked the witnesses and the witnesses withdrew. The hearing concluded at 3.40pm and the Committee adjourned until 3.45pm.

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Appendix 2: Premier's Correspondence to Committee 13/10/2004

Tabled during the public hearing, 30 November 2004

Premier of New South Wales
Australia

Mr Paul Lynch MP
Chairperson
Committee on the Office of the Ombudsman
and Police Integrity Commission
Parliament of New South Wales
Macquarie Street
Sydney NSW 2000

13 OCT 2004

Dear Mr Lynch

I refer to your letter regarding the proposed referral of the review of the *Protected Disclosures Act 1994* (the Act) to the Committee on the Office of the Ombudsman and Police Integrity Commission (the Committee).

I note your advice that the resources of the Committee are presently committed to its current inquiry program and that the Committee would only be able to conduct the review when its current inquiry priorities permit.

In my view, given that the two previous reviews of the Act were conducted by the predecessors of the current Committee, it would be appropriate for the Committee to conduct the review. In light of the requirement for the Act to be reviewed every two years, I would ask that you do everything to ensure that the review commences as soon as possible.

As requested, please find enclosed documents setting out those recommendations implemented (Annexure 1), and those recommendations not implemented (Annexure 2). You will note that a substantial number of the recommendations have been implemented, either in full or in part. In addition, the Government has made several other amendments to the Act at the request of the Steering Committee. These amendments are also set out in Annexure 1.

Of those recommendations that have not been implemented, a large proportion relate to the creation of a Protected Disclosures Unit (PDU) within the Office of the Ombudsman, and concomitant statistics collection and reporting obligations. As I advised by letter of 19 September 2001, I do not believe that the benefits that might flow from the creation of the PDU and increased reporting arrangements would be any greater than those that have been achieved through the existing administrative arrangements.

LEVEL 39, GOVERNOR MACQUARIE TOWER, 1 FARRER PLACE, SYDNEY 2000, AUSTRALIA. TEL: (02) 9228 5239 FAX: (02) 9228 3935
G.P.O. BOX 5341, SYDNEY 2001

The remaining recommendations, in my view, require further consideration. In this regard, Annexure 2 contains some initial comments prepared by The Cabinet Office that you may wish to consider in the course of your review.

I hope that this information is of assistance.

Yours sincerely

Bob Carr
Premier

Annexure 1 – Review recommendations implemented in full or in part

Protected Disclosures Act 1994
Review recommendations implemented in full or in part

In full:

Recommendation: 1st review (rec 4)
Require public sector agencies to include in their codes of conduct statements on the rights and obligations of staff making and receiving disclosures, and the importance of the Act to the ethical framework of the agency, and examples of situations that may arise where a protected disclosure is made and how to deal with them.
The Premier's Department Model Code of Conduct urges employees to report suspected corrupt conduct, maladministration and waste. It also states that managers should ensure that employees have information about internal reporting procedures and draws attention to Premier's Memorandum 96-24 which deals with the establishment of internal reporting systems and the Ombudsman's Guidelines. The Model Code of Conduct and Ethics for Public Sector Executives states that executives are expected to be supportive of staff who make or intend to make protected disclosures.

Recommendation: 1st review (rec 5)
The code of conduct for members of the Chief and Senior Executive Service should contain reference to their duties in relation to protected disclosures.
The Model Code of Conduct and Ethics for Public Sector Executives states that executives are expected to be supportive of staff who make or intend to make protected disclosures.

Recommendation: 1st review (rec 6)
The contracts for members of the Chief and Senior Executive Service should contain a standard provision requiring them to ensure that procedures for dealing with protected disclosures are implemented. This should form part of their performance review.
The Model Contract of Employment for NSW Chief and Senior Executives contains an obligation for CEOs to ensure employees are aware of the procedures for making protected disclosures and the protections available under the Act. It is not practical to adopt a standard term in all such contracts because the duties of executives vary significantly. Many executives will not be "principal officers" under the Act and will have no responsibilities under the Act. Rather, the Information Paper that accompanies the contract serves to highlight the special duties that some executives may have under the Act.

Recommendation: 1st review (rec 9)
Section 20 should be amended to provide that in any proceedings for an offence, the employer has the onus of proving that any detrimental action taken against the employee was not taken in reprisal for a protected disclosure.

Annexure 1 – Review recommendations implemented in full or in part

This was one of the first recommendations to be implemented. It was implemented by the *Protected Disclosures Amendment (Police) Act 1998* which commenced on 27 November 1998. See section 20.

Recommendation: 1st review (rec 14)
Clarify that the protection provided under sections 20 and 21 extend to members of the police service who voluntarily make a disclosure notwithstanding their general obligation to disclose misconduct.
This was one of the first recommendations to be implemented. It was implemented in September 1998 by the *Protected Disclosures Amendment (Police) Act 1998* which commenced on 27 November 1998. See section 9(4).

Recommendation: 1st review (rec 19)
Investigating authorities should continue to include statistical information on their functions under the Act in their annual reports.
Investigating authorities continue to include statistical information on their functions under the Act in their annual reports.

Recommendation: 1st review (rec 22)
The Auditor General should circulate some working definitions and examples of "serious and substantial waste". The definition of "public official" should be amended to clarify that it includes police.
The Auditor General provided a working definition, which was included in the Guidelines issued to all agencies by the Ombudsman's Office. The definition of "public official" was amended by the *Statute Law (Miscellaneous Provisions) Act 2001.*

Recommendation: 1st review (rec 23)
It is not necessary to amend the Act to refer to anonymous disclosures. However any guidelines on the Act should explain that anonymous disclosures can be protected if the identity of the person becomes known.
The Guidelines state that anonymous disclosures can be protected disclosures under the Act.

Recommendation: 2nd review (rec 6)
The Act should cover public officials making disclosures to the Department of Local Government about serious and substantial waste in local government.
Implemented through the *Statute Law (Miscellaneous Provisions) Act (No 2) 2001.*A further amendment (implemented through the *Statute Law (Miscellaneous Provisions) Act 2003*) clarifies that this provision extends to disclosures about councillors and delegates of councils.

Recommendation: 2nd review (rec 7)
Require public sector agencies to tell staff about internal reporting systems and require the Ombudsman to monitor compliance with this.
This is addressed administratively. The Premier's Department Model Contract of Employment for Chief and Senior Executives includes an

Annexure 1 – Review recommendations implemented in full or in part

obligation for CEOs to ensure that employees are aware of the procedures for making protected disclosures and the protections available under the Act. The Model Contract also requires CEOs to ensure the satisfactory introduction and operation of internal reporting systems. The Model Code of Conduct states that executives are expected to be supportive of staff who make or intend to make a protected disclosure.

Recommendation: 2nd review (rec 12)
Clarify that the protections provided under sections 20 and 21 apply to correctional officers employed by the Department of Correctional Services who initiate disclosures notwithstanding that they are required to disclose misconduct.
Implemented by Statute Law Revision Program in April 2001.

In part:

Recommendation: 1st review (rec 3)
Require all investigating authorities to provide reasons to a whistleblower for not proceeding with an investigation into their protected disclosure.
This has been addressed administratively. However legislative change is considered inappropriate. This is because the Act is designed to protect whistleblowers, not to alter the existing framework of investigating authorities. Disclosures made to an investigating body are to be investigated according to the procedures of that body. Some bodies (eg Ombudsman) have obligations to give reasons and others don't (eg ICAC, Auditor General). It would be illogical for bodies that operate under different rules, with different powers and functions to have to adopt a uniform practice in regard to this single aspect of their operations and thereby treat protected disclosure investigations differently to other investigations.

Recommendation: 1st review (rec 10)
Require each investigating authority to refer any evidence of an offence under section 20 to the DPP.
This has been (partially) addressed administratively. The ICAC Act, PIC Act and Ombudsman Act all contain similar provisions to section 20 but none require the relevant investigating authority to refer matters to the DPP. Such referrals are better dealt with administratively. For example, the ICAC has indicated that it would, as a matter of course, refer evidence of an offence under section 20 to the DPP in appropriate circumstances in accordance with its functions under section 14 (1) of the ICAC Act.

Recommendation: 2nd review (rec 2)
Have the Steering Committee continue to play a central role in determining the strategic direction of the development of the protected disclosures scheme.
The legislation in relation to this remains unamended.

Annexure 1 – Review recommendations implemented in full or in part

Recommendation: 2nd review (rec 5)
Provide for the Ombudsman to make disclosures to the DPP or the police for the purpose of conducting prosecutions.
An amendment to sub-section 34(1)(c) of the *Ombudsman Act 1974* was included in the *Statute Law (Miscellaneous Provisions) Bill 2004* assented to on 6 July 2004. The amendment allows the Ombudsman to disclose information to a police officer (or any other investigative authority that the Ombudsman considers appropriate) for the purpose of making any inquiry, or carrying out any investigation, to determine whether any proceedings referred to in paragraph 31 (1)(c) should be instituted. These offences deal with giving false evidence to the Ombudsman or obstructing an investigation by the Ombudsman.

Other recommendations implemented

It should also be noted that the Government has made several other amendments to the Act, at the request of the Steering Committee. These include:

- In April 2000 (through the Statute Law Revision Program) the Act was amended to clarify that the protections of the act extend to employees of State Owned Corporations.
- In October 2001 (through the Statute Law Revision Program) the Act was amended to extend the limitation period for bringing charges under section 20 of the Act from six months to two years.
- In October 2001 (through the Statute Law Revision Program) the Act was amended to protect public officials who make disclosures to the Department of Local Government about serious and substantial waste in local government.
- In June 2002 (through the Statute Law Revision Program) the Act was amended to enable a protected disclosure to be made to an officer of the public authority to which a person belongs and also to an officer of the public authority to which the disclosure relates.

Annexure 2 – Review recommendations not implemented to date

Protected Disclosures Act 1994
Review recommendations not implemented to date

Related to Protected Disclosures Unit (PDU) & statistics:

Of those recommendations not implemented, many relate to the creation of a PDU, and the collection of statistics. These include 1st review (rec 1) and 2nd review (rec 3), 1st review (rec 2) and 2nd review (rec 4), 1st review (rec 16), 1st review (rec 17), 1st review (rec 18), 1st review (rec 20), 1st review (rec 21), and 2nd review (rec 11).

The Premier wrote to the Ombudsman on 8 May 2001 and the Committee on 19 September 2001 advising of the Government's position (copy of letter to Committee attached). The Premier's position remains unchanged in 2004.

Remaining recommendations for consideration

The remaining recommendations require further consideration. Some initial comments prepared by The Cabinet Office follow:

Recommendation: 1st review (rec 7)
Include in the Act a statement of the Legislature's intent that public authorities and officials should act in a manner consistent with and supportive of, the objects of the Act and that they should ensure that persons who make protected disclosures are not subject to detrimental action.
Section 3(1) of the Act already provides that the object of the Act is to encourage and facilitate disclosure. This is to be achieved by enhancing procedures for disclosure and protecting people from reprisals. Section 20 imposes a very clear obligation on public authorities to ensure that whistleblowers are not subject to detrimental action by making it a criminal offence to take such action against a whistleblower. It is therefore not clear that the proposed statement of legislative intent would add anything to the Act.

Recommendation: 1st review (rec 8)
Provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action.
Where a person suffers loss as a result of having made a disclosure, avenues for redress may already exist under the Victims Compensation Act (in respect of acts of violence) or under the Industrial Relations Act (in respect of unfair dismissal or discrimination in employment). The person may also have an action under general law where they suffer harm.

It is not clear why a person who makes a disclosure under the Act should have a special right to damages (in addition to those referred to above) when similar damages are not available to other people who make complaints to

Annexure 2 – Review recommendations not implemented to date

ICAC, the Ombudsman etc. Further, if a person was to commence proceedings for damages under the Act, they would lose their entitlement to reinstatement, remuneration or compensation under the Industrial Relations Act (section 89). Uninformed persons may therefore inadvertently jeopardise their own position.

Recommendation: 1st review (rec 11)
Extend protection against detrimental action to any person/body engaged in a contractual arrangement with a public sector agency who makes a protected disclosure.
It would be very difficult to devise a workable definition of a contractual relationship with a public authority.

Recommendation: 1st review (rec 12)
Extend protection against detrimental action to any person who makes a protected disclosure to the Internal Audit Bureau.
It may not be appropriate for a person to make a protected disclosure to an officer of the Internal Audit Bureau given it is an entity providing commercial services to government agencies (rather than a watchdog). If a person seeks to make such a disclosure, he or she should immediately be redirected to the Auditor-General.

Recommendation: 1st review (rec 13)
The Auditor-General's jurisdiction under the Act should be expanded to enable him to receive disclosures relating to serious and substantial waste of public money in local government.
This has been overtaken by the 2nd review, recommendation 6 (which has been implemented).

Recommendation: 1st review (rec 15)
Clarify that the protections do not apply to Members of Parliament and local government councillors.
This requires further consideration.

Recommendation: 2nd review (rec 2)
Have the Premier comprehensively evaluate the priority areas for reform of the protected disclosures scheme.
This recommendation is noted. The 3rd review of the Act by the Committee provides the appropriate opportunity for such an evaluation.

Recommendation: 2nd review (rec 8)
Expressly provide for the Courts to make orders suppressing the publication of material which would tend to disclose the identity of a whistleblower.
It is not clear that the Court's general capacity to suppress such information is insufficient.

Annexure 2 – Review recommendations not implemented to date

Recommendation: 2nd review (rec 9)
Provide that detrimental action includes payback complaints made in retribution for a protected disclosure.
The existing definition of "detrimental action" in section 20 of the Act would appear to sufficiently cover "payback complaints".