

Submission of the

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

to the

ten year review by the

**Ombudsman and Police Integrity Commission
Committee of the NSW Parliament of the**

Police Oversight System in NSW

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Inquiry Terms of Reference

- (a) the appropriateness of the respective roles and functions of the PIC and the Office of the Ombudsman;
- (b) the extent of the powers available to the Ombudsman and the PIC to perform their functions;
- (c) the management structures, funds and resources available to the Ombudsman and the PIC to perform their functions;
- (d) the accountability mechanisms built into the system;
- (e) the efficiency and effectiveness of the current police oversight system and the scope for further efficiencies and effectiveness;
- (f) any other related matter;

and report to both Houses of Parliament on the inquiry.

1. Executive Summary

1. The New South Wales Council for Civil Liberties ('CCL') receives complaints from the public about police conduct on a regular basis. CCL has had experience with dealing with complaints made subsequently to the NSW Ombudsman by some of these complainants. Some complainants report back to CCL that they are disillusioned with the whole process after complaining to the Ombudsman.
2. CCL has also represented police officers who have made complaints, of a managerial and criminal nature, against police. These officers have also felt that their interests are not being represented by the existing system. They have also complained that the Ombudsman too readily dismisses their complaints.
3. CCL is concerned about the conflict of interest that arises from senior police who investigate complaints also receiving a 12.5% bonus if they reach performance targets (which include reducing complaints). CCL also believes that senior police should be held accountable if rank and file officers sustain complaints as a result of following the orders of senior police.
4. Without exception, civilian complainants express disbelief when informed that if they send their complaint to the Ombudsman then police will investigate their complaint. The fact that police investigate police places a chill on the making of complaints against police in NSW.
5. The current complaint structure does not take into account the obvious power imbalance between an individual complainant and police. CCL recommends that Category 2 complaints against police should be investigated by a person who is independent of the police. Their report should be provided to the complainant and to the Local Area Commander. The Ombudsman should be responsible for ensuring that the Local Area Commander takes appropriate action.
6. CCL has also noticed that the public does not understand when they should complain to the Ombudsman, PIC or a Local Area Commander. CCL recommends that a 'one-stop-shop' should be established that accepts all complaints against police and forwards them on to the appropriate complaints body.
7. CCL is concerned that serious complaints against police can escape the notice of the NSW Ombudsman. Consequently, CCL recommends that either the Ombudsman's police complaints team should be better resourced or, alternatively, that the oversight of Category 2 complaints should be handed over to the Police Integrity Commission.

8. CCL has no confidence in the Ombudsman's procedures for reviewing legislation. CCL strongly recommends that the Ombudsman change its legislative review procedures. Any review by the Ombudsman of police legislation should be divided into three discrete phases: inquiry, fact finding and recommendation formulation. The inquiry stage should be transparent and public. The other stages should be internal processes that are not disclosed to any external body prior to the final report being sent to the appropriate Minister(s).
9. If existing procedures for legislative review are to be maintained, then, in the interests of transparency, it is appropriate for all correspondence during the closed consultation process to be published as an appendix to any subsequent report.
10. Overall, the oversight police system in NSW gives Local Area Commanders too much control over the process. The Ombudsman too often rubberstamps the decisions of Local Area Commanders. When the Ombudsman does make recommendations to a Local Area Commander, a Commander can simply ignore those recommendations. A more effective and independent process for both civilian and police complainants need to be established in NSW. The process needs to be more focussed on the needs of complaints than managerial efficiency.
11. Finally, CCL notes that the Ombudsman's reports into police activity have been of a high standard. However, the Ombudsman seems to be content with publishing a media release and posting these reports on their website. CCL believes that the Ombudsman is failing to communicate the findings of these reports to the wider community. CCL recognises that the law does not provide the office of the Ombudsman with teeth, however that should not prevent the watchdog from barking.

2. Ombudsman and Complaints against Police

12. The existing procedures for complaining about police conduct in NSW are based on a managerial model. This model was recommended by the Wood Royal Commission into the NSW Police Service.¹ In its final report in 1997, the Royal Commission concluded that reform of the NSW police would be best served by the "Service setting proper professional standards and then doing whatever it can to encourage its members, in a managerial way, to lift their performance".² In this model, police Local Area Commanders are accountable for the conduct of their officers and should "be prepared personally to establish what has occurred if a problem exists and then act speedily and fairly to resolve it".³
13. Following the recommendations of the Royal Commission, there is a hierarchy of complaints against police in NSW. The most serious complaints ('category 1'), like police corruption and criminal conduct, are investigated by the Police Integrity Commission (PIC). Less serious complaints ('category 2'), like police harassment and minor misconduct, are investigated by the Local Area Commander along managerial lines. The investigation of these complaints are overseen by the Ombudsman. Minor complaints ('category 3') are dealt with directly by the Local Area Commander, subject to a random audit by the Ombudsman.

2.1 police should not investigate police

14. While the Royal Commission's recommendations are certainly an improvement on the old adversarial system, CCL's experience is that the public has very little confidence in the investigation of category 2 complaints. Complainants always express disbelief when told that police investigate complaints against police. Many complainants choose not to make a complaint once they find this out. This is not surprising given that the very nature of their complaints pre-disposes most complainants to distrust police. Some complainants give up because they have no confidence in the system. Other complainants, particularly the young, the poor and the indigenous, do not complain because they fear reprisals from police and they have no confidence in the Ombudsman to protect them.
15. When it comes to category 2 complaints, the managerial model has had a chilling effect on complaints against police in NSW. The existing system simply fails to recognise the power imbalance between a lone complainant and the NSW Police Force. The needs of complainants, both police and civilians, are simply not taken into account in the managerial complaint structure recommended by the Royal Commission.

¹ Justice Wood, *Royal Commission into the NSW Police Service: Final Report Volume 2* (1997), Chapter 4 'The Complaints and Discipline System'.

² Wood Royal Commission, Volume 2, n 1, [4.14].

³ Wood Royal Commission, Volume 2, n 1, [4.26].

16. CCL has raised this issue with the Ombudsman's office, which has offered to provide an independent person to attend meetings between police and a complainant. This goes some way to addressing the power imbalance, but due to resource constraints within the Ombudsman's office this is not standard practice.
17. According to the Royal Commission, one of the advantages of a managerial-based complaints system is that Local Area Commanders can be held accountable for the actions of their subordinates:⁴

the success with which Local Commanders perform this supervisory and managerial role should be a critical factor in the assessment of their capability to retain command, or to advance to more senior positions within the Service.
18. This has given rise to performance-based contracts for Local Area Commanders that use complaint handling as a performance indicator. CCL believes that this leads to a conflict of interest. CCL understands that, under the terms of the non-executive commissioned police officers Fixed Term appointments policy (File F/2002/12654), a Local Area Commander is entitled to a 12.5% bonus accrued per annum and paid at the conclusion of a five year contract. This places pressure on a Local Area Commander to minimise complaints while maximising productivity (measured by number of arrests, increased intelligence, etc). The conflict arises because if the Local Area Commander agrees that police under his or her control have behaved inappropriately, then this amounts to a concession that the training and supervision of officers under his or her management are inadequate, thereby jeopardising the bonus entitlements. It is no wonder that the highly inaccurate drug detection sniffer dogs are so popular with some Local Area Commanders: they lead to increased intelligence in the COPS database and increase the likelihood of receiving a 12.5% bonus.
19. Furthermore, senior police should be totally accountable if the rank and file sustain complaints as a consequence of doing what they are told by senior police. It is similar to the situation of a truck driver who is forced to drive interstate like a lunatic because of management policy. While the individual has to accept responsibility for their actions, so too do those who shape those actions and the values of the people who are expected to put that policy into practice.
20. When Local Area Commanders might jeopardise their bonus by acknowledging complaints, there is a demonstrable conflict of interest in police investigating police.

⁴ Wood Royal Commission, Volume 2, n 1, [4.26].

CCL recommends that Category 2 complaints should be investigated by a person who is independent of the police. Their report should be provided to the complainant and to the Local Area Commander. The Ombudsman should be responsible for ensuring that the Local Area Commander takes appropriate action.

2.2 the need for a single complaints body

21. In CCL's experience the public is unaware of the three categories of complaints against police. When citizens wish to make a complaint they are confused and are not sure whether they should contact their local police station, the NSW Ombudsman or the Police Integrity Commission.

CCL recommends that a 'one-stop-shop' should be established that accepts all complaints against police and forwards them on to the appropriate complaints body.

2.3 Ombudsman's office is failing to recognise serious complaints

22. As the Wood Royal Commission recommended, the Ombudsman has a role in ensuring that a Local Area Commander's resolution of a category 2 complaint is appropriate.⁵ Unfortunately, the existing system has some serious flaws. CCL is aware of one case in which a complainant was subjected to an intimate forensic procedure that involved him removing all his clothes and being asked to lift his genitals so that police could inspect behind his scrotum. The search was unlawful because the complainant was never asked for his informed consent. The Local Area Commander declined to investigate the complaint. Despite a very articulate complaint, the NSW Ombudsman accepted the Local Area Commander's response. The complainant appealed to the Assistant Commissioner of Police, who hid behind the Ombudsman's decision: "having regard for the decision of the NSW Ombudsman, I propose to take no further action". CCL brought this case to the attention of the NSW Ombudsman on the complainant's behalf and it is now being investigated more thoroughly.
23. Perhaps one of the most disturbing category 2 complaints CCL has dealt with over the last eighteen months involves two police officers who pulled over a car containing four youths (including a nine year old boy), ordered them out of the car, searched all of them (including the nine year old) and then told them to "stay in Redfern and never come to Leichhardt again". Police did not have the requisite reasonable suspicion to exercise the powers they did. The incident was a shameless exercise of racial profiling. Nevertheless, the Acting Local Area Commander dismissed the complaint and the Ombudsman did nothing.
24. One disillusioned complainant sums up their experience like this:

⁵ Wood Royal Commission, Volume 2, n 1, [4.85].

"I feel resigned to accept the fact that the NSW Police isn't going to accept any responsibility for the events that occurred and I have always questioned their integrity before this took place. And after the initial response from [*name of complaints officer suppressed*] at the NSW Ombudsman I have found myself questioning its impartiality and ability to investigate this case."

25. Another complainant expresses their disillusionment about the whole process this way:

"The process of complaints reaffirmed to me that the NSW Ombudsman and other bureaucracies are more likely to believe, and give credibility to, middle-aged white men than minorities including the young. I feel like police were simply able to dismiss my version of what happened in favour for their own.

"I don't believe that the current system treated myself or the other passengers as credible sources of information or that our views were respected."

26. These cases demonstrate that the procedures at the NSW Ombudsman are failing to recognise serious complaints when they arise.
27. CCL does not suggest that the Ombudsman's office is wilfully ignoring serious complaints. Whenever CCL has pointed out deficient responses, the Ombudsman has (when the complainant agrees) taken appropriate action and investigated. The failure to recognise serious complaints could be due to a lack of education on the part of the Ombudsman's staff or to the lack of resources in the Ombudsman's office. CCL recognises that the Ombudsman's police complaint team is chronically understaffed. Given that the majority of complaints against police are overseen by the Ombudsman's office, it seems wrong that, in 1999, PIC had almost three times the staff overseeing police complaints: 37 people in the Ombudsman's office compared to 107 at PIC.⁶
28. However, this does not excuse serious complaints going unnoticed. When the majority of complaints are investigated by police and oversighted by the Ombudsman (in 2004/05, 2440 complaints of a total of 4367),⁷ CCL is concerned that, because of understaffing in the Ombudsman's, appalling decisions of some Local Area Commanders are simply being rubberstamped by the Ombudsman. The warning of criminologists should not be forgotten:

The danger in any [complaints oversight] system is that it becomes merely a clearinghouse for complaints, with a symbolic assurance to

⁶ Colleen Lewis & Tim Prenzler, *Civilian Oversight of Police in Australia* (December 1999) Trends & Issues No.141, Australian Institute of Criminology, <<http://www.aic.gov.au/publications/tandi/tandi141.html>>, 4.

⁷ NSW Ombudsman, *Annual Report 2004-2005* (2005), 44.

aggrieved members of the public that there is scrutiny of police responses.⁸

CCL recommends that either the Ombudsman's police complaints team should be better resourced or, alternatively, that the oversight of Category 2 complaints should be handed over to the Police Integrity Commission.

⁸ Colleen Lewis & Tim Prenzler, n 6, 6.

3. Ombudsman and legislative review

29. The legislative review role of the Ombudsman is relatively new. The Ombudsman was first asked to monitor and report on the operation of new legislation that increases police powers in 1998.⁹ This review role is variously described as a legislative 'safeguard',¹⁰ an 'external oversight measure'¹¹ designed to 'ensure that police exercise their powers appropriately'.¹²
30. Typically, such legislation authorises the Ombudsman to monitor the exercise of the powers conferred upon police by an Act.¹³ To facilitate this monitoring, the Ombudsman is authorised to require the Police Commissioner 'to provide information about the exercise' of the powers.¹⁴ The Ombudsman is then typically mandated to prepare a report after two years and to provide that report to the Attorney-General, Police Minister and the Police Commissioner.¹⁵
31. In reality, this review role is only useful if government implements recommendations made by the Ombudsman. CCL is concerned that Parliament can simply ignore those reports it does not like. For example, CCL expects that the NSW Ombudsman's review of the use of drug detection dogs in NSW will call for the phasing out of the inaccurate sniffer dogs. It is extremely unlikely that these recommendations will be acted upon. The 'law and order auction' will ensure that both sides of politics will continue to erode civil liberties.
32. This mechanism of legislative review is weak and a poor substitute for the more transparent, democratic and rigorous mechanism of judicial review backed up by a Bill of Rights. Significantly, the Ombudsman cannot currently review legislation against international human rights standards.

CCL recommends that the Ombudsman's review role should permit an examination of whether legislation under review is consistent with Australia's international obligations under the International Bill of Human Rights.¹⁶

⁹ *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) s.6.

¹⁰ Legislative Council, *Parliamentary Debates*, 5 May 1998 (Jeff Shaw, Attorney General) 4277.

¹¹ Legislative Council, *Parliamentary Debates*, 27 November 1998 (Jeff Shaw, Attorney General) 10834.

¹² Legislative Council, *Parliamentary Debates*, 20 June 2000 (Carmel Tebbutt, Minister for Juvenile Justice) 7055.

¹³ e.g. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s.242(1).

¹⁴ e.g. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s.242(2).

¹⁵ e.g. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s.242(3)

¹⁶ *Universal Declaration of Human Rights* (1948); *International Covenant on Economic, Social and Cultural Rights* (1966); *International Covenant on Civil and Political Rights* (1966); *Optional Protocol to the International Covenant on Civil and Political Rights* (1966); *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the*

3.1 The current procedure

33. CCL believes that the procedure for legislative review implemented by the Ombudsman is not best practice. Currently the procedure involves sending a draft report to police for comment. The draft report is not publicly available. It includes draft findings of fact and draft recommendations. CCL believes that these procedures lack transparency, treat some stakeholders preferentially and leave the Ombudsman open to allegations of perceived bias. CCL has raised these concerns with the Ombudsman, but has been told that the Office has sought legal advice and is satisfied that these reviews are conducted appropriately.
34. The current procedure for legislative review appears to involve three steps: public consultation; preparation of final report; and the final report is sent to the appropriate Minister(s).

3.1.1 step one: public consultation

35. This step of public consultation is an important one. Generally, the Ombudsman prepares and releases a discussion paper for public comment. The discussion papers of the NSW Ombudsman are of a very high standard indeed. The Ombudsman and his staff are to be commended for this. It appears that, while police were initially reluctant to accept their statutory requirement to cooperate with the Ombudsman in these reviews by handing over requested information, the police are now cooperating with the Ombudsman to a satisfactory degree.¹⁷
36. The transparency of this step could be improved, however, by publishing all of the submissions to a review on the Ombudsman's website. This is not currently done. It is standard practice for parliamentary inquiries and many statutory bodies, for example the federal Australian Communications and Media Authority.¹⁸

In the interests of transparency, CCL recommends that all submissions to the Ombudsman's review of legislation be made available on the Ombudsman's website.

37. During this consultation phase, the Ombudsman will often go out into the community, seeking input into a review. For example, the Police Association of Australia helped to organise focus groups in Local Area Commands throughout New South Wales in the Ombudsman's recent report on criminal infringement notices.¹⁹ The Ombudsman is to be commended for this proactive approach to community stakeholder consultation.

abolition of the death penalty (1990). See: UN High Commissioner for Human Rights, <<http://www.ohchr.org/english/law/>>.

¹⁷ NSW Ombudsman, *Annual Report 2004-2005* (2005), 59.

¹⁸ eg <http://www.acma.gov.au/ACMAINTER.262384;STANDARD:926901124:pc=PC_2547>.

¹⁹ NSW Ombudsman, *On the Spot Justice? The trial of criminal infringement notices by NSW police* (April 2005) 6.

3.1.2 step two: preparation of final report

38. This step involves analysis of the public consultation, further consultation with government stakeholders and the drafting of the final report. CCL is critical of the way the Ombudsman has implemented this step of the process, because it lacks transparency, fails to consult the public, treats some stakeholders preferentially and leaves the Ombudsman open to allegations of perceived bias.
39. **CCL is highly critical of the Ombudsman providing police (and other agencies) with drafts, or partial drafts, of the final report and recommendations.** There is nothing in the statutory framework requiring the Ombudsman to consult with external agencies on the final report before it is sent to the Attorney General. In fact, the legislation provides that the report should be given to the Police Commissioner at the same time as the appropriate Minister(s).²⁰
40. CCL is concerned that this process takes place behind closed doors, that it provides police with an avenue of input into the final report that is not open to the general public and that it provides police with unfair advance notice of the Ombudsman's findings and recommendations. This advance notice gives police media relations staff valuable time to prepare responses to any adverse findings well before the public release of the report.
41. Such a process undermines the inclusiveness of the initial public consultation. It also has the potential to undermine the public's confidence in the independence of the entire process, when some stakeholders are afforded special non-transparent access to the report and its outcomes.
42. To use an analogy: it would be improper for a judge to hand to lawyers a draft judgment for comment. In the same way, it is inappropriate for the Ombudsman to hand a draft review report to police for comment.
43. The Ombudsman is of the view that it is appropriate to provide police with a draft copy of the report as a matter of procedural fairness – to afford police the right to respond to what is in the report before it is published. An example of this closed consultation process is noted in the Ombudsman's recent report on criminal infringement notices:²¹

To ensure fairness to agencies, and that all of the information in the report was accurate, a consultation draft was supplied to each of the Attorney General's Department (from where it was forwarded to the Chief Magistrate of the Local Court), the Commissioner of Police, Ministry for Police and the Office of State Revenue.

²⁰ see [30].

²¹ NSW Ombudsman, *On the Spot Justice? The trial of criminal infringement notices by NSW police* (April 2005) 8.

44. This partial disclosure goes on to say that the 'majority of the feedback received was directed toward the draft recommendations and has been incorporated into the report'. However there is no disclosure of what this feedback was or how it affected the drafting of the final report. The public cannot comment on the responses of the agencies consulted, because the responses are not disclosed. Even more significantly, the Ombudsman has completely failed to consult the public on the agencies' responses.

3.2 improving the procedure

45. CCL believes that procedural fairness does not require police (or other agencies) be given draft reports and draft recommendations for comment. This legislative review role is new for the Ombudsman and the way it has been implemented seems to confuse the three discrete processes of inquiry, fact finding and the formulation of recommendations.
46. In general terms, the purpose of the process of inquiry is to gather together the relevant information about the exercise of police powers pursuant to the legislation under review. This involves the public consultation process, already undertaken by the Ombudsman. It also involves consultation with a limited number of stakeholders about allegations of fact.
47. At the inquiry stage, it is appropriate for the Ombudsman to consult with police on alleged facts adverse to police. This is a proper application of the hearing rule. However, it is only appropriate to consult for the purposes of confirming or discounting those allegations of fact made during the public consultation or inquiry processes. This consultation should be transparent.
48. For example, it is right and proper for the Ombudsman to write to police and to put to them an allegation of fact made by an organisation such as CCL. The police have a right to respond and put their side of the story. CCL would also expect, as a matter of procedural fairness, a right of reply. CCL would also expect that this process would be open and transparent, and that all correspondence would be made public.
49. Once this process of inquiry is over, the Ombudsman should move to the next discrete stage of a review: the finding of facts. This involves sifting through the evidence amassed from the inquiry stage and making findings of fact based upon that evidence. It is not proper for *any external body* to be consulted, or to attempt to interfere with, this process. Practically, it might be necessary to return occasionally to the inquiry stage to seek clarification of evidence or to put to parties allegations that had been previously overlooked. This reopening of inquiry should be fully transparent.

50. Once the findings of fact have been completed, the Ombudsman should move to the last discrete stage of a review: the formulation of recommendations based upon those findings of fact. Again, it is inappropriate for any external body to be consulted about these recommendations.
51. Further, it is inappropriate to disclose the findings of fact and recommendations of a review report to any external body before the final report is sent to the Attorney-General and tabled in Parliament. The process of public inquiry affords all parties the necessary access to procedural fairness. It is inappropriate to afford a limited number of stakeholders the opportunity to provide input at the fact finding or recommendation formulation stages.
52. In summary, the different stages of the process of legislative review need to be more clearly defined. A clear demarcation between, on the one hand, the *external* processes of public consultation and further transparent inquiry and, on the other hand, the *internal* processes of fact finding and recommendation formulation will help to ensure that the Ombudsman is both independent and seen to be independent.

CCL strongly recommends that the Ombudsman change its legislative review procedures. Any review by the Ombudsman of police legislation should be divided into three discrete phases: inquiry, fact finding and recommendation formulation. The inquiry stage should be transparent and public. The other stages should be internal processes that are not disclosed to any external body prior to the final report being sent to the appropriate Minister(s).

If existing procedures are to be maintained, then, in the interests of transparency, it is appropriate for all correspondence during the closed consultation process to be published as an appendix to any subsequent report.