LEGISLATIVE ASSEMBLY

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

ELEVENTH GENERAL MEETING WITH THE NSW OMBUDSMAN

Together with Transcript of Proceedings 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 *Telecommunications (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 General Meeting with the Ombudsman and statutory officers of the Office of the Ombudsman was the first opportunity for the Committee to take formal evidence on the work of the Office, since the commencement of the new Parliament.

As is the usual practice for General Meetings, questions on notice were provided to the Ombudsman in advance of the Meeting and the public hearing comprised supplementary questions and questions without notice.

The Committee has focussed in the report on the conduct of two statutory reviews: the review of the *Law Enforcement (Controlled Operations) Act 1997* and the review of the *Police Act 1990*. The outcomes of these two reviews have the potential to impact on the Ombudsman's jurisdiction, functions and powers and the General Meeting. The Committee held a meeting with representatives of the Ministry for Police to obtain information on aspects of the reviews, and followed this up by taking evidence at the General Meeting on such matters as the consultation process and method of reporting.

The report outlines a dispute that has developed between the Office of the Ombudsman and NSW Police on the issue of the forms currently used within NSW Police to apply for authorisation to conduct a controlled operation. The Ministry for Police has advised that it will not be dealing with this issue as part of the review of the *Law Enforcement (Controlled Operations) Act*. In view of the significant implications this dispute has for the ability of the Ombudsman to effectively oversight controlled operations, the Committee has emphasised the need for a resolution of the issue.

An important matter noted in the commentary is the recent major extensions of the Ombudsman's jurisdiction, which have had significant structural and resource implications for the Office. The Office is consolidating its extended jurisdiction and the Committee agrees with the Ombudsman that careful consideration needs to be given to any further expansion of jurisdiction in the immediate future.

A related issue noted by the Committee is the need for appropriate consultation to occur with the Ombudsman on proposed legislation that would affect his Office. A number of failures have been identified in this regard, however, not usually where the Ombudsman is the principal party to the proposed legislation. On an issue of clarification, the Committee has recommended that the *Terrorism (Police Powers) Act 2002* be amended to make express provision for the Ombudsman to oversight complaints concerning the conduct of police officers under the Act, consistent with the Ombudsman's jurisdiction under the *Police Act*.

I would like to thank the Ombudsman and the statutory officers who participated in the General Meeting for the comprehensive information they have provided on the work of the Ombudsman's Office. On behalf of the Committee, I wish to congratulate the Ombudsman on silver medal awarded in the Australasian Annual Report Awards for the Ombudsman's Annual Report for 2001-2002. The Ombudsman's Annual Report is an important source of information about the work of the Ombudsman's Office and is the key document used by the Committee to structure the examination that takes place in the General Meeting.

Finally, I would like to thank the Members of the Committee for their participation in the General Meeting and their contribution to the reporting process. The Committee's report is a consensus document, which represents the bipartisan and constructive approach taken by the Members of the Committee to the exercise of its oversight role.

Paul Lynch MP
Chairperson

Chapter One - Commentary

1 STATUTORY REVIEW

1.1 BACKGROUND

Pursuant to its statutory functions under s.31B of the *Ombudsman Act 1974*, and s.95 of the *Police Integrity Commission Act 1996,* the previous Committee on the Office of the Ombudsman and Police Integrity Commission reported to Parliament in June 2002 on its tenth General Meeting with the NSW Ombudsman and the sixth General Meeting with the Commissioner of the Police Integrity Commission (PIC). Both General Meeting reports included comment on aspects of the consultation process undertaken in relation to the review of the *Police Integrity Commission Act*. The previous Committee intended to consider the findings of the review upon its completion and presentation to the Parliament.

Since its appointment, the current Committee also has monitored and considered the statutory reviews being conducted by the Ministry for Police on the *Law Enforcement (Controlled Operations) Act 1997* and the *Police Act 1990*. The Committee's experience in relation to these reviews is examined in detailed later in the Commentary, to illustrate a number of threshold issues concerning the statutory review process that the Committee considers should be drawn to the attention of the Parliament.

1.2 MINISTERIAL STATUTORY REVIEWS

In the New South Wales context, review clauses in legislation were introduced as a policy initiative in 1992. At the time, it was envisaged that review clauses would be included in principal Acts but not in amending Acts. Review clauses would require the Minister administering the Act to review whether:

- the policy objectives which the legislation sought to achieve remain valid; and
- the form of the legislation remains appropriate for securing those objectives.

Reviews would usually occur five years after the date of assent and the Minister was required to report to Parliament on the outcome of the review. The purpose of the review clauses was to ensure that legislation is properly reviewed after being in operation for several years, and to fully consider the need for its continued existence. Such provisions would assist in removing obsolete and ineffectual statutory provisions, and to help reduce the quantity of legislation in existence.[1]

The scope of the statutory review provisions as they currently stand is relatively unchanged. The focus remains on determining whether the policy objectives of a statute remain valid, and whether the terms of a statute remain appropriate for securing those objectives. However, there is some variation in the timeframes within which reviews are conducted.

[1] NSW Premier's Department, Memorandum No.92-10, "Review Clauses in Legislation" (Memorandum to all Ministers), 13 May 1992.

At the outset it should be stated that the Committee considers the scope of existing statutory review provisions to be appropriate. It is proper that the Minister with responsibility for administering a piece of legislation should be responsible for policy review and development in relation to that legislation. As currently drafted, statutory review provisions specifically give effect to this aspect of Ministerial responsibility. As a parliamentary body, the Committee is removed from, and outside, the review process, which is a process of the Executive Government. Rather, the Committee has a statutory role to monitor and review the Office of the Ombudsman, the PIC and the Inspector, and possesses the discretion to report to Parliament, with such comments as it thinks fit, on any matter appertaining to each of these bodies, or the exercise of their functions, which the Committee is of the opinion warrants drawing to the attention of Parliament. The Committee takes the position that it is able to report on any aspect of a review that relates to the Committee's statutory functions. In particular, the Committee considers that it has a role to report to the Parliament on matters affecting the jurisdiction, functions and powers of the Ombudsman, PIC and the Inspector. This includes reporting on such matters arising from the statutory review process.

Successive Committees oversighting the Ombudsman and PIC have emphasised this point, and have endeavoured to find an appropriate process by which they could monitor the conduct and outcomes of relevant statutory reviews. To date, the Committee has utilised private meetings, or briefings, from the departmental officers with carriage of the reviews for this purpose. Thus far, the Ministry for Police has conducted all of the reviews considered by the Committee. The Committee is pleased to note the recognition given by the Ministry for Police to the views the Committee has expressed in its reports to Parliament. However, there are a number of matters relating to statutory reviews about which the Committee remains concerned.

1.3 "BEST PRACTICE" CONSULTATION

In the report on the tenth General Meeting with the Ombudsman, the previous Committee examined the progress of the review of the *Police Integrity Commission Act*, the consultation process involved, and certain key issues relevant to the functions and jurisdiction of the Ombudsman. The report stresses the need for open and meaningful consultation with key stakeholders in the police oversight system, and is critical of delays that occurred in the consultation process. More recently, the current Committee has monitored the reviews of the *Law Enforcement (Controlled Operations) Act* and the *Police Act*, in addition to the review of the *Police Integrity Commission Act*.

On the basis of the Committee's examination of these reviews, the Committee considers that it is important for agencies to adhere to principles and standards of consultation that should apply to statutory reviews, and the development of legislative proposals, which have significant implications for independent statutory officers such as the Ombudsman and the PIC. In doing so, the Committee further considers that regard should be had to the development of policies on legislative consultation processes within related Commonwealth and United Kingdom jurisdictions.

In November 2000, following on from the release of the release of the White Paper on *Modernising Government*[2] in 1999, the British Cabinet Office released a *Code of practice on written consultation* to apply to consultation documents issued after January 2001.[3] The code relates to national consultations, that is consultation covering whole areas of a department's responsibility, where views are sought from the public, as distinct from inter-departmental or government consultation. Although it has no legal force, and cannot prevail over statutory or other mandatory external requirements, the code is otherwise considered to be binding on UK Departments and their agencies, unless a departure is required in exceptional circumstances.[4] It is aimed at promoting an effective and inclusive consultation process, leading to improved policy decision-making.[5] Significantly, the code is also seen as having a wider relevance to regular and more limited consultations, which are often public.[6]

The consultation criteria contained within the code is as follows:

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.
5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.
6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.
7. Departments should monitor and evaluate consultations, designing a consultation coordinator who will ensure the lessons are disseminated.[7]

Within Australia, the Cabinet and Legislation Handbooks, published by Department of Prime Minister and Cabinet, also offer some guidelines on the consultation that should occur in the development of legislative proposals.

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[2] *Modernising Government*, Cm 4310, HMSO, March 1999. Chapter 2 of the White Paper deals with policy making. See http://www.archive.official-documents.co.uk/document/cm43/4310/4310.htm

[3] See http://www.cabinet-office.gov.uk/regulation/Consultation/Code_MSWord.doc The Code is currently being reviewed and the Cabinet Office released a consultation document, entitled *The Code of Practice on Consultation,* in September 2003. The consultation period concludes in November 2003 and a summary of responses is to be published prior to 24 February 2004. See http://www.cabinet-office.gov.uk/regulation/Consultation/DraftCode.doc

[4] Cabinet Office, *Code of practice on written consultation – Applies to consultation documents issued after 1 January 2001*, November 2000, pp.3, 5.

[5] ibid, pp.3-4.

[6] ibid, p.5.

[7] ibid, p.7.

The Cabinet Handbook states that "good policy requires informed decisions", which in turn "require agreement on facts and knowledge of the opinions of those who have expertise in the subject matter". The Handbook also comments that as far as possible, any differences on proposals (especially regarding matters of fact) should be resolved in advance of Cabinet consideration or, if resolution is not possible, any differences should be identified and set out in a way that will facilitate informed decision-making. Emphasis is placed on permitting adequate time for proper consultation and planning accordingly. The Handbook specifies certain basic consultation requirements, including that all submissions to Cabinet should be the subject of consultation among departments where the issues concerned impinge upon their core functions.[8] Also, "best practice" involves consultation as "an integral part of the development of a policy proposal", in which Ministers and departmental officers with an interest, should have ample opportunity to contribute to the development of the proposal and to resolve any differences before lodgement of the submission.[9]

The *Legislation Handbook* states that "best practice" in developing legislation requires consultation with relevant parties within government, and where appropriate, outside government.[10] However, it is not considered appropriate for public consultation to occur on proposed legislation:

> (a) which would alter fees or benefits only in accordance with the Budget;
> (b) which would contain only minor machinery provisions that would not fundamentally alter existing legislative arrangements; or
> (c) for which consultation would give a person or organisation consulted an advantage over others not consulted.[11]

The *Cabinet Handbook* further indicates that in the preparation of submissions to Cabinet it is important to balance the need to consult with agencies with a proper interest in the proposal against the risk of a wide circulation that increases the possibility of premature disclosure.[12] The Committee acknowledges that certain decisions made by Ministers, in relation to the preparation of legislation, are appropriately matters for their judgement, eg whether or not there is a need for a draft exposure bill.

The aforementioned publications derive from different jurisdictions and are quite distinct and separate from review of the operation of existing legislation. Nevertheless, they provide a useful basis for considering some of the guiding principles and standards that should apply to both government and non-government consultation undertaken in statutory reviews. It is relevant to note that in the case of all three statutory reviews in question, the results of the reviews have been used to assist in the preparation of legislative proposals.

In view of the particular nature of the three statutes being considered, all of which involve significant public interest issues, the conduct of their review required to be undertaken in a considered, transparent and comprehensive fashion. The *Police Integrity Commission Act*

[8] Department of Prime Minister and Cabinet, *Cabinet Handbook*, fifth edition, amended November 2002, (Commonwealth of Australia), Canberra 2002, p. 21. See http://www.dpmc.gov.au/pdfs/cabineted5.pdf
[9] ibid, pp.21-2.
[10] Department of Prime Minister and Cabinet, *Legislation Handbook*, includes update No. 1 of May 2000, (Commonwealth of Australia), Canberra 1999, p.2. At http://www.dpmc.gov.au/pdfs/LegislationHandbookMay00.pdf
[11] ibid, p.3.
[12] *Cabinet Handbook*, op.cit, p.23.

flowed from the Royal Commission into the NSW Police Service and is a piece of legislation that was introduced with bipartisan support. The jurisdiction of the PIC concerns serious police misconduct and corruption, and PIC's extensive powers are coercive and covert in nature. Such powers have the potential to trespass unduly on personal rights and liberties. Controlled operations fall into the category of covert powers used by law enforcement agencies. The *Law Enforcement (Controlled Operations) Act* provides a legislative scheme whereby law enforcement agencies have authority to engage in what would otherwise be criminal activities, in accordance with the provisions of the Act, for the purpose of detecting and preventing serious crime and corruption. Significantly, controlled operations do not require judicial approval. The *Police Act* is a comprehensive legislative scheme that includes the police complaints system, which is of direct relevance to the functions and powers of both the Ombudsman and the PIC.

Following is an account of the Committee's examination of the process undertaken for the review of the *Law Enforcement (Controlled Operations) Act 1997* and the *Police Act 1990*, in which particular attention has been given to:

- the consultation planning process;
- the extent of consultation;
- reporting on statutory outcomes.

The Committee's report on the seventh General Meeting with the PIC also examines the review of the Police Integrity Commission Act and the Police Act.

2 REVIEW OF THE LAW ENFORCEMENT (CONTROLLED OPERATIONS) ACT 1997

2.1 BACKGROUND

The *Law Enforcement (Controlled Operations) Act 1997* was enacted in response to the recommendation of the NSW Police Royal Commission to overcome difficulties for law enforcement agencies arising from the High Court judgment in *Ridgeway v R* (1995) 184CLR19[13], which called into question the admissibility of evidence obtained illegally or improperly.

Legislative provisions - The Act permits law enforcement officers to commit offences as part of an approved operation for the purpose of preventing, frustrating or prosecuting crime. It provides for an officer or employee of certain prescribed law enforcement agencies[14],

[13] In this case, Ridgeway had been charged with importing heroin into Australia and the importation was part of a covert operation. The unlawful activities of the AFP officers involved in the operation formed an essential part of the offence with which Ridgeway was charged. However, the High Court excluded the evidence and upheld an appeal against Ridgeway's conviction. The evidentiary principles contained in that judgment were incorporated in to Commonwealth and State Evidence Acts, and led to evidence that is obtained illegally or improperly being inadmissible, unless the desirability of admitting the evidence outweighs the undesirability of doing so. NSW Ombudsman, *Law Enforcement (Controlled Operations) Act Annual Report 2001-2*, November 2002, p.5.

[14] Law enforcement agency is defined under the Act to include: NSW Police, the Independent Commission Against Corruption, the New South Wales Crime Commission, the Police Integrity Commission, and such of the

including the PIC, to apply to the Chief Executive Officer (CEO) of their agency for an authority to conduct a controlled operation on behalf of the agency. The Act clarifies that evidence obtained from a controlled operation is prima facie admissible in Court. It also provides that law enforcement officers have complete immunity from departmental, civil and criminal prosecution for pre-approved offences they commit during a controlled operation. Offences committed without prior approval will carry indemnity only if they are undertaken in life threatening situations.[15]

Relevance to the Committee's jurisdiction - The *Law Enforcement (Controlled Operations) Act* is relevant to the Committee's oversight of both the Office of the Ombudsman, the PIC and the Inspector of the PIC. For the purposes of the Act, the PIC is one of the prescribed law enforcement agencies that is able to conduct a controlled operation. Part 4 of the Act provides the Ombudsman with the role of monitoring the operation of the Act and reporting annually on this function. The Inspector of the PIC has a role in relation to the development and oversight of codes of conduct used by law enforcement agencies in respect of controlled operations.

2.2 ACCOUNTABILITY & THE ROLE OF THE OMBUDSMAN

The second reading speech on the Bill states that "a strict system of accountability" is to apply to the otherwise unlawful activities undertaken by law enforcement agencies.[16] The internal accountability mechanisms that apply to law enforcement agencies in relation to controlled operations are:

- the application approval process;
- the requirement for the principal law enforcement officer responsible for the controlled operation to report to the CEO within 2 months of completing a controlled operation, including such matters as the CEO requires; and
- a specific code of conduct.[17]

In accordance with Part 4 of the Act, the Ombudsman performs an external accountability function that involves inspecting records held by the prescribed law enforcement agencies for the purpose of ascertaining whether or not each of these law enforcement agencies has complied with the requirements of the Act (s.22(1)).

The Inspector noted in the first statutory review that the auditing by the Office of the Ombudsman "constitutes the prime (external) oversighting of compliance by the law enforcement agencies with the statutory requirements in relation to the granting of approvals and the making of reports". However, in doing so, he noted that this function was quite

following agencies as may be prescribed by the regulations as law enforcement agencies for the purposes of the Act: (i)the Australian Federal Police, (ii)the Australian Crime Commission, and (iii)the Australian Customs Service.

[15] Inspector of the Police Integrity Commission, *Review of the Law Enforcement (Controlled Operations) Act 1997*, April 1999, p.4.

[16] Legislative Assembly, *Hansard*, Law Enforcement (Controlled Operations) Bill, 20 November 1997.

[17] NSW Ombudsman, *Law Enforcement (Controlled Operations) Act Annual Report 2001-2*, November 2002, p.8.

distinct from a review of the discretionary determination by a CEO as to whether or not to grant an authority to conduct a controlled operation. It should be noted that the Inspector did not recommend any significant changes to the auditing provisions of the Act.[18]

Notifications - Section 21 of the Act requires that a CEO must notify the Ombudsman in writing within 21 days after granting an authority or a variation of authority to conduct a controlled operation. The CEO also must notify the Ombudsman within 21 days after receiving a report on the conduct of an authorised operation to which an authority relates. The information required to be included in such notifications is prescribed by regulation and the Act empowers the Ombudsman to obtain information from the relevant CEO in order to consider such authorities and reports (s.21(2)).

Inspections - Under s. 22 of the Act the Ombudsman must inspect the records of each law enforcement agency at least once every 12 months, and may inspect the records of any of the law enforcement agencies at any time. The inspection reports are provided to the CEO of the agency to which the report relates and to the Minister responsible for that agency. The Ombudsman also may make a special report to Parliament at any time with respect to any inspection conducted under s.22.

For the purpose of conducting controlled operation inspections, the Ombudsman may exercise the same powers conferred in relation to inspections carried out under the *Telecommunications (Interception)(New South Wales) Act 1987*, and:

- may enter at any reasonable time premises occupied by the authority, after notifying the chief officer of the authority;
- is entitled to have full and free access at all reasonable times to all records of the authority;
- is entitled to make copies of, and to take extracts from, records of the authority;
- may require an officer of the authority to give the Ombudsman such information as the Ombudsman considers necessary, being information that is in the officer's possession, or to which the officer has access, and that is relevant to the inspection.(s.13 *TI (NSW) Act*);
- may require the officer to give the information to the Ombudsman in writing and at a specified place and within a specified period; and
- may require the officer to attend before a specified inspecting officer in order to answer questions relevant to the inspection. (s.14 *TI (NSW) Act*)

Ombudsman's Annual Reports - The Act requires the Ombudsman to prepare an annual report to Parliament on the Office's work and activities under the Act, which is to include the following information for each law enforcement agency:

a) the number of formal authorities granted or varied by the CEO, and the number of formal applications for the granting or variation of authorities that have been refused by the CEO, during the reporting period;

[18] Inspector of the Police Integrity Commission, *Review of the Law Enforcement (Controlled Operations) Act 1997*, April 1999, pp.6-7.

a1) the number of urgent authorities or urgent variations of authorities granted by the CEO, and the number of urgent applications for authorities or urgent variations of authorities that have been refused by the CEO, during the reporting period;
(b) the nature of the criminal activity or corrupt conduct against which the controlled operations conducted under the authorities were directed;
(c) the number of law enforcement and civilian participants involved in the controlled operations conducted under those authorities;
(d) the nature of the controlled activities engaged in for the purposes of controlled operations conducted under those authorities; and
(e) the number of law enforcement and civilian participants who have engaged in controlled activities for the purposes of the controlled operations conducted under those authorities. (s.23(2)).

Reports by the Ombudsman must not include any information that could reasonably be expected to:

(a) endanger the health or safety of any person;
(b) disclose the methodology used in any investigation that is being, has been or is proposed to be conducted by any law enforcement agency;
(c) prejudice any current or proposed investigation conducted by a law enforcement agency;
(d) prejudice any legal proceedings arising from any such investigation. (s.24(1))

2.3 USE OF CONTROLLED OPERATIONS

The most readily accessible information concerning the use of controlled operations is obtained from the Ombudsman's Annual Reports on Controlled Operations and the Inspector's report on the first review of the Act. After noting some initial problems during the implementation of the Act and its early operation, the Ombudsman recently has reported that agencies are cooperative, and that the vast majority of administrative irregularities are minor. Controlled operations generally are planned, assessed and authorised to the required standard.[19] (The Ombudsman's Annual Report on Controlled Operations for 2002-3 is due to be released after the General Meeting)

NSW Police is consistently the biggest user of controlled operations. In the 2001-2 reporting period, the number of authorisations by NSW Police increased by over 40% and NSW Police conducted the majority of completed controlled operations (169 of a total 182). By comparison the use of controlled operations by other law enforcement agencies is relatively minimal. The majority of controlled operations conducted by NSW Police relate to criminal activity associated with the supply and possession of prohibited drugs. The Ombudsman has reported that a high proportion of controlled operations are successful and often lead directly to arrests and criminal charges, and the confiscation of drugs and other proceeds of crime.[20] The use of provisions enabling telephone applications is rare. There was only one urgent application in 2001-2, which was sought by NSW Police.

[19] NSW Ombudsman, *Law Enforcement (Controlled Operations Act Annual Report 2001-2002,* November 2002, p.13.
[20] This observation was made in both the Ombudsman's Controlled Operations Annual Report for 2000-1 (p.11) and for 2001-2 (p.13).

There are some important trends that have emerged in relation to controlled operations since the commencement of the Act, and in particular since the 1999 legislative amendments;

- There has been a continual increase each year in the number of controlled operations authorised by NSW Police;
- In 2001-2 the number of authorisations by NSW Police increased by almost 40% over the previous year from 148 to 206;
- The number of controlled operations authorised by the NSW Crime Commission has decreased significantly over the five year period from 1997-2002;
- The number of controlled operations conducted by the PIC and the ICAC continues to be very low in comparison to the NSW Police;
- From 2000-2002 no controlled activities actually took place in approximately 15% of the completed controlled operations undertaken by NSW Police, and 20% of the controlled operations completed by the NSW Crime Commission similarly involved no controlled activities; and
- during the 2001-2 reporting period only one urgent application was sought (by NSW Police).

The following five-year comparison of controlled operations comes from the Ombudsman's Annual Report on Controlled Operations for 2001-2:

Table 1: Controlled Operations Authorised — A five year comparison

	1997–1998*	1998 - 1999	1999 - 2000	2000 - 2001	2001 - 2002
NSW Police	35	142	144	148	206
NSW Crime Commission	7	23	45	14	6
Police Integrity Commission	3	14	2	0	3
Independent Commission Against Corruption	2	2	2	1	4
National Crime Authority	N/A	N/A	N/A	1	3
Australian Federal Police	N/A	N/A	N/A	0	0
Australian Customs Service	N/A	N/A	N/A	0	0
Total	**47**	**181**	**193**	**164**	**222**

Table 2: Controlled Operations Completed — A five year comparison

	1997–1998*	1998 - 1999	1999 - 2000	2000 - 2001	2001 - 2002
NSW Police	14	115	107	125	169
NSW Crime Commission	3	22	33	10	5
Police Integrity Commission	3	10	1	2	3
Independent Commission Against Corruption	2	2	2	1	4
National Crime Authority	N/A	N/A	N/A	1	1
Australian Federal Police	N/A	N/A	N/A	0	0
Australian Customs Service	N/A	N/A	N/A	0	0
Total	**22**	**149**	**143**	**139**	**182**

* *The Act only became operative from 1st March 1998*

2.4 REVIEWING THE CONTROLLED OPERATIONS LEGISLATION

Section 32 of the *Law Enforcement (Controlled Operations) Act* provides for two statutory reviews by the Minister "to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives".[21] The first review was undertaken twelve months after the commencement of the Act, by the previous Inspector of the PIC, the Hon. M.D. Finlay QC, on referral from the Minister for Police and was tabled in April 1999. The second review is required to be undertaken as soon as possible after 1 December 2002 and is to be tabled in each House of Parliament by 1 December 2003. The approach taken by the previous Inspector in the first review was to recommend largely incremental changes and to ensure the retention of strong external accountability. The majority of the recommendations from the first review were given effect in legislation enacted in 1999.

During the first review, the Inspector described the main policy objectives of the Act as being to:

A. Provide law enforcement agencies with the investigative tools they need to effectively investigate serious crime, particularly organised crime and drug trafficking. To this end, the Act permits the Chief Executive Officer of each prescribed agency to authorise suitably trained officers to undertake, as part of an approved controlled operation, what would otherwise be illegal activities (Controlled activities). In practice, the Act is intended to permit law enforcement officers to break the law in order to investigate it;

B. Provide a strict system of accountability for the approval of controlled operations and the conduct of controlled activities by ensuring that authorisations are granted only in accordance with statutory guidelines (sections 6 & 7) and by providing external auditing of compliance with these requirements by the NSW Ombudsman;

C. Safeguard officers by providing an indemnity against departmental, criminal or civil prosecution for all controlled activities they undertake;

D. Remove any doubt as to the status of evidence obtained in the course of a controlled operation by ensuring that all such evidence is classified as legal and prima facie admissible. [22]

All parties to the first review agreed that the policy objectives of the Act remained valid, and the Inspector concluded that they were likely to remain so for the foreseeable future.[23]

Mr Finlay also put forward two propositions about controlled operations, as follows:

[21] Originally s.32 of the Act only provided for the first statutory review. However, in light of agreement between the parties to the first review that a subsequent review in similar terms was desirable, the Act was amended in 1999 by the *Law Enforcement (Controlled Operations) Amendment Act* to provide for a further review as soon as possible after three years from the commencement of the Act (see Inspector of the Police Integrity Commission, *Review of the Law Enforcement (Controlled Operations) Act 1997*, April 1999, p.45).
[22] Inspector of the Police Integrity Commission, *Review of the Law Enforcement (Controlled Operations) Act 1997*, April 1999, p.5.
[23] ibid.

1. The public interest is served by the enactment of legislation which enables law enforcement agencies to use "authorized operations" to obtain evidence of serious criminal activity or corrupt conduct, to arrest its perpetrators or to frustrate such activity or conduct; and

2. The public interest is also served by not permitting law enforcement agencies to use 'authorised operations' involving conduct, which could otherwise be illegal unless such conduct can be foreseen, planned for and authorised in advance so as to be capable of being accounted for.[24]

The Inspector stated that applying one of the preceding considerations at the expense of the other would require careful weight and evaluation.[25] Although he was discussing the issue of granting retrospective approval for controlled operations, the principles apply generally.

2.4.1 THE CONDUCT OF THE SECOND REVIEW OF THE ACT

The Committee has examined certain aspects of the consultation process undertaken by the Ministry for Police during the second review, some of which also arose in relation to the reviews of the *Police Act* and the *Police Integrity Commission Act*. Consultation for the latter review was the subject of comment in the previous Committee's report to the Parliament on the tenth General Meeting with the Ombudsman (June 2002) and it is not proposed to canvass these issues again here.

Advertising and consultation - The Ministry for Police has advised that the second review was advertised and submissions invited from key stakeholders. Ten submissions were received: seven of which recommended substantive changes and legislative amendment; and three of which did not recommend legislative amendment.[26] The seven main submissions were received from:

- The Independent Commission Against Corruption
- The NSW Crime Commission
- The Police Integrity Commission
- The Australian Federal Police
- NSW Police
- Privacy NSW
- The Ombudsman[27]

The process by which the Ministry for Police has consulted stakeholders in the second review of the Act differs significantly to the process adopted by Mr Finlay in the first review of the Act. He undertook a full and open consultation process involving throughout all parties with an apparent interest, including:

- NSW Police
- The ICAC

[24] Inspector of the Police Integrity Commission, *Review of the Law Enforcement (Controlled Operations) Act 1997*, April 1999, p24.
[25] ibid.
[26] Briefing note attached to correspondence to the Chair from the Minister for Police, dated 13 October 2003, concerning the review of the Act.
[27] Information provided at the briefing to the Committee by representatives of the Ministry for Police on 19 November 2003.

- The NSW Crime Commission
- The PIC
- The NSW Ombudsman
- The Australian Federal Police
- The National Crime Authority (since replaced by the Australian Crime Commission)
- The Criminal Justice Branch, Criminal Law Division of the Attorney General's Department.

During the first phase of 1999 review, parties were formally advised of the questions involved in the review and given an opportunity to respond. Responses were provided in respect of possible legislative amendments and a number of additional matters also were raised for consideration. In the second phase, meetings were conducted and attended by representatives of all parties. Discussions were held on problem areas and ways to overcome these problems, including administrative measures or statutory amendments. The Inspector also conducted individual meetings with field operatives and party representatives, as requested. In the third and final stage of the review, the Inspector circulated an initial draft report to the above parties with an invitation for comment. Some agencies gave their comments and held further conferences with the Inspector. The Inspector then evaluated the arguments submitted and, in some instances, amended the draft report. The Inspector conducted the review with the assistance of a Senior Policy Analyst from the Ministry for Police.[28]

2.4.2 CONSULTATION WITH THE OMBUDSMAN

At the time of the General Meeting, the Ombudsman indicated that, following the invitation by the Ministry for Police to make a submission to the second review of the Act in February 2003, there was limited opportunity afforded by the Ministry for consultation about the main issues raised in submissions, and any proposed administrative or legislative changes. The Ombudsman made a preliminary submission to the review on 24 April 2003 and sought an opportunity to comment on any submissions from the law enforcement agencies as they related to the oversight of the Act by the Office, or any proposed changes that might impact on accountability.

The Ministry has advised the Committee that the submissions to the review did not encompass areas of disagreement between agencies. Consequently, it was not considered necessary to circulate the submissions. With regard to the Ombudsman, the Ministry told the Committee that the Ombudsman's submission dealt with the role of the Office under the Act, and that this area had only been considered to a small extent in the submission from NSW Police.[29]

Nevertheless, it emerged from evidence tendered to the Committee that the Ministry was aware of a disagreement that had arisen between the Ombudsman's Office and NSW Police on the Ombudsman's powers under the *Law Enforcement (Controlled Operations) Act*. According to this evidence, the Ministry's Executive Officer to the review was present at a meeting held between NSW Police representatives and the Ombudsman's Office on 1 April

[28] Inspector of the Police Integrity Commission, *Review of the Law Enforcement (Controlled Operations) Act 1997*, op.cit., p.5.ibid, pp.8-9.
[29] Briefing from Police Ministry representatives on 19 November 2003.

2003 to discuss concerns held by the Ombudsman about a particular controlled operation and the impact of the new application form being used by NSW Police. The Ombudsman recounts that the Police undertook to make written submissions on the issue to the review. On 7 May 2003 the Commissioner of Police wrote to the Ombudsman indicating that any ongoing concerns might be addressed in the review of the *Law Enforcement (Controlled Operations) Act* being conducted by the Ministry for Police.[30]

In view of the dispute with NSW Police, the Ombudsman subsequently sought an opportunity from the Ministry to make a further submission on receipt of that advice. The Ministry agreed to receive a further submission and undertook to contact the Office when a final draft report was completed. The Ombudsman's further written submission was made on 3 November 2003, following some delays in obtaining advice from Senior Counsel. It includes details of the dispute with the NSW Police.[31] The Ombudsman has advised the Committee that the Ministry has not acknowledged this further submission, and that there has not been any other consultation with the Ministry during the review. The Ombudsman's Office was not provided with copies of other submissions, or invited to comment upon any issues raised in them.[32] In addition, at the time of the General Meeting on 25 November, the Ombudsman's Office had not been provided with, or asked to comment on, a draft report on the review.

2.5 CURRENT REVIEW ISSUES CONCERNING THE FUNCTIONS AND POWERS OF THE OMBUDSMAN

The previous statutory review raised issues of a relatively minor nature, and the Inspector recommended an 'incremental approach' to amending the existing terms of the Act in order to clarify them and make them more appropriate to the policy objectives.[33] In contrast, the Ministry for Police has indicated that several of the submissions received to the second review raise "substantive proposals and advice for legislative change".[34] Issues identified by the Ministry for Police related to:

- the ambit of the Act;
- the coverage of the legislation to particular types of undercover activities;
- the criteria for determining approvals;
- the process for determining approval;
- admissibility of evidence.[35]

During the briefing on 19 November 2003, Ministry representatives informed the Committee that the issues arising from the review are not issues fundamental to the operation of the Act.

[30] See Appendix 2 for the Ombudsman's answer to supplementary question number 5 tabled at the General Meeting

[31] See Appendix 2 for the Ombudsman's answer to supplementary question number 2 tabled at the General Meeting; the Ombudsman provided the Committee with a copy of the second submission made by the Office to the review.

[32] See Appendix 2 for the Ombudsman's answer to supplementary question number 5 tabled at the General Meeting.

[33] Inspector of the Police Integrity Commission, *Review of the Law Enforcement (Controlled Operations) Act 1997*, op.cit., p.12.

[34] Correspondence from the Minister for Police, dated 13 October 2003.

[35] Briefing note by the Ministry for Police, provided by the Minister for Police in correspondence to the Chairman on 13 October 2003.

Instead, they are aimed at improving and fine tuning the current scheme. The distinction the Ministry appears to be making is that although the issues raised in submissions to the review may be substantive ones they are not fundamental to the objectives of the Act and do not call the controlled operations scheme into question. The Ombudsman did submit to the review that the general policy objectives of the Act remain valid, and its terms appropriate for securing those objectives[36]. However, the Office also sought clarification of the Ombudsman's functions and powers under the Act.[37]

The Committee is not aware of what issues were raised in other submissions to the review, only the terms of the Ombudsman's submission but the Ministry advised that no significant proposals were made that would affect the Ombudsman's powers or functions, and that the issues raised are fairly minor. According to the Ministry, the issues surrounding the application forms currently in use by NSW Police are being dealt with separately to the review, as the Ministry perceives these questions to be more administrative in nature.[38]

Although these issues may be considered to be matters of procedure and interpretation, nevertheless they have the capacity to impact on the accountability scheme under the Act, which revolves around the Ombudsman's auditing functions. On the introduction of the controlled operations legislation into Parliament, the then Attorney General emphasised the "operational accountability" enshrined in the legislation.[39] During the first review of the *Law Enforcement (Controlled Operations) Act*, the existence of this accountability scheme was identified as one of the main policy objectives of the Act and was recognised as such by the Ministry in its briefing note to the Committee.[40] It is the view of the Committee that any matter which could conceivably limit or detract from the Ombudsman's' ability to provide external accountability in respect of the use of controlled operations is a significant matter. As the Ministry has decided not to deal with this important issue as part of the review process, the Committee considers it advisable to outline the matters in dispute, which were examined during the General Meeting.

2.5.1 ACCOUNTING FOR CONTROLLED OPERATIONS

The Ombudsman gave evidence during the General Meeting about the nature of the difference of opinion that has arisen between the Office and NSW Police over a new standard template introduced by NSW Police for making applications for controlled operations. The issue concerns the information contained within the application form which the CEO of the agency uses to satisfy himself or herself that the controlled operation should be authorised. In granting an authority to conduct a controlled operation the CEO must be satisfied as to the following:

[36] The Ombudsman also states in his Annual Report on Controlled Operations for 2001-2 that the results of his monitoring of the Act for that year "clearly demonstrate that the underlining policy objectives of the Act continue to remain valid". NSW Ombudsman, *Law Enforcement (Controlled Operations) Act – Annual Report 2001-2002,* op. cit., p 13

[37] See answer to Questions on Notice No. 10.

[38] Briefing from the Ministry for Police on 19 November 2003.

[39] NSW Legislative Council, Hansard, 3 December 1997, p.3037.

[40] Briefing note attached to correspondence to the Chair from the Minister for Police, dated 13 October 2003, concerning the review of the Act; see also Inspector of the Police Integrity Commission, *Review of the Law Enforcement (Controlled Operations) Act 1997*, April 1999, p.5.

(a) that there are reasonable grounds to suspect that criminal activity or corrupt conduct has been, is being or is about to be conducted in relation to matters within the administrative responsibility of the agency,
(b) that the nature and extent of the suspected criminal activity or corrupt conduct justify the conduct of a controlled operation,
(c) that the nature and extent of the proposed controlled activities are appropriate to the suspected criminal activity or corrupt conduct,
(d) that the proposed controlled activities will be capable of being accounted for in sufficient detail to enable the reporting requirements of this Act to be fully complied with. (s.6(3)(a)-(d))

Other criteria are found at ss. 7(2) and 7(3)(a)(b).

At present, all agencies with the exception of NSW Police, require applicants to supply reasons why each of these criteria are met, and most applications explain the reasons for each criterion in a few sentences. The Ombudsman advised that the new Police template, which was introduced on 16 September 2003, does not require applicants to supply information specifically addressing each criterion. Instead the form simply records a statement in which the applicant expresses *their belief* as to the criteria.[41]

The Ombudsman's views were brought to the attention of the Commissioner of Police whose internal advice was that the form was satisfactory. Meetings between relevant staff of both agencies failed to resolve the difference of opinion and the Commissioner of Police obtained advice from the Solicitor General that the new shorter form meets the technical legal requirements of the Act. Senior Counsel's advice subsequently obtained by the Ombudsman concurs with this assessment. However, the Ombudsman is of the view that the new Police application form does not provide sufficient information to enable the CEO to be properly satisfied that the threshold criteria have been met; the shortened form does not provide a clear and adequate audit trail that would easily demonstrate the mandatory requirements of the Act have been satisfied.[42]

The importance of the information contained within the forms to the proper exercise of the Ombudsman's audit function needs to be recognised. The Ombudsman has emphasised that the controlled operations approval process is essentially a paper-based process, and that the integrity of the approval system is very dependent on the adequacy and completeness of the written applications and operational plans. He submitted to the review that:

> Parliament has seen fit to require the conduct of controlled operations to be predicated on the satisfaction by the chief executive officer that a number of thresholds have been satisfied. The legal requirement and good administrative practice demand that the decision maker bring an independent mind to those considerations. If a prescribed form simply required in respect to these matters a statement of belief in the form (for example, of "I believe the nature and extent of the proposed controlled activities are appropriate to the suspected criminal activity") this would not in my view provide a sufficient basis to satisfy the chief executive officer as to whether in fact the controlled activities were appropriate. While other information (for example, in the operational plan) may provide further information in this respect, it is by no means certain. In addition, the grounds of the applicant in forming the relevant belief remain

[41] See answer to Question on Notice No. 9.
[42] ibid.

obscure.[43]

In practical terms the Ombudsman indicated:

> In the past, my inspecting officers have generally not had any need to seek further information from the decision maker to show how they had satisfied themselves of the mandatory considerations under the Act. This was because information about each criteria was usually set out separately in the application form and it was easy to see that sufficient information was before the decision maker to enable them to form an opinion on each matter. With the new form, that information may be buried in the general description of the operation and the criminal or corrupt conduct it seeks to address or it may not be there at all.[44]

The absence of sufficient information would make inspections by the Ombudsman more difficult and time consuming, and it also may lead to the situation where the Ombudsman will need to seek additional information from the authorising officer in order to determine compliance with the requirements of the Act.[45] However, legal advice obtained by NSW Police calls into question the Ombudsman's jurisdiction and ability to obtain information in such circumstances.

The Ombudsman has informed the Committee that, in respect of his powers and functions, the legal advice provided by the Solicitor General to the Commissioner of Police, essentially interprets the Ombudsman's monitoring functions to be confined to matters concerning the maintenance of documents and the provision of relevant reports. The legal advice obtained by the Ombudsman indicates an alternative view and the Ombudsman has expressed concerns that issue will not be able to be resolved without litigation. He gave evidence to the Committee that:

> In the submission I made to the review of the Act, I said that if the Ombudsman's monitoring function under the Act was reduced to such a level it would be a charade. I would be doing little more than making sure that for each controlled operation there was an application and operational plan, an authorisation and a follow up report. The fact that there may be no reasonable grounds for approving the application would be an irrelevant issue.
>
> Clearly this is not what the Act envisaged when it set up the accountability provisions for controlled operations.[46]

For the purpose of performing his monitoring of controlled operations, the Ombudsman's powers under the *Telecommunications (Interception)(NSW) Act* are imported into the Act at s.22(2). However, the Ombudsman has highlighted the difference between the extent of his jurisdiction under controlled operations legislation, which is to ensure compliance with the requirements of the *Law Enforcement (Controlled Operations) Act*, and the narrow inspection function he performs in under the *Telecommunications (Interception)(NSW) Act*, which is aimed at ensuring compliance with the record keeping requirements of that Act. It is the Ombudsman's view that any limitation on his power to oversight controlled operations derives

[43] See answer to Supplementary Question No. 3 at Appendix 2.
[44] See answer to Supplementary Question No. 1 at Appendix 2.
[45] See answer to Supplementary Question No. 1 at Appendix 2.
[46] See answer to Supplementary Question No. 1 at Appendix 2.

from an unintended drafting error where the powers were imported from one act to another. Consequently, he has recommended an amendment to the Act to clarify the issue.[47]

At the time that the General Meeting was held, the Ombudsman had not been advised of the progress of the review and, therefore, was unable to confirm whether the matter is being dealt with as part of the review or not. Recent correspondence between the Ombudsman and the Commissioner would suggest that the Commissioner intends to continue to rely upon his legal advice and is not prepared to change his procedures. The Ombudsman informed the Committee that he was planning to conduct round table discussions with the Commissioner to attempt to progress the matter.[48] The Committee will monitor closely the outcome of these discussions and, if the matter remains unresolved between the Ombudsman and Commissioner of Police, will review the position again.

2.5.2 THE USE OF CONTROLLED OPERATIONS AND INVESTIGATIVE METHODOLOGIES

Controlled operations are conducted for the purpose of:

(a) obtaining evidence of criminal activity or corrupt conduct,
(b) arresting any person involved in criminal activity or corrupt conduct, or
(c) frustrating criminal activity or corrupt conduct, or
(d) carrying out an activity that is reasonably necessary to facilitate the achievement of any purpose referred to in paragraph (a), (b) or (c)[49]. (s.3)

A significant issue raised by the Ombudsman during the General Meeting relates to the use of controlled operations by the NSW Police to obtain admissions from persons concerning the commitment of an offence. The Ombudsman suggested that:

> . . . the review should consider "whether the Act can and should cover cutting edge investigation methodologies that require operations which are not designed in themselves to directly detect and obtain evidence of crimes, but rather to indirectly assist in obtaining admissions of participation in crimes quite different and remote in time from the controlled activities undertaken.[50]

The original intention of the Parliament does not appear to have encompassed this different use of controlled operations. Mr Finlay noted in the first review that the Act is not intended to cover "accepted policing practice" such as "frequenting hotels and other locations in order to identify potential suspects, recruiting informants (including those who proffer drugs) and activities undertaken as part of collecting intelligence about criminals or crime in general (eg, investigations by officers in a local area command into drug trafficking)".[51]

[47] See answer to Supplementary Question No. 1 at Appendix 2.
[48] See answer to Supplementary Question No. 4 at Appendix 2.
[49] Item (d) in the s.3 definition of controlled operation was inserted by the 1999 amendments that followed the Inspector's first review.
[50] See answer to Question on Notice No. 10.
[51] Inspector of the Police Integrity Commission, *Review of the Law Enforcement (Controlled Operations) Act 1997*, op.cit., p.4.

This distinction is supported by comments in the second reading speech that indicate that controlled operations should only be used in relation to serious crime:

> Approval may be granted only in circumstances in which the scope of the proposed controlled operation is sufficient to deal with, but not exceed, the conduct being investigated. The use of alternative, more traditional investigative tools should always be considered. Minor matters and matters that can successfully be investigated by traditional means will not be considered for controlled operations. In practice, controlled operations will be used only when traditional methods of investigation are inadequate. This means that they are aimed at the investigation of serious matters like drug trafficking, money laundering, child pornography, organised crime and corruption.[52]

The Committee is of the view that this issue concerning the use of controlled operations should be examined as part of the review of the Act.

2.5.3 OTHER REVIEW ISSUES

The Ministry has advised that Committee that the range of issues raised during the second review of the Act included:

- further clarification of s.3A;
- existing restrictions on retrospective approvals;
- the process for obtaining approval of a controlled operation;
- the effectiveness of current internal and external monitoring processes;
- the admissibility of evidence;
- inter-jurisdictional issues concerning model legislation for cross-border investigations;
- the use of controlled operations to meet deficiencies in, or circumvent the requirements of, other legislation;
- the length of term of a controlled authority; and
- suspension of controlled operations[53]

The Committee notes that a number of these issues were the subject of proposals made in the first review but that they were not supported by Mr Finlay:

- CEOs should be permitted to certify that in the case of very sensitive matters that inspection be deferred for a specified period (not exceeding 12 months);[54]

- That provision be made for retrospective approvals of unauthorised activities prior to the commencement or during the course of a controlled operation;[55]

[52] Legislative Assembly, *Hansard*, Law Enforcement (Controlled Operations) Bill, 20 November 1997
[53] Briefing note attached to correspondence to the Chair from the Minister for Police, dated 13 October 2003, concerning the review of the Act.
[54] Inspector of the Police Integrity Commission, *Review of the Law Enforcement (Controlled Operations) Act 1997*, op.cit., p.34.
[55] ibid, pp.20-26.

- That immunity from prosecution should be extended to include law enforcement activities conducted in preparation for a controlled operation.[56]

The Inspector indicated that the latter two proposals needed to be carefully evaluated and weighed, and could be re-examined in the next review in light of the ongoing operation of the Act. He gave some guidance as to possible amending provisions should the proposals be adopted.[57]

The Committee has decided only to comment at this stage on the issue of application forms, which the Ministry for Police has identified as a matter being dealt with outside of the review process. The Committee will await the Minister's report on the outcomes of the review in order to assess any proposals or recommendations made for legislative amendments. If considered necessary, the Committee will then report any concerns it has about the outcomes of the review to the Parliament.

2.5.4 Review of the *Police Act 1990*[58]

The Ministry for Police commenced the review of the Police Act 1990, on behalf of the Minister for Police, in August 2002. The Act requires that the review be tabled in Parliament on or before 31 December 2002. Although the Ministry has indicated on more than one occasion that a report on the outcome of the review was imminent, it has yet to produce a report on the outcomes of the review. In the Discussion Paper on the review of the *Police Integrity Commission Act*, the Ministry reported that the review of the *Police Act* would be tabled on 1 January 2003[59]. On 9 April 2003 the Ministry informally advised that the review of the Police Act 1990 would probably be tabled at the end of June 2003. At the time of the seventh General Meeting with the PIC in November 2003, the report on the outcomes of the review of the Police Act was nearly 11 months overdue from the statutory reporting deadline.

The Office of the Ombudsman made a written submission to the Ministry in relation to the review of the *Police Act* on 17 October 2002. In December 2002 and January 2003, the Office contacted the Executive Officer to the review to establish the status of the review and was advised that the NSW Police submission had been received and that a report or discussion paper would not be available before the election in March 2003. The Executive Officer later contacted the Office on 5 August 2003 to advise that workshops were being proposed on Parts 8A and 9 of the Police Act. He undertook to advise the Office on any workshop in due course.[60]

The PIC has given evidence that it made a submission to the review of the Police Act on 23 October 2002, which largely dealt with the issues raised in Chapter 12 of the Discussion Paper on the review of the Police Integrity Commission Act. The Ombudsman provided the PIC with a copy of the Office's submission to the review but, at the time the PIC prepared its answers for the General Meeting with the Committee, the PIC had not been consulted in relation to any other submissions or proposals. Consequently, it was unable to answer

[56] ibid, pp.28-30.
[57] ibid, pp.25, 29-30.
[58] This section of the report is replicated in the report on the General meeting with the PIC, in view of its significance to both the Office of the Ombudsman and the PIC.
[59] *Report of the Review of the Police Integrity Commission Act 1996 – Discussion Paper*, December 2002, p 90.
[60] Ombudsman's Answer to supplementary question No. 9.

questions put as to whether or not any proposals made during the review would significantly impact on its jurisdiction, functions or operations.[61]

In November 2003, both the Ombudsman and the PIC advised the Secretariat that they have had no further consultation with regard to the review of the *Police Act*.[62]

At a briefing with the Committee on 19 November 2003, representatives of the Ministry indicated that a large number of issues had been raised in the review thus far and that these issues were being collated. The Ministry advised that the submissions made in regard to the complaints provisions of the *Police Act*, one of the Committee's primary interests, were in the nature of fine-tuning and this reflected the continual improvements that had been made to the complaints system. The Ministry indicated that it was aware of the Committee's viewpoint on the broader systemic issue of whether or not there should be a single complaint body: a threshold issue still subject to disagreement between certain parties to the review.

During the briefing the Committee was advised by the Ministry that a series of roundtable discussions involving the Ombudsman, PIC and NSW Police were being planned for March 2004 to discuss issues arising from the review. The Committee is uncertain as to the need for such consultation at this stage of the reporting process, particularly in light of previous advice from the Ministry that it would shortly be tabling the report on the review of the Act.

An offer was made by the Ministry for Police to provide the Committee with the proposals that develop out of the round table discussions, before the Ministry finalises its position on these matters. The Committee has accepted the Ministry's offer and will continue to monitor the review process closely. In particular, the Committee will monitor that the parties to the roundtable discussions are fully appraised of the issues to be considered in the talks in order to facilitate an informed and open discussion of the issues. The Committee also will monitor the extent to which the stakeholders to the review of the *Police Act* receive regular updates on the progress being made by the Ministry towards completing the report on the review, and whether they are given adequate opportunity to properly comment on the draft report before it is finalised. Should a final report on the outcomes of the review not be forthcoming in a timely manner following the proposed roundtable discussions, the Committee will consider taking evidence from the Ministry on the delay.

2.6 REPORTING ON STATUTORY REVIEW OUTCOMES

Review of the *Law Enforcement (Controlled Operations) Act 1997* - According to the Ministry briefing note, a report is to be prepared on the review for the Minister for Police and recommendations for administrative and legislative changes will then be considered by the Government, with a view to developing proposed legislation, in consultation with key stakeholders.[63] During a briefing provided to the Committee on 19 November 2003, representatives of the Ministry referred to the complexity of the legislation and clarified that the Minister intends to meet his reporting obligations under the Act. However, whether or not the report produced in December would be a full report or an interim report has yet to be

[61] PIC, Answer to QON No. 27.
[62] Secretariat telephone cal to PIC and Office of the Ombudsman 4 November 2003.
[63] Briefing note attached to correspondence to the Chair from the Minister for Police, dated 13 October 2003, concerning the review of the Act.

determined. The Ministry further advised that any necessary legislation would be brought forward in the next Parliamentary sitting period.

Review of the *Police Integrity Commission Act 1996* - In view of the tabling of the Discussion Paper on the review of the *Police Integrity Commission Act* in December 2002, and the apparent lack of further consultation with the Ombudsman prior to the drafting of subsequent legislation, the Committee wishes to express its concern about the method and content of reports produced on statutory reviews. The Discussion Paper on the review of the *Police Integrity Commission Act* outlined a number of proposals for further consideration on which the Ombudsman made a brief submission in January 2003. The Ombudsman's submission included comment on the recommendations concerning the extension of the PIC's jurisdiction to include civilians, legal professional privilege, and the police complaints system.[64] The Office is not aware of any further contact by the Ministry in response to its submission. It remains to be seen whether consultation with the Ombudsman will occur prior to the introduction of legislative proposals to Cabinet or the Parliament. At that late stage, extensive public consultation could only occur if a draft exposure bill was released. In the absence of such a bill, the level of consultation that occurs after the drafting of a Cabinet Minute is quite limited and will not compensate for a thorough exposition of issues based on open and informed discussion during the review process. The proper resolution and clarification of issues through the review process would enable informed decision-making by Cabinet and, where issues cannot be resolved, opposing arguments, which are canvassed adequately during the review, could be clearly identified.

The Committee notes the view of the representatives for the Ministry for Police that the Discussion Paper on the review of the Police Integrity Commission Act meets the Minister's reporting obligations under the Act. The statutory reporting provisions do not usually provide any requirement as to the content of the report on the outcomes of the review. Nevertheless, it is the view of the Committee that the report on the outcome of a statutory review should provide a definitive assessment of the operation of the statute in question, rather than being a document that is intended to promote further discussion of unresolved issues. This approach would seem to have been the intention behind the inclusion of the statutory review provision in the *Law Enforcement (Controlled Operations) Act 1997*, as the Hon. J. Shaw MLC, indicated in his second reading speech:

> This bill provides for a review of the first 12 months of its operation. Clause 32 requires that a report to Parliament be made within 3 months of the end of the review period.
>
> This will provide an opportunity to ensure that the legislation is working as intended, and that the accountability mechanisms are effective. [65]

In recommending a second review of the Act, a proposal that had the support of all parties to the first review, the Inspector emphasised that:

> To some extent the operation the Act and the suitability of its terms to best achieve the policy objectives of the Act is still evolving.[66]

[64] Answer to Question on Notice No. 10.
[65] LC Hansard, 3 December 1997.
[66] Inspector's report, p.45

It does not seem desirable to the Committee for the report on the outcome of the second review of the Act to be merely a precursor to further discussion and debate.

The Committee plans to closely monitor the progress made by the Ministry for Police towards finalising the report on the outcomes of the second review of the *Law Enforcement (Controlled Operations) Act 1997,* including the extent to which stakeholders to the review are given adequate opportunity to properly comment on the draft report on the outcomes of the review.

3. JURISDICTIONAL ISSUES

Since the Tenth General Meeting with the NSW Ombudsman, the Ombudsman's Office has grown by more than one third[67]. This is due to the expansion of the Ombudsman's jurisdiction through its merger with the Community Services Commission and the lack of an Inspector-General of Corrective Services. There also is the possibility that the Ombudsman's jurisdiction may increase further if the Privacy and Personal Information Protection Amendment Bill 2003, currently before the Parliament, is enacted and the Ombudsman acquires the functions of the Privacy Commissioner. The Ombudsman gave evidence before the Committee that "with the finalisation of any decisions as to this and other bills presently before the Parliament, which may confer additional responsibility on the Ombudsman, I believe that the office has now grown to what should be its maximum size for the immediate future".

Clearly the Office of the Ombudsman has experienced substantial growth in jurisdiction and oversight responsibilities. The Committee believes it appropriate that, once the amendments to the *Privacy and Personal Information Act 1998* are decided, careful consideration should be given to any further proposed extensions to the Ombudsman's jurisdiction until the new areas of responsibility have been fully integrated into the Office.

A related issue raised by the Ombudsman addresses the role and function of the Office. The Ombudsman noted during the hearing that in terms of smaller agencies being amalgamated with his Office

> . . . there needs to be a synergy in terms of functions and responsibilities. There are many watchdog agencies that have a range of functions or different responsibilities and you would need to look very closely at whether there was an appropriate fit. If I could give you one example: the Health Care Complaints Commission. That would not, in my view, be a good fit with the Office of the Ombudsman. If it were put forward as being something that ought come in I would have reservations about it, certainly as it is currently structured and certainly given its breadth of responsibilities. It has a prosecutorial function which is very inconsistent with the role of this office.[68]

Increased areas of jurisdiction have led the Ombudsman to propose making more regular reports to Parliament about the key functions performed by his Office. To date, the Ombudsman has reported on all areas of responsibility in the one annual report. However, reporting separately on key areas, such as police complaints and community services could

[67] Opening statement by Mr Bruce Barbour, Ombudsman, 25 November 2003.
[68] Transcript of Eleventh General Meeting with the Ombudsman, 25 November 2003, pp.15-16.

improve the focus on, and accountability of, each area of responsibility. It may also have the effect of enhancing Parliamentary and public debate about important issues affecting the community. The Ombudsman would still deliver an annual report as required by legislation.

Given the much broader jurisdiction that the Ombudsman is now required to report on, regular reports on key areas of responsibility seems a reasonable way to ensure accountability across a breadth of issues that may well loose focus when subsumed into a large annual report. This would, of course, impact on the Committee's work, both in terms of General Meetings and inquiries. It may be that if this new reporting regime is adopted, there will be a requirement for more frequent General Meetings to enable the Committee to examine issues arising from each of these jurisdictional reports. The Committee looks forward to discussing this matter with the Ombudsman during the coming year.

Consultation regarding legislative proposals – Another matter which arose during the General Meeting, in relation to the expansion of the Office's jurisdiction, concerned the level of consultation that occurred with the Ombudsman about legislation affecting his jurisdiction.

In answer to a supplementary question, the Ombudsman indicated:

> With proposals made by central agencies co-ordinated by Cabinet Office that directly affect our functions, we are now always consulted. For example, in the recent proposed changes to the child protection functions of the Ombudsman and the proposed changes to the privacy legislation, as well as the incorporation of the Community Services Commission, we were consulted throughout the process.
>
> However, occasionally there are proposals that slip by without us having the opportunity for input. For example, the Committee would be aware from our Annual Reports and meetings that for some time we have been recommending amendment of the Local Government Act to enable meaningful sanctions against individual councillors whose conduct breaches the code of conduct or otherwise seriously disrupts the business of council.
>
> The Local Government Amendment Bill 2003 was recently introduced which provides for such a system. It enables the Director General of the Department to suspend councillors in certain circumstances including on the basis of a report of the Ombudsman. The amendment bill also greatly enlarges the jurisdiction of the Independent Commission Against Corruption into this area of maladministration that was formerly the exclusive province of the Director General and the Ombudsman.
>
> We were advised that the general proposal was being prepared but were not consulted on the details of this bill.
>
> Similarly, there have been a number of amendments to schedules 1 and 2 of the Freedom of Information Act over the past few years that exempt bodies or types of documents from the coverage of the Act which we have not been consulted about.[69]

The Ombudsman also has given evidence that there had been occasion where he was not consulted about proposed legislation, which conferred legislative review functions on his

[69] See appendix 2 for answer to supplementary question no. 11.

Office, and that this had significant consequences for the capacity of the Office to conduct the legislation review.[70]

The Committee is concerned by the evidence it has taken on failures to consult the Ombudsman on proposed legislation recommending changes to his jurisdiction. The Committee considers that, except in the most exceptional circumstances, it would be appropriate to consult the Ombudsman about any proposal under consideration that would affect his statutory jurisdiction. The Committee acknowledges that such failures do not appear to reflect the approach taken by central agency proposals that are coordinated by Cabinet Office, where the Ombudsman has been the principal party to the proposed legislation.

4. INQUIRY INTO THE SUPPORTED ACCOMODATION ASSISTANCE PROGRAM

This inquiry was commenced by the then Community Services Commissioner and has continued under the Office of the Ombudsman. The inquiry involved the Australian Institute of Health and Welfare conducting a survey of the approximately 390 Supported Accommodation Assistance Program (SAAP) funded services in NSW. It also examined the policies of 80 agencies involved with the SAAP program. The Deputy Ombudsman and Community and Disability Services Commissioner gave evidence that while the findings of the study are still preliminary, "there is a clear indication that there is a very large level of exclusion of certain categories of people from the homeless persons system".[71]

The Ombudsman stated that the draft report of this inquiry was currently with the Minister for Community Services and the Director General of the Department of Community Services for their consideration and comment. The Deputy Ombudsman and Community and Disability Services Commissioner said it was likely the inquiry would be concluded within the next two months. The Committee notes the significance of this report and awaits its publication with interest.

5. TERRORISM (POLICE POWERS) ACT 2002

The *Terrorism (Police Powers) Act 2002* provides the PIC with the ability to investigate the conduct of police officers using the powers provided for under this Act. Section 13 of the Act states that the PIC is the only body with any powers of review for police actions authorised under this Act. As the PIC is mandated to only investigate the most serious forms of police corruption, the Committee was concerned to ensure that the PIC was able to refer other serious misconduct matters and complaints against police acting under the authority of the Terrorism Act to the Ombudsman for investigation, as is the case with police misconduct matters under the existing police complaints system.

The Ombudsman, in response to a question on notice about this matter, responded that in his view police exercising special powers will be subject to the complaints processes outlined

[70] Answer to Question on Notice No. 47.
[71] Transcript of Eleventh General Meeting with the Ombudsman, 25 November 2003, p28.

in Part 8A of the *Police Act 1990*. This is reflected in the second reading speech of the Premier, who commented on introducing the Bill to Parliament that:

> Clause 13 makes it clear that the decisions of senior police are reviewable by the Police Integrity Commission. The Ombudsman's jurisdiction to oversight complaints about the inappropriate exercise of the powers under the bill is not affected.[72]

The Committee notes that while this intention is clearly outlined in the second reading speech, it does not appear in the body of the Act. The Committee recommends that consideration be given to amending the *Terrorism (Police Powers) Act 2002,* to make express provision for the Ombudsman to oversight complaints concerning the conduct of police officers under the Act.

RECOMMENDATION 1: The Committee recommends that consideration be given to amending the *Terrorism (Police Powers) Act 2002,* to make express provision for the Ombudsman to oversight complaints concerning the conduct of police officers under the Act.

[72] The Premier, Second Reading Speech, *Terrorism (Police Powers) Bill 2002*, 19 November 2002, p6978.

Chapter Two - Questions on Notice

ANSWERS TO QUESTIONS ON NOTICE

OFFICE MANAGEMENT

1. *To what extent has the merger with the Community Services Commission served as an opportunity to refine and standardise procedures and practices across the Office? Have any other efficiencies resulted from the merger?*

The amalgamation of the Community Services Commission (CSC) (now the Community Services Division or CSD) into the Office was a major project, which is referred to on pages 14 and 15 of our 2002-2003 Annual Report.

As noted in my Message on page 3 of our 2002-2003 Annual Report, the CSD has been successfully restructured and the corporate staff of the former CSC have been successfully integrated into the Corporate Support Team of the Office.

Before and after the amalgamation, a range of areas were identified for training of CSC/CSD staff including about the approach of the Ombudsman and the investigation powers available under the *Ombudsman Act*.

The complaint handling procedures of the CSC have been reviewed and redrafted by the CSD to bring them into line with the equivalent procedures in the General Team of the Office.

The integration of the work and staff of the former CSC into the Office is an on-going project. As is common with such projects, the early stages are characterised by certain inefficiencies and various unavoidable extra costs. The efficiencies and benefits that will undoubtedly result from this amalgamation will accrue over time.

2. *Have there been any issues arising from the further expansion of the Ombudsman's jurisdiction into the private sector following on from the merger?*

The Ombudsman's jurisdiction in relation to non government agencies first occurred approximately 9 years ago with the advent of the privately operated gaol in Junee and later with the private certifiers under the Environment Protection Authority Act. Our coverage was expanded when we assumed the child protection jurisdiction in 1998 whereby both government and certain non government agencies were required to report child abuse allegations made against their employees.

Our jurisdiction was further expanded in relation to non government agencies with the amalgamation of the Community Services Commission in December 2002. Under the amended *Community Services (Complaints, Reviews and Monitoring) Act 1993*, the Ombudsman has jurisdiction in relation to services provided by the Department of Community Services, the Department of Ageing, Disability & Home Care and non government

agencies, funded, licensed or authorised by the Minister for Community Services, Ageing or Disability Services.

Non government services include both non profit and for profit agencies.

In particular, legislative amendments effective from December 2002, brought licensed boarding houses (licensed or declared residential centres for handicapped persons) into the community services jurisdiction of the Ombudsman. Licensed boarding houses are mostly run by for-profit operators.

In the licensed boarding house area following our amalgamation, extensive dialogue and education took place with the industry association for licensed boarding house proprietors, forums were held to explain the new jurisdiction and there has been training of staff and Visitors involved so they do appreciate the environment within which licensed boarding house proprietors operate.

There are no significant issues that have arisen in relation to dealing with non government agencies other than to ensure that the office maintains effective dialogue with sector peak bodies representing non government agencies and that our staff are fully briefed to understand the environment and constraints within which non government organisations operate. Both of these strategies have been implemented.

3. *What benefits have been realised from the introduction of the enterprise document management system (EDMS) and its implementation in the police complaints area followed by the rest of the Office?*

One of the Police Complaints Case Management (PCCM) projects was the implementation of an enterprise document management system (EDMS) in our police team. Seeing the advantages of such a system, we sought and were given funding to extend it throughout the office. The EDMS project commenced in 2001-2002 with the preferred vendor being selected in May 2002.

During the reporting year considerable resources were invested in this project. A significant number of staff were involved in developing policies or procedures or attending a series of focus groups to assist the vendor tailor the product to our needs. The general team was chosen to pilot the EDMS prior to its roll out throughout the office. During the pilot, the EDMS was further fine tuned to ensure that it suited our business needs. An extensive training program was provided to all staff.

Expected disruption to business processes was minimal due to careful project management and a proactive change management strategy. Staff quickly adapted to the new system. There have been some noticeable productivity gains for many staff, particularly in terms of savings in time accessing precedent or other information. This is a product of having our electronic document holdings in one accessible data base instead of partitioned directories, the enforcement of common file naming protocols across the office, the ability to capture and store emails in relevant case files, and the enhanced search capabilities of the product itself.

Because much of the work of the Police Team is conducted within c@ts.i, the EDMS has been of more immediate benefit to the rest of the Office .

We are currently proceeding with a development project to link the EDMS to the two principal data bases used by the Community Services Division.

4. *What were the results of the internal audits conducted into the recording of information and the case management system in use within the Office?* (Annual Report 2001-2002, p.20)

Part of the duties of specialist senior investigators in the General Team is to monitor complaint trends and issues in their areas of expertise. Regular checks of data integrity are a part of that process. For example, our specialist corrections staff review all prison cases recorded in Resolve, our case management system, on a quarterly basis as a minimum. Keywords that capture the predominant complaint issues are checked for appropriateness against the case summary. Also the correctional centre nominated is checked against the agency of which it is a part for accuracy as are the issues against that parent agency (for example, ensuring only health related issues are logged against the Corrections Health Service, or that Junee Correctional Centre is logged with Australasian Correctional Management as its 'parent', not the Department of Corrective Services). If any errors are detected, they are corrected immediately. No statistics are maintained about the results of these reviews.

In addition, supervisors perform a quality review on all complaint files at closure. As part of that process a print out of all the data captured in the case management system is attached to the hard copy complaint file. This is reviewed to make sure that all essential data fields are completed and the information is correct before final mark off is authorised.

Other teams perform similar checks on the quality of data that is entered into the case management system. The Police Team have staff whose responsibility it is to check the quality of information/data received from the NSW Police as well as the information/data that our own staff enter into our case management systems (either Resolve or c@ts.i). The Child Protection Team has also developed an internal audit process for checking the accuracy of information.

5. *What were the results of the systematic review of policies and procedures that was due to be completed early in 2002-3*? (Annual Report 2001-2002, p.21)

The review revealed that we had no proper process in place for policy development, maintenance and review. In fact, a number of our policies had not been reviewed for some time and were either outdated, inconsistent with other policies or obsolete.

In August 2002 the Ombudsman approved a policy that established a framework for policy development, maintenance and review. All policies will be progressively reviewed against the criteria outlined in this policy. To date the Ombudsman has reviewed and approved 45 policies covering core business, employment related and security issues.

6. *Have there been any further developments in relation to the proposal for a "one-stop-shop", called Complaints NSW, to receive, assess and refer complaints and inquiries about the NSW public officials, government agencies, health and legal professionals and community services? What benefits did the Ombudsman see in this proposal?*

On p.23 of our 2001-2002 Annual Report we reported on our proposal for a "one-stop-shop", to be called *Complaints NSW*. As we noted, after much work and when it appeared that the establishment of this service was largely assured, the project had to be abandoned when Treasury withdrew funding. As we said in that report:

> *"It seems incomprehensible that such a project, supported by so many agencies, was stopped by the refusal to extend an authorisation limit to spend funds that were available.*"

One positive outcome of the proposal has been the inclusion of a new Part 6 into the *Ombudsman Act*. This Part contains provisions which enable agencies listed in a Schedule to the *Ombudsman Act* to refer complaints and to share information. To date this Office has entered into formal agreements under Part 6 with the following agencies: Health Care Complaints Commission, Legal Services Commissioner, President of the Anti Discrimination Board and Privacy Commissioner and the Department of Local.

Given the on-going work involved in the amalgamation of the CSC with this Office, the expansion of our corrections area and the possible integration of Privacy NSW to this Office, we would not be in a position to implement *Complaints NSW* at this time even if a decision was now made by Treasury to re-fund the project.

7. *What was involved in formalising the risk management framework in relation to the Police Team and how has this approach been consolidated?*

In June 2001 the Ombudsman's police team held a number of workshops to identify those decisions (for example, choosing a complaint investigator or determining interview procedures) which presented the greatest risks to the effectiveness and timeliness of NSW Police complaint investigations. The workshop considered the consequences of making wrong decisions – attributed largely on the basis of the seriousness of the complaint allegation. Risk treatments were then identified.

This work formed the basis for guidelines, provided to police team officers in late 2001, which identified some relevant factors to consider in assessing the adequacy of police investigations. The initial introduction of the guidelines was accompanied by workshops, and the guidelines continue to be provided to new officers during induction training.

More recently the Ombudsman has commenced an office-wide risk assessment project. This will provide a generic risk assessment model for Ombudsman activities which can be used in individual investigations or projects, and broader office activities. This work is in addition to the ongoing risk assessment activities of each team in undertaking their various functions.

The police team guidelines were given to NSW Police to provide further information about the considerations of the Ombudsman in undertaking the assessment of police complaint

investigations. The Police Integrity Commission has also been provided with a copy of guidelines as part of the process to standardise, to the extent appropriate, the assessment of NSW Police complaint investigations.

8. *During 2001-02, a review of delayed files in one team showed that three agencies were not reporting back within a reasonable time and consideration was being given to investigating one of these agencies. Has this problem been resolved and, if the investigation proceeded, which agency was involved and what were the investigation outcomes?* (Ref: p20 of the 2001-2002 Annual Report)

This issue refers to the delay in agencies forwarding the results of their investigations of child abuse allegations against employees to us at the conclusion of the investigation process. Our review of outstanding matters in 2001-2002 revealed that, on average, agencies took four months to complete their investigations. Some matters took longer than four months because they were more complex or because the agency was awaiting the outcome of a criminal investigation or a decision from the Industrial Relations Commission or the Administrative Decisions Tribunal.

However, three agencies, the Department of Education and Training, the Department of Juvenile Justice and the Catholic Commission for Employment Relations, took an average of approximately six months to finalise their investigations. Over the past year, we have worked with these agencies to develop an understanding of the specific issues that they face in completing investigations of this nature, and to assist them to refine their processes.

We have recently completed an investigation that related to CCER's handling of child abuse allegations against an employee who has been engaged to provide services to children. Our statement of provisional findings and recommendations comments on a range of issues, including the time taken to investigate this matter, and makes some significant recommendations in relation to the improvement of its systems for handling child abuse allegations against employees. Once the final report of this investigation is issued, we will monitor CCER's compliance with our recommendations.

Please refer to Question 35 for further information regarding this issue.

LAW ENFORCEMENT (CONTROLLED OPERATIONS) ACT 1997

9. *Have there been any problems experienced recently in relation to the Ombudsman's monitoring of controlled operations?*

A difference of opinion between NSW Police and my office emerged following NSW Police introducing a new standard template for making applications for controlled operations. The Act currently provides that the chief executive officer cannot grant an authority to conduct a controlled operation unless satisfied of a number of matters set out in section 6(3) (a)-(d), section 7(2) and section 7(3) (a) and (b).

Currently, all agencies apart from NSW Police, including the Special Crime and Internal Affairs Command of NSW Police, require applicants to supply some reasons why they believe each of these criteria are met. I am not aware that any of these agencies consider this an

onerous requirement. In most applications, the reasons for meeting each threshold criteria can be satisfactorily set out in a few sentences.

On 16 September 2003 NSW Police introduced a new template application form that no longer required applicants to supply any information specifically addressing certain of these criteria. Rather, it simply records a statement expressing the belief of the applicant as to these criteria.

We took the view that the new template application form did not include sufficient information to enable the chief executive officer to be properly satisfied that these thresholds were met.

Our view was consistent with legal advice NSW Police had previously obtained from the A/Crown Advocate in October 1998.

These views were brought to the attention of the Commissioner but his internal advice was that the form was satisfactory. Correspondence and meetings between relevant staff failed to resolve the difference of opinion. The Commissioner subsequently sought advice from the Solicitor General which except for one issue, supported his position that the form was sufficient to meet the legal obligations of the Act. The Ombudsman also sought Senior Counsels advice on the matter. It also confirmed that the form was sufficient to permit a lawful approval. However, Senior Counsel noted that there may be occasions where an inspection of the application form and approval will not readily enable the Ombudsman to determine that the operation is one which consistently with the legislation was able to be approved, an appropriate procedure was followed and that no breach of the Act occurred. In such circumstances, the Ombudsman would have to resort to one or more of his powers to obtain sufficient information to determine whether the operation was lawful and if appropriate to consider whether the approval was a valid one. This of course makes the monitoring and inspection function more difficult to carry out.

We continue to consider the shortened form does not provide a clear and adequate audit trail to easily demonstrate that the mandatory requirements of the Act have been satisfied. Hopefully, this issue can be resolved through discussion with the Commissioner.

The Solicitor General also advised the Commissioner that it was not open to the Ombudsman to seek further information from the decision maker as to the basis of their satisfaction with any of these criteria. Senior Counsel's advice to the Ombudsman was that there was no such restriction to seek further information where necessary. While the Ombudsman does not accept the Solicitor General's advice is correct on this point, the confusion is an unintended consequence of the enactment whereby my inspecting powers under the *Telecommunications (Interception) (New South Wales) Act* are imported into the *Law Enforcement (Controlled Operations) Act*. The Ombudsman's monitoring functions under these acts are distinctly different. It has therefore been recommended to the current review of the Act that this be clarified by a suitable amendment.

Further details of these issues will be addressed in the Ombudsman's Annual Report under the *Law Enforcement (Controlled Operations) Act* that will be issued in late November. We are currently awaiting submissions from the Commissioner on a draft of that report. We have

also included discussion of these issues in a submission to the Police Ministry's review of the Act which I have already made available to the Committee.

10. *What issues did the Office raise in relation to the Police Ministry's review of the Law Enforcement (Controlled Operations) Act 1997?*

We submitted that the general policy objectives of the Act remain valid and the terms of the Act remain appropriate for securing those objectives. However, we suggested a number of minor amendments to streamline the process and clarify the Office's functions and powers.

Following the Solicitor General's advice to the Commissioner of Police that the Ombudsman's powers of inspection were quite limited due to the words "in the same way as they apply to an inspection conducted under that Act" in section 22(2), we recommended they be omitted. Otherwise the Ombudsman's scrutiny function would be something of a charade as it would essentially be reduced to assessing the maintenance of documents rather than compliance with the Act.

We indicated that section 6(5) serves no practical value to the authorisation process. This relates to the requirement on the CEO to keep written records of the reasons for which they are satisfied that there are reasonable grounds to suspect that criminal activity or corrupt conduct has been, is being or is about to be conducted in relation to matters within the administrative responsibility of the agency. Unlike other threshold criteria, such grounds are immediately evident in applications that by necessity have to detail the conduct being investigated to provide a context for the controlled operation. In most cases, the reasons recorded are simply verbatim extracts from the application. Such duplication serves little or no purpose.

We suggested the review consider whether the Act can and should cover cutting edge investigation methodologies that require operations which are not designed in themselves to directly detect and obtain evidence of crimes, but rather to indirectly assist in obtaining admissions of participation in crimes quite different and remote in time from the controlled activates undertaken.

We also indicated that it would be desirable to include some information about the practical outcomes of controlled operations in the Ombudsman's Controlled Operations Annual Report and other information about legal and policy developments relating to controlled operations. Accordingly we recommended that a new subsection be added to section 23(2) to enable the Ombudsman to include in his Annual Report under the Act such other information as the Ombudsman thinks fit.

Finally we commented upon two outstanding issues mentioned in the previous review of the Act by the former Inspector of the Police Integrity Commission. The first related to the need for retrospective approval of unforseen activities undertaken during a controlled operation. Our inspections over the past three years have revealed very few cases where such activities have been reported and we are not aware of any substantive cases of detrimental action arising from such activities. Consequently, we submitted there did not appear to be any need to pursue such an amendment.

The second issue related to the need to extend immunity from prosecution to include law enforcement activities conducted in preparation for a controlled operation. We have not come across any case where significant detrimental action (either actual or anticipated) arising from such activities has been mentioned in applications. However, such information is likely to be reported within agencies by other means so we suggested the review seek submissions from the law enforcement agencies on this issue

11. *Has the review led to any proposals to change the role and jurisdiction of the Ombudsman regarding the audit of controlled operations?*

The review is not yet completed. At this stage, we have not been provided with copies of other submissions made or received or any advice as to possible proposals arising from the review.

TELECOMMUNICATIONS INTERCEPTION OVERSIGHT

12. *What has been the response to the proposal to amend the Telecommunications (Interception) (NSW) Act 1987 to clarify the Ombudsman's powers of inspection?*

This refers to a recommendation made to the Attorney General in both our special report under section 11(2) of the *Telecommunications (Interception) (New South Wales) Act 1987*, *Release of lawfully obtained information by NSW Crime Commission relating to Operation 'Mascot' and the Police Integrity Commission relating to operation 'Florida',* and the 2002 Annual Report under that Act.

It arose from a technical objection made by the Commissioner of the Police Integrity Commission to the production of certain documents during the course of an investigation into the first mentioned matter.

The documentation in question related to the Commission's decision making process preparatory to the release of telecommunications product and other material to staff of the Australian Broadcasting Commission. The documentation was sought for the purpose of assisting the Ombudsman form an opinion as to whether an officer of the PIC had contravened a provision of the Commonwealth *Telecommunication Interception Act.*

Mr Griffin stated he was not convinced that the Ombudsman' functions and powers in Part 3 of the *Telecommunications (Interception) (New South Wales) Act* entitled the Ombudsman to gain access to the PIC's 'decision making' documents given they appeared extraneous to the record keeping requirements of Part 2 of the Act.

Mr Griffin took the view that notwithstanding s12 of the Act, the Ombudsman's powers in Part 3 were restricted to the purpose articulated in s9 of "inspect[ing] an eligible authority's records in order to ascertain the extent of compliance by the authority's officers with Part 2". Part 2 is concerned with the records which an authority is required to keep. Relevantly, s5(1)(d) and (e) require an authority to keep "particulars" of each "use made" and "communication of" lawfully obtained information.

Nevertheless, for reasons of transparency, the Commissioner provided the information requested by way of dissemination of the documents under the *Police Integrity Commission Act 1996.*

Section 9 of the Act states:

> *9. Functions---generally*
>
> *The Ombudsman may:*
>
> *(a) inspect an eligible authority's records in order to ascertain the extent of compliance by the authority's officers with Part 2,*
> *(b) report to the Minister about the results of those inspections, and*
> *(c) do anything incidental or conducive to the performance of any of the preceding functions.*

The power in s.12 to include in a report to the Minister a report on a contravention of the Commonwealth Act is rendered largely ineffective if there is no power to examine relevant documents and question staff of an eligible authority in order to decide whether a provision of the Commonwealth Act had been contravened. On one view, the wording of section 9, particularly the function of doing "anything incidental or conducive to the performance of any of the preceding functions", appears to support the view that the Ombudsman's powers are not restricted in the sense Mr Griffin suggests. However, the mater is uncertain and it points to a possible defect in the *Telecommunications (Interception) (New South Wales) Act 1987.*

If Mr Griffin is correct, it means the inspecting authority charged with ensuring compliance of eligible authorities with the telecommunications legislation is precluded from effectively carrying out it's function of reporting to the Minister in relation to suspected contraventions of the Commonwealth Act.

To avoid potential problems in the future, we recommended this uncertainty be eliminated by amending the *Telecommunications (Interception) (New South Wales)* Act to incorporate an appropriate provision similar to section 5C of the Commonwealth *Telecommunications (Interception) Act 1979.* It provides much broader powers to the Ombudsman to conduct inquiries to determine whether there have been breaches of the legislation.

Section 5C of the Commonwealth Act provides:

> *(1) For the purposes of this Act, information or a question is relevant to an inspection under Part VIII of an agency's records if the information or question is about:*
> *(a) In any case:*
> *(i) the location*
> *(ii) the making, compilation or keeping, or*
> *(iii) the accuracy or completeness;*
> *(b) in any case –any matter to which any of those records relates; or*

(c) if the Ombudsman suspects on reasonable grounds that an officer of an agency has contravened this Act –any matter relating to the suspected contravention.

(2) Nothing in subsection (1) limits the generality of a reference in this Act to information, or to a question, that is relevant to an inspection of an agency's records.

It seems appropriate that all jurisdictions have consistency in the functions and powers of the telecommunications interception monitoring body.

There has been no response from either the NSW Attorney General or the Commonwealth Attorney General in relation to that recommendation. However, Mr Tom Sherman on behalf of the Commonwealth Attorney General has recently conducted a review of certain provisions of the *Telecommunications Interception Act (Cwth) 1979*. We met with Mr Sherman in May this year and raised several issues in relation to our inspection role and the failure of State law to maintain consistency with the Commonwealth legislation.

It is expected that the review will be completed by the end of the year. While Mr Sherman's terms of reference were quite narrow, we are hopeful that his review might raise the issue of inconsistencies between the Commonwealth and State legislation and prompt action to address the issue.

13. *Is the Ombudsman still unable to inspect telecommunications interception records kept by the Inspector of the PIC?*

Yes we are unable to inspect the records of the Inspector as he has not been declared as an eligible authority under the State Act –only the Commonwealth Act. However, as far as we are aware, the Inspector does not keep records as such. The inspector accesses the records at the PIC premises and the PIC is required to keep records of what is accessed by the Inspector. To that end we do inspect the PIC records as they relate to access by the PIC Inspector.

LISTENING DEVICES

14. *What arguments did the Ombudsman put to the Law Reform Commission's Surveillance review in support of the proposal that the Ombudsman should have a monitoring role in relation to the use of listening device warrants?*

In the original submission made in 1997 the Office indicated that it was well placed to conduct this monitoring role as it had experience dealing with secure covert operations and carrying out a similar auditing role in relation to telecommunications inspections.

In 2001 we made a further submission to the Attorney General in response to the Commission's Interim Report. It raised a number of issues.

RECORD KEEPING AND INSPECTION

While the Commission accepted our submission that there was a need for external monitoring of compliance by agencies with the proposed surveillance legislation, it proposed adoption of the record keeping and inspection requirements contained in the *Telecommunications (Interception) (NSW) Act* .It appeared to overlook the much stronger monitoring regime of the *Law Enforcement (Controlled Operations) Act* which we favoured. The first confines the inspecting function to simply ascertaining compliance with the record keeping and destruction requirements whereas the latter is more in line with Interim recommendation 73 and requires the Ombudsman to assess whether or not the requirements of the Act are being complied with including issues of conduct covered by the Code of Conduct relating to controlled operations. We therefore argued for this wider role.

INSPECTING AUTHORITY

The Commission saw two alternatives for the monitoring agency-the Ombudsman and the Privacy Commissioner. We believed our expertise in monitoring compliance with legislative regimes for high security matters may not have been sufficiently appreciated. Our analogous role relating to controlled operations did not appear to have been considered by the Commission. We argued we were better placed to carry out this role for the following reasons:

- depth of experience conducting such inspections;
- proven methodologies for conducting such inspections;
- apart from our monitoring experience relating to telephone interceptions and controlled operations, our long experience investigating complaints of police misconduct and prison administration issues means we have a well developed appreciation of the significance of information having intelligence and security implications.
- as well, we have appropriate internal policies and procedures for maintaining the integrity of such information.
- we have a specialist unit that currently conducts all secure monitoring activities as well as dealing with complaints and appeals relating to the Witness Protection Program.
- the unit is personally supervised by an Assistant Ombudsman who directly participates in the inspections
- staff of the unit have undergone an in-depth external vetting process to obtain appropriate security clearances
- the Senior Investigation Officer of the unit is a former Australian Federal Police surveillance specialist
- the Unit is housed in a reinforced secure office within our larger office that has biometric entry security and 24 hour security monitoring
- the Assistant Ombudsman and unit staff have been formally trained in counter-surveillance

We also submitted that an inspecting authority that did not have this depth of experience and infrastructure would be ill-equipped to carry out such responsibilities and pose risks that are likely to be unacceptable to the law enforcement agencies concerned.

NOTIFICATION MECHANISM

We pointed out that the Interim report failed to canvass the mechanism needed to alert the inspecting authority to the individuals and organisations authorised to conduct covert surveillance and therefore subject to the inspection regime. We argued for a proactive inspection role aimed at identifying defects and breaches in legislation that can be remedied before evidence is challenged on technical grounds in court rather than a post facto inspection regime.

ANNUAL REPORT

The Interim report proposed the Attorney General would report certain matters annually under the proposed Surveillance Act. However, we noted there appeared to be no consideration of the option of the inspecting authority doing that as happens under the controlled operations legislation as well as the absence of a requirement to report on compliance breaches and other issues of concern.

COMPLAINTS AND REVIEW PROCEDURES

The Commission proposed a complaint and review system involving the Privacy Commissioner and the Administrative Decisions Tribunal in relation to overt surveillance basically because it conceptualised such breaches as interference with the privacy of individuals. Later it proposed access to this same scheme by people aggrieved in relation to breaches of the covert surveillance provisions which it considered should be criminal offences. It also proposed that a private action should be able to lie concurrently with a prosecution for a criminal offence.

Our submission argued that there was a need for a substantially higher threshold for making available an investigation and review function in relation to grievances about covert surveillance activities by law enforcement agencies. By definition, they are not simply privacy infringement issues, but rather issues of misconduct and criminality. Current public policy exempts the major law enforcement agencies from compliance with the information protection principles and they also benefit from other exemptions under the *Privacy and Personal Information Protection Act 1998*, including being exempt from the Privacy Commissioner's investigation functions.

The Law Reform Commissions proposal if accepted would completely overturn current public policy in respect to the investigation functions of the major law enforcement agencies. We also believed there was potential that such a system could be exploited by criminals taking complaints to the Privacy Commissioner or bringing proceedings in the ADT for the collateral purpose of discovery aimed at frustrating authorised surveillance activities. We argued that any such system would need to be regulated to strictly limit disclosure of information to prevent such potential abuse.

We therefore suggested it would be more sensible to enable the inspecting authority to also perform any complaint and review function. We argued that a body like the Ombudsman not only enjoys the confidence of the public and law enforcement agencies for independent and

fair investigations, but is also able to effectively operate under appropriate secrecy and disclosure provisions that do not threaten the integrity of law enforcement operations.

As far as we are aware, the Law Reform Commission has not proceeded to issue a final report.

Since that time there has been a proposal circulated for some cross border surveillance legislation in response to post September 11 concerns about terrorism. A private members bill (*Communications Interception Legislation Amendment (Ombudsman Oversight) Bill 2002)* introduced in May 2002 by the then Shadow Minister for Police addressing some of the recommendations of the Law Reform Commission interim report has lapsed.

POLICE AREA

15. *What have been the main issues for the Office in the police area since the 10th General Meeting with the Committee?*

Some of the main issues for the police area are as follows:

THE ADEQUACY OF COMPLAINT-HANDLING BY POLICE

A major focus of our work with police has been to improve our capacity to monitor the local complaint-handling performance of commands across NSW, particularly in relation to:

- the adequacy of investigations.
- the timeliness of investigations.
- the range and suitability of management outcomes.
- the use of alternative dispute resolution techniques and outcomes achieved.
- complainant satisfaction.

This work enables us to provide feedback to NSW Police and particular commands on trends as they emerge, so that deficiencies, delays and other issues of concern can be identified and remedied.

For a long time we urged NSW Police to develop benchmarks for complaint-handling. NSW Police is now developing performance indicators for assessing the quality and timeliness of complaint investigations and the satisfaction levels of both complainants and police.

As the police capacity to check complaint handling improves, we will monitor how well NSW Police identifies and assists commands with poor complaint handling practices. We also want NSW Police to recognise and promote the work of commands that perform well.

COMPLAINTS BY POLICE ABOUT THE MISCONDUCT OF OTHER POLICE

Of the 3099 complaints about police received by the Ombudsman in 2002-2003, 783 originated from police – well up on the 621 serious matters reported by police the previous year.

Police officers are often well placed to identify serious misconduct. Of the 62 officers charged with criminal offences during the year, 43 were charged as a result of the investigation of reports made by police.

We are undertaking a detailed review of complaints by police to explore the scope for improving the manner in which they are handled. This review includes assessing the adequacy of NSW Police systems to ensure that police whistleblowers are adequately supported and that police officers who have complaints made against them are treated fairly.

OFFICERS OF CONCERN

We continued to prepare detailed profiles on officers with significant complaint histories. These are assisting in the improved identification and management of officers of concern.

In particular, we have used the officer profiles to discuss with commanders how they are managing officers of concern within their command and, where appropriate, possible strategies to manage these officers more effectively. The profiles have also been useful in bringing to attention officers who are or may be under stress or who have significant welfare issues.

This analysis provided a starting point for our response to the Committee's recommendation in December 2002 that the Ombudsman and PIC assist NSW Police in establishing indicators for an early warning system to identify and assist police officers who may be vulnerable to corruption. As a result of this recommendation, a research committee was established, consisting of senior members of the Ombudsman, PIC and NSW Police. Details regarding progress on this project are set out in our response to question 25.

POLICE AND ABORIGINAL COMMUNITIES

Since February we have been closely examining the relationship between particular local area commands and their Aboriginal communities.

Our work in this area is being conducted in the context of the recent NSW Police *Aboriginal Strategic Direction*. This policy requires local area commanders to develop and implement measures aimed at improving outcomes for Aboriginal communities. The objectives of the policy are to encourage police to:

- strengthen communication and understanding between police and Aboriginal people.
- improve community safety by reducing crime and violence within the Aboriginal community.
- reduce Aboriginal people's contact with the criminal justice system.
- increase Aboriginal cultural awareness throughout NSW Police.
- divert Aboriginal young people from crime and anti-social behaviour.
- target Aboriginal family violence and sexual abuse.

An Ombudsman audit team comprising the Assistant Ombudsman (Police), the police team's complaints manager, members of the Aboriginal Complaints Unit, and a researcher have been meeting with local police, other service providers and Aboriginal community

representatives in various locations to assess the adequacy of police initiatives. So far we have reviewed the Shoalhaven, Mid North Coast, Richmond, Oxley, Canobolas, Wagga Wagga and Castlereagh commands.

Our audit reports assess the steps each command has taken to implement the Aboriginal Strategic Direction objectives. We see the value of our observations and recommendations as being of assistance to commanders in their implementation of the policy. In particular, we consider it is important to report on practical police initiatives as they are identified and tried, rather than some years after the event; it is also important to recognise and encourage effective ideas that are already in place.

16. *Has the implementation of PODS been completed and have PODS and c@ts.i led to the rationalisation of the notification system for police complaints?*

The core design of PODS (Phases I, II and III) was completed by November 2002 and the system has been operational since that time. Phase IV (c@ts.i investigations) and Phase V (c@ts.i security) have also been completed. It is anticipated that the final Phase VI (e@gle.i and Firearms Data) will be completed in early March 2004. At that time, the PODS project will be officially "handed over" to the PIC by the PODS development team.

The introduction of c@ts.i has rationalised the notification of complaints.

The significant advantage of c@ts.i is that a "notifiable" or Category 1 complaint received by police, once entered on the system by NSW Police, is immediately notified to and accessible by the Ombudsman (and, in the case of Category 1 complaints, the PIC). c@ts.i therefore eliminates the delays that can be occasioned by other conventional methods of notification, such as post and fax, and/or by delays in the NSW Police internal administration of correspondence.

Another advantage of the system is that all agencies can employ the one c@ts.i reference number for a particular complaint, rather than agencies using their own discrete reference numbers for the same matter.

However, it must be said there have been significant practical problems in the operation of the c@ts.i system. Since its introduction, there have been slow computer processing times and not infrequent breakdowns of the system. We have highlighted with NSW Police – most recently at the most senior management levels – the importance of investing adequate resources in the further development and reliable operation of c@ts.i. This would ensure not only that complaints are promptly notified between the relevant agencies but, more generally, that the capacity of NSW Police and this office to fulfil our respective responsibilities in relation to complaint handling is maximised.

17. *What have been the results of the Ombudsman's audits of police minor matters, ie local management matters, and how do they compare with previous audit results?*

In the Ombudsman's Annual Report of 1998/99[73], we reported on the audit of local commands' management of minor complaints. 16 (or 22%) of the 72 centrally recorded complaints that were not notified should have been. 35 (or 28%) of the 126 locally recorded complaints were also not notified to the Ombudsman, and should have been.

Since the last meeting with the Committee, Ombudsman officers have audited the management of all complaints in 9 local area commands, including metropolitan, rural and regional commands.

Six of the commands were selected as part of the ongoing audit program of local complaint management systems by the Ombudsman. Of the 496 complaints examined [74]:

- 271 complaints were notified to the Ombudsman as required by relevant agreements.
- 59 complaints (12%) should have been notified to the Ombudsman. On the whole, however, these complaints were appropriately dealt with by local commands. The nature of these complaints included: serious matters reported verbally to police officers; inappropriate COPS accesses found as a result of regular audits; and failed court proceedings as a result of serious incompetence by police officers. The complaints have since been appropriately notified.
- 55 minor customer service complaints, which would have been notified to the Ombudsman prior to legislation amendments commencing in January 2002, were identified in the audit. It was particularly pleasing to note that these complaints were well managed by local commands.

Three targeted audits of other local commands were commenced after concerns were raised about the failure to notify the Ombudsman of serious complaints. Of the 138 complaints examined[75], 15 matters (11%) which should have been notified to the Ombudsman were not. These included assault allegations and release of confidential information. Action taken in respect of these complaints and minor matters managed locally was generally appropriate.

An analysis of the outcomes of the audits indicates an improvement by police in the past few years in appropriately notifying the Ombudsman of serious complaints. This financial year, we plan to audit an additional 10 local commands, and a specialist command, to continue to examine both notification of serious complaints and management of minor matters.

18. *Has the Ombudsman identified any improvements in the management actions taken to address police misconduct in relation to non-reviewable matters?*

We track state-wide trends in the types of management action, both reviewable and non-reviewable, taken during and at the end of NSW Police complaint investigations.

In relation to non-reviewable management outcomes, we have noted a significant downturn in the use of "management counselling" and a significant upturn in the use of "increased supervision". The following figures demonstrate these trends:

[73] Pages 39-40
[74] All complaints for the period 1 Jul 2001 to 30 Jun 2002
[75] Including complaints from 2002 and 2003

	98-99	99-00	00-01	01-02	02-03
Management counselling (%)	46.5	43.0	43.3	40.2	35.9
Increased supervision (%)	6.0	5.5	5.2	6.3	8.7

We have also noted an upward trend in the training of individual officers. Although the use of command level training dipped last financial year, it remains an important outcome for a significant volume of cases:

	98-99	99-00	00-01	01-02	02-03
Training – command (%)	11.3	12.0	12.8	12.1	9.6
Training – officer(s) (%)	5.2	5.9	6.6	6.9	7.4

Although commanders still appear to rely heavily on counselling as a method of managing poor performance by their officers, it is encouraging to see a significant downturn in the use of this technique and the greater use of training and increased supervision.

We will continue to track the management outcomes of NSW Police investigations, and are also engaged in project work to explore the effectiveness of the various forms of non-reviewable action.

19. *Has the police complaints meeting organised in Coonabarabran been an initiative repeated elsewhere?* (Annual Report 2001-2002, p.11)

We often use community meetings to bring communities, local police and other service providers together to discuss concerns and work towards possible solutions.

Sometimes these forums are in response to a particular incident or issue, such as a serious complaint or a death or injury arising in the context of a police pursuit. Often the focus of these forums is to clarify issues of concern, distinguishing issues requiring investigation from some of the pre-existing community concerns, and agreeing on a process for police to respond.

Increasingly, we convene community forums as part of an ongoing program of visits to regional areas to audit police work with local Aboriginal communities. Since February an Ombudsman team has visited local commands based at Lismore, Nowra, Orange, Port Macquarie, Tamworth, Wagga Wagga and Walgett. Although the primary focus of these visits is to look for effective police programs involving Aboriginal people (see response to Question 15), we also arrange other meetings to discuss broader community and policing issues. The outcomes include working with police on how best to address the issues raised.

20. *What has been the outcome of the NSW Police review of the Professional Standards Managers (PSMs) and have these positions worked to support the complaints process?*

PSMs

Since the restructure of NSW Police, PSMs (who are usually of Inspector or Chief Inspector rank) have remained as an integral part of the five region commands. The focus of PSMs

remains on monitoring and driving improvements to complaints performance and professional standards within their regions.

Ombudsman officers have regular contact with PSMs in dealing with difficult, delayed or deficient complaint investigations. Our experience has been that most PSMs facilitate resolution of complaint issues. In addition PSMs work closely with complaint handlers in local commands through activities such as: organising investigation training; providing professional standards advice; and reviewing some local command complaint investigations.

CMU

NSW Police has recently established the Complaints Management Unit (CMU) within the Special Crime and Internal Affairs Command (SCIA). The CMU is tasked with improving the overall quality and timeliness of the investigation of serious (Category 1) complaints. The CMU, which includes five Inspectors, is to provide support to, and reviews of, the investigation and outcomes of local command investigations. The reviews will occur at the outset, prior to any interview with the involved officer and at the completion of the investigation.

The Ombudsman is monitoring a short trial of the CMU processes within Greater Metropolitan Region to assess any impact on the timeliness, effectiveness, complainant and officer satisfaction and outcomes of NSW Police complaint investigations.

21. *What has happened in relation to the deferred trial to develop innovative complaint handling techniques, which was to be a joint initiative between the Office of the Ombudsman and the Police Service?*

The proposed complaint handling trial, detailed in the 2000-2001 annual report, did not proceed as scheduled due to the restructure of NSW Police. Since then, other initiatives to drive improvements to complaint handling practices have commenced, effectively overtaking the earlier proposal. The most significant of these initiatives are:

The Complaints Management Unit trial in the Greater Metropolitan Region, as noted in the answer to question 20 above.

- A short trial of a new Complaints Management Manual (the manual) in four local area commands, a specialist command and a Region command.

  The manual includes information about the receipt, assessment, and investigation of complaints, and actions and outcomes at the end of complaint investigations. In addition, it will include resources such as the NSW Police Internal Witness Support Policy and proposed Informal Resolution Guidelines.

  Our Project in this area includes reviewing the manual, observing some complaint management teams (including their use of the manual), and assessing the impact of the manual on the timeliness and effectiveness of complaint investigations.

- A program involving Ombudsman observers sitting in on Complaint Management Team (CMT) meetings at seven regional and six metropolitan commands to observe how each local command uses its CMT. This included observations on the types of issues discussed, investigation management, whether complaint trends are monitored and processes for determining outcomes.

  The observers provide feedback directly to each CMT, usually at the end of the meeting. The observations will also provide a basis for recommendations to senior police management at the completion of the project.

- A program of meeting with local commanders to assess and discuss complaint handling practices in their commands. These discussions are based on detailed profiles of each command's complaint handling practices and their officers' complaint histories. In addition to checking how well commanders manage complaint issues and whether alternative strategies had been considered, the visits provide valuable feedback on issues that might not be included in investigation reports. These include welfare issues or environmental factors that might influence officer performance, or good work that an officer is doing despite a problematic complaint record.

  We have profiled all of the local commands visited as part of our auditing of NSW Police work with local Aboriginal communities (see response to Question 15), and provided advice in detailed discussions with those commanders. Several other commands have also been included in this program. In addition, our Assistant Ombudsman and other senior staff regularly conduct complaint handling workshops involving senior and specialist officers at local and regional commands.

22. *What conclusions has the Office drawn from the detailed profiles developed on complaint handling issues affecting individual Local Area Commands?*

The local area command profiles contain information on general complaint patterns, officers with significant complaint histories and complaint performance measures.

By examining a command's complaint patterns against statewide trends we have been able to discuss with commanders areas of concern as well as positive trends.

Having detailed information on officers with significant complaint histories, allows us to assess the extent to which commanders are identifying and managing risks relating to individual officers. We are pleased to see that over recent years commanders have become much more active in this area.

We are able to measure the performance of individual commands against statewide performance through examining turnaround times, deficient investigation rates, complainant satisfaction rates and the types of management action taken to address findings of misconduct and inappropriate conduct. This data allows us to target effectively the strengths and weaknesses of a command's complaint handling practices.

23. *What conclusions has the Ombudsman drawn on the effectiveness of the Command Management Framework as an audit tool?*

In December 2002, Ombudsman officers observed an audit of the Richmond local area command conducted by the NSW Police Audit Group. The aim was for our officers to gain a practical understanding of the process.

We were pleased to see a process with clear guidelines that was easier for commanders to use than the previous P80 audit system. The emphasis on commanders conducting their own risk assessments based on local issues is a positive initiative. Our observations of the Richmond audit revealed that police officers with responsibility for particular portfolios generally found CMF to be a helpful and useable tool for managers. The audit results also form a significant part of the Operational Crime Reviews (OCRs) conducted by the Commissioner.

So far we have commenced audits into two systems management areas, unlawful access to COPS and maintenance and practices regarding closed circuit television equipment (CCTV). We intend to examine the quality of auditing practices in relation to areas of corruption prevention in the coming year.

Our follow up audit of NSW Police's compliance with auditing requirements in the area of unlawful access to COPS revealed that while there are still some areas that need to be improved, overall compliance with the standard operating procedures and use of the risk assessment guidelines under CMF has improved significantly.

Access to video footage can be an effective way of quickly clarifying issues and resolving complaints. The aim of our audit is to examine relevant procedural issues and whether the introduction of new CCTV equipment and new standard operating procedures is having a positive impact on the resolution of complaints We are in the process of analysing information provided by NSW Police and will be in a position to report on our observations before the end of this year.

Due to funding constraints, the intranet version of CMF (iCMF) is yet to be rolled out across NSW Police. In the interim, commands will continue to keep hard copy records of audits. While this system is no less effective in terms of the quality of the audits, it seriously limits the number of audits that can be conducted by the Audit Group across the state, due to staffing and geographical constraints. For this reason, the Audit Group focuses on high risk areas when determining priority for their audits.

We were recently advised that the Manager of the Audit Group has been appointed corporate sponsor for the iCMF project and is in the process of negotiating further funding. The Audit Group has recently been given a number of additional positions (which are yet to be filled) that will increase their capacity for auditing.

Our feedback from the Audit Group is that compliance with the key areas namely: crime management, people management (including corruption resistance) and systems management has improved across NSW Police. The CMF also makes it easier for external agencies like our office to audit particular systems issues because the audit results are recorded centrally and in a consistent format.

We are confident that CMF has the potential to be an effective audit tool. The sooner NSW Police implements iCMF, the sooner they will be able to assess compliance on an ongoing basis with a greater number of commands.

24. *Has the Ombudsman been advised of the results of the evaluation and review by the Ministry of Police of the trial of police secondary employment?*

The Ombudsman received a copy, from the Minister for Police, of the NSW Government's 'Report on the Evaluation of Supplementary Policing Trial' on 30 October 2003. The Minister noted his intention to table the report in Parliament, and his instruction that the recommendations be implemented.

25. *What progress has been made by the Joint Research Committee established to develop a corruption identification and minimisation program?*

Following receipt of the Committee's 'Research Report on Trends in Police Corruption'[76], the Ombudsman initiated a meeting in January 2003 with the Strategic Research Team of the police Special Crime and Internal Affairs (SCIA) branch, and the PIC, to progress the recommendation of the Committee that 'the [PIC] and the NSW Ombudsman consider assisting NSW Police in establishing the indicators for an Early Warning System to identify and assist vulnerable police officers'.

Since that time, a steering committee chaired by NSW Police has worked to finalise terms of reference for an early warning system project, which will include a literature review, contact with other policing organisations and consideration of present arrangements within NSW Police. The project plan has been completed and work on the project is scheduled to commence in November 2003.

The Ombudsman has pressed, throughout this process, to ensure that the project considers not only the identification of vulnerable officers, but the range of management responses to assist those officers. Progress has been somewhat delayed by the need for NSW Police to appoint an appropriate corporate sponsor, and for employee management expertise to be made available for the project.

The Ombudsman has used the opportunity presented by the steering committee to commence an exchange of information with SCIA about officers where Ombudsman research indicates significant concerns may exist. The Ombudsman has been concerned to ensure that any process provides fairness to involved police officers, and appropriate independent consideration of the Ombudsman's concerns by NSW Police. The Ombudsman believes that this process will provide further opportunities to identify and assist officers in trouble.

[76] December 2002

UNIVERSITIES

26. *Have university complaints continued to rise and are there any trends in the types of matters subject to complaint?*

As stated on p.25 of our 2002-2003 Annual Report, the rise in complaints about universities over the previous three years (34 in 1999-2000, 46 in 2000-2001 and 56 in 2001-2002) has slowed with 60 complaints received in 2002-2003. However, as noted in the Report the higher than average rate of both protected disclosures and requests for review of our decisions concerning university complaints (and hence the work involved in handling them) continued.

27. *Have the deficiencies in the internal reporting systems of certain universities in NSW been addressed in response to advice from the Ombudsman, and to what extent are the internal reporting systems, currently in place, effective and adequate?* (Annual Report 2001-2002, p.70)

We have not previously had the resources to review how each university has responded to advice from this Office in relation to their internal reporting systems. However, in the course of conducting investigations concerning certain universities we have taken the opportunity to review their current internal reporting policies. In this regard we recently commenced a formal investigation into a range of matters concerning one university, including their procedures and practices for dealing with protected disclosures.

In the coming year it is our intention to survey all NSW universities in relation to the procedures they have in place for receiving and dealing with complaints by staff about the conduct of other staff, and complaints by students about the conduct of staff.

CHILD PROTECTION

28. *What are the predominant factors that led to the decisions taken to monitor 97 child abuse investigations? (some of the types of factors are identified at p.109, Annual Report 2001-2002)*

Although there are a range of reasons why we may monitor an agency's investigation, the predominant reasons are:

- the allegations involve the sexual assault of a child or are of an otherwise serious nature, or
- the investigation has been going for more than four months, the agency has not provided a reasonable explanation for the delay and has a history of delayed responses.

In general, we will monitor these types of notifications because of the higher risk nature of the allegations and because we want to ensure that we have timely input into the investigation process.

We will also monitor notifications that involve senior staff employed by agencies within our jurisdiction. Some agencies also have specialist, centralised units that are responsible for the investigation of child abuse allegations against their employees. If a child abuse allegation is made against a staff member of one of these units, we will monitor the agency's handling of the investigation. We do not receive a large number of notifications of this kind; however, when they do arise, we have a closer involvement in the investigation process because of the sensitive nature of these matters and the potential for conflict of interest.

29. *What were the outcomes of the 16 direct investigations conducted by the Child Protection Team in 2001-02?*

In the 2001-2002 year, we commenced 8 investigations and continued to work on 8 investigations that had been commenced in previous years. Of these 16 investigations, we finalised 9 and carried 7 over to the 2002-2003 financial year. All of these investigations have now been finalised.

In 2001-2002, 5 of the 16 investigations were discontinued because, after making some enquiries, we were satisfied that the agencies' conduct did not constitute conduct of the kind specified in section 26(1) of the *Ombudsman Act*.

Some of these investigations were lengthy because the complexity of the situation necessitated further enquiries during the course of our investigation and because of the need to monitor agencies' compliance with our recommendations over time.

(a) Department of Community Services

In 2001-2002, 5 of the 8 investigations that were commenced related to the conduct of the Department of Community Services (DoCS).

Two of these investigations related to DoCS' investigation of child abuse allegations against employees of other agencies. Our main concerns in these investigations related to DoCS' failure to adequately investigate the allegations that were made and its failure to exchange information with the other employers so that they could take appropriate action in relation to their employees.

The remaining three of these investigations concerned DoCS' failure to properly investigate child abuse allegations against its own employees (both paid employees and foster carers). In all of these cases, we recommended that DoCS take specific action to address the issues that we had raised, such as reviewing its decision-making, amending case records or providing information to other agencies. We have monitored DoCS' compliance with our recommendations and are, overall, satisfied with its response. We continue to monitor DoCS' compliance with our recommendations in three investigations.

We also continued to work on two investigations that were commenced in the 2000-2001 financial year. These investigations focused on systemic issues that we had noticed in relation to:

- the systems for preventing the abuse of children and young people in out-of-home care and for dealing with child abuse allegations against foster carers, and
- the systems for identifying and notifying child abuse allegations against employees to the Ombudsman.

We made a number of recommendations concerning the systemic issues that we identified. As a result of our investigations, DoCS has reviewed relevant policies and procedures, considered how to provide information about its responsibilities under the *Ombudsman Act* to its employees (including foster carers) and has made significant improvements in the time taken to notify us of child abuse allegations against its employees. DoCS is also in the process of implementing our recommendation that it establish a centralised unit to manage all child abuse allegations against its employees.

(b) Other agencies

In 2001-2002, we also commenced or continued investigations into the handling of child abuse allegations against employees of the Department of Education and Training (DET), the Catholic Commission for Employment Relations (CCER), non-government schools and a local council. In these cases, we were concerned that these employees may have been treated unfairly during the investigation process or that the agency in question had not adequately considered the risk that the employee may have posed to children. We later discontinued 6 investigations because, after making some enquiries, we were satisfied that the agencies' conduct did not constitute conduct of the kind specified in section 26(1) of the *Ombudsman Act*.

In the remaining investigations, we recommended that the agency in question reinvestigate the allegations or review its investigation process. We also assisted the agency to assess the possible risks that the employee posed and to then take action to address these risks. We also referred one matter to the police so that a criminal investigation could be pursued. We have monitored these agencies' compliance with our recommendations and are satisfied that they have addressed the issues that we raised.

30. *What were the results of the Child Protection Team's audits of policies, systems and investigative practices used by agencies to prevent child abuse and to deal with child abuse allegations?* (p112, Annual Report 2001-2002)

(a) Auditing council child protection policies

There are 172 councils in NSW. Many councils run child care centres and family day care schemes. The majority of notifications received from councils relate to allegations against employees who work in services to children.

In 2000-2001, we decided to conduct an audit of local council child protection policies over a period of time because it was clear that some councils were not aware of their obligation to report child abuse allegations and convictions against employees to the Ombudsman. To

date, we have audited 118 council's child protection policies, and consider this to be a long-term project.

Although most councils have a policy in place that refers to the process for notifying and investigating child abuse allegations against employees, these policies often confuse the requirements under different pieces of child protection legislation, contain inaccurate information about their responsibilities or do not provide information about the requirement to notify child abuse allegations concerning all employees to us (not just those in child related employment). We have continued to provide advice to councils about their policies and aim to complete this project within the next two years.

(b) Auditing the Catholic Commission for Employment Relations' systems for handling allegations of child abuse

As a result of our feedback from our audit of CCER's systems for handling allegations of child abuse, CCER employed a consultant to review its processes and systems for handling child abuse allegations. As a result of this review, CCER restructured its employment relations area. Previously, CCER had employed a team of child protection specialists, who provided specialist advice to schools and dioceses in relation to the investigation of child abuse allegations against employees. However, the new structure has seen the integration of these specialist positions into the employment relations teams, which provide advice concerning more general employment-related issues. Our concern is that this may result in the loss of specialist knowledge in the child protection area, so we are continuing to monitor CCER's performance.

Overall, we are satisfied with the standard of investigations conducted within the Catholic schools system and have extended our Class or Kind Determination in relation to this sector. Under the new arrangements, certain allegations in relation to the Catholic systemic schools are exempt from notification, whilst certain allegations in relation to the Catholic independent schools are now notified by schedule.

(c) Auditing systems for preventing child abuse in schools for special purposes

Please refer to Question 31.

(d) Auditing investigative practices

Following our audit of the non-government agency described on p113 of the 2001-2002 Annual Report, we made a number of recommendations aimed at improving the agency's systems for preventing and responding to child abuse allegations against its employees. We have requested quarterly reports concerning its compliance with our recommendations and are maintaining regular contact with the agency through phone calls and meetings.

To date, the agency has appointed a person to coordinate investigations concerning child abuse allegations against employees, conducted training for its staff and engaged a consultant to review its child protection policies and procedures. The initial results of these initiatives are encouraging, as the agency has demonstrated a willingness to improve its

systems and has committed resources to this task. We will continue to monitor the agency's practices and, if satisfied with its performance, may consider a class or kind determination in relation to this agency.

31. *Has there been any improvement in relation to the systemic issues revealed by the audit of systems for preventing child abuse in schools for special purposes, eg patterns of over-use of restraint of children with disabilities?* (p.112, Annual Report 2001-2002)

In 2002-2003, we completed our audit of the systems for preventing child abuse in schools for special purposes (SSPs). Although we are concerned about the issues that we raised in the 2001-2002 annual report such as the increasing number of children attending SSPs with high support needs and aggressive behaviours, we were pleased to observe that most schools that we audited had well-developed systems and were aware of the particular vulnerability of children with disabilities.

We were concerned that staff within SSPs may not recognise situations such as over-restraint of children with disabilities as child abuse, and arranged for the Assistant Ombudsman (Children and Young People) to address the Principals of the government SSPs in early 2003. This group responded positively to a discussion regarding the Ombudsman's role and their responsibilities under the *Ombudsman Act*.

We are satisfied with the results of our audit of SSPs and do not plan to continue to audit these schools in 2003-2004.

32. *Have the systemic issues identified at pp. 118-119 of the Ombudsman's Annual Report for 2001-2002 in relation to the Department of Education and Training and the Department of Community Services been resolved?*

(a) Department of Education and Training

We have had extensive discussions with the Department of Education and Training in relation to our requirement that agencies advise us of the findings of every investigation that they complete into allegations of child abuse against employees. The department was concerned that its disciplinary scheme did not allow it to determine whether or not an employee had acted as alleged without the benefit of a formal disciplinary process. We were concerned that, if the department did not make a determination in relation to every case, it could not adequately assess the risk that the employee posed to children in their care.

We have now entered into an arrangement with the Department of Education and Training whereby the department makes a determination in relation to ten categories of findings, which reflect the department's disciplinary processes. Although this process is administratively more cumbersome than previous processes, we are able to interpret the department's categories in order to record a finding for our purposes and are satisfied with this outcome.

(b) Department of Community Services

The Department of Community Services has continued to act inconsistently with regard to making a finding. The Director-General has recently advised the Ombudsman that in his view, the department is unable to make a determination in relation to an employee's conduct because the *Children and Young Persons (Care and Protection) Act 1998* refers to the department's responsibility to investigate and assess reports for the purpose of determining whether or not a child or young person is at risk of harm. The department refers to these investigations as 'risk of harm' assessments in relation to the alleged victim. The department has argued that it has no legal mandate to make a determination regarding an employee's conduct.

We remain of the view that the department has responsibilities under the *Ombudsman Act* that require it to investigate child abuse allegations against its employees for the purposes of determining whether or not the employee has acted as alleged. It is our view that it is necessary to make a finding in relation to the employee's conduct so that the department can assess the risk that the employee poses to children and to determine the appropriate action to take. Although a 'risk of harm' assessment is valuable to determine whether or not there are current concerns for the safety, welfare or well-being of particular children or it does not provide information about the source of any potential risks or whether those risks possibly extend to other children. That is, the department's current processes do not consider the employee's behaviour and whether or not it is likely to re-occur.

It is our view that the *Ombudsman Act* requires the department to report the results of its investigations to the Ombudsman, and that this includes a finding or conclusion in relation to the employee's conduct.

We have recently agreed to seek a joint legal opinion in relation to this issue and will continue our discussions with the department.

33. *Most of the notifications received by the Office concerned allegations of physical abuse and women were the alleged offenders in 56% of notifications about allegations of serious physical abuse. Has this continued to be the case?*

Over time, the proportion of notifications concerning allegations of physical assault has increased slightly but remains relatively stable; at approximately 65-68% of all notifications received.

Financial year	Proportion of notifications where physical assault is the primary abuse type
1999-2000	65%
2000-2001	66%
2001-2002	67.5%
2002-2003	68%

In 2001-2002, we looked more closely at the breakdown of allegations of physical assault as part of our process of developing our class or kind determinations in relation to the Department of Education and Training and the Catholic Commission for Employment Relations. We used this information to determine the categories of behaviour that could be excluded from notification to us.

In 2002-2003, there has been an overall increase in the number of notifications received. However, there has been a slight decrease in the proportion of allegations relating to female employees. For example, in 2001-2002, women were represented in 56% of cases relating to allegations of more serious physical abuse (eg hitting and kicking), compared with 54% in 2002-2003.

34. *Will the proposed changes to the Ombudsman Act that introduce a new definition of 'reportable conduct' instead of the term 'child abuse' have any significant impact upon the work of the Office in the Child Protection Area?*

The *Child Protection Legislation Bill 2003* aims to improve the operation of Part 3A of the *Ombudsman Act* by clarifying the meaning of 'reportable conduct' and by making it clear that certain matters, such as accidental contact or comforting a distressed child, do not need to be reported to the Ombudsman. We hope that these amendments will address the concerns raised by the education sector whilst maintaining the integrity of the legislation.

It is too early to understand the potential impact that the legislative change may have, but we will carefully monitor its effects over time.

We are currently formulating a strategy to educate the approximately 7000 agencies in our jurisdiction about the changes during 2004. We anticipate that there will be a significant amount of work involved in briefing agencies about the changes, in addition to revising and publishing our publications such as our guidelines for employers (Child Protection: responding to allegations of child abuse against employees) and our fact sheets.

35. *Has there been any improvement in the capacity of agencies, such as Department of Education and Training, Department of Juvenile Justice and the Catholic Commission for Employment Relations to finalise matters that have been the subject of notification?*

Please also see the information provided in Question 8 in relation to this issue.

In the 2001-2002 annual report, we noted our concern about the sometimes lengthy delays experienced by the Department of Education and Training (DET), the Department of Juvenile Justice (DJJ) and the Catholic Commission for Employment Relations (CCER) in completing their investigations and forwarding the results of the investigations to us. On average, it took approximately six months for these agencies to finalise their investigations; compared with an average of four months for agencies overall.

Over the past year, we have continued to meet regularly with representatives from these agencies to address the delays in finalising matters, and are monitoring their current

initiatives to reduce delays. We have also worked with these agencies to develop an understanding of the specific issues that they face in completing investigations of this nature. We have observed an increased number of notifications from DET where the matter is investigated and finalised within 30 days of the head of agency becoming aware of the allegation. In 2001-2002, 23% of the matters that were notified to us by DET were finalised at the point of notification to us, compared with 40% of notifications received in 2002-2003.

Whilst the agencies have taken steps to significantly improve their processes, we are concerned that some matters are significantly delayed because of the time taken to complete formal disciplinary action or because of criminal investigations or court processes. When investigations are delayed, the employee and other relevant parties (such as the child and the child's family) are left in a state of uncertainty and the agency is unable to take action to address the issues raised in the investigation. In addition, agencies can incur significant costs if an employee has been suspended from duties with pay during the investigation.

We have recently completed an investigation that related to CCER's systems for handling child abuse allegations against an employee who has been engaged to provide services to children, and have made some significant recommendations in relation to the improvement of its systems for handling child abuse allegations against employees. Once the final report of this investigation is issued, we will monitor CCER's compliance with our recommendations.

We have also reviewed our own processes so that we have a more active involvement in matters where the investigation has been ongoing for more than four months, as there are some circumstances where we may be able to assist in the early resolution of the matter or where our involvement encourages the agency to review the priority of the investigation.

36. *Is the Office in a better position to determine the cause of the higher percentage of notifications of child abuse allegations received from independent schools, as compared to other agencies? In particular, has it been determined whether the higher percentage is because independent schools are dealing with 'grooming' behaviour allegations at an earlier pre-emptive stage, or because a number of independent schools are boarding schools and, consequently, there is more opportunity for 'grooming' behaviour?*

In 2001-2002, there was a 30% increase in the matters notified from non-Catholic independent schools. The increase in notifications from independent schools can primarily be attributed to a series of workshops that we ran in conjunction with the Association of Independent Schools (AIS) for principals of these schools. Over 200 principals attended these workshops, which were held across the state to draw attention to our role in child protection, the responsibilities of principals as heads of agencies for independent schools and the risk management issues associated with child abuse allegations against employees.

Last year, we reported that the number of allegations of 'misconduct that may involve child abuse' (grooming behaviours) was proportionally higher for independent schools (22%) compared with other agencies (14%).

In the 2002-2003 reporting year we have observed the same pattern, with 23% of notifications involving allegations of 'misconduct that may involve child abuse' (grooming behaviours), compared with an average of 13% for all agencies.

Last year, we commented that the slightly higher proportion of this type of notification from independent schools may have been because these agencies could have been dealing with these types of behaviours at an earlier stage or that the nature of boarding house arrangements provides more opportunity for 'grooming' behaviour. We still consider that both may play a part in explaining why non-Catholic independent schools have a higher proportion of notifications of this type and will continue to monitor the patterns of reporting from this sector.

We have also continued to audit independent schools, with particular attention given to schools that have openly resisted their reporting obligations or where the students attending the schools are highly vulnerable (eg schools for children with a disability or with boarding facilities). Overall, we have been impressed with the standards set by these schools in the area of child protection, and are satisfied with the systems that they have in place for preventing and responding to child abuse allegations against employees.

DEPARTMENT OF COMMUNITY SERVICES

37. *What has been the outcome of the Office's ongoing investigations into individual complaints and systemic issues concerning the Department of Community Services?*

During 2002-2003, 47% (334) of all formal community services complaints were about DoCS:

Service provider: DoCS	2002-2003 (no. (%))
Child protection services	175 (25%)
Out of Home Care (OOHC) services	111 (15%)
Other (incl. requests for assistance, licensing issues)	41 (6%)
Adoption	7 (1%)

(27% of complaints were about the DADHC; and 26% about non-government funded, licensed & authorised services.)

Key issues raised by complaints related to departmental systems and procedures, casework and case management practice, including the department's:

- adequacy of investigation and follow-up of reports of child abuse and/or risk of harm (RoH);
- planning in OOHC, including planning for the family relationships, developmental, educational, social, and health and safety needs of children and young people in care;
- consultation with, and involvement of, clients in decision-making affecting them.

Key systemic and individual service provision issues raised by complaint investigations, reviews of children in care and inquiries included:

Systems for responding to child protection cases where there is also Family Court involvement:

DoCS has responded to recommendations from an Ombudsman investigation in 2001, which determined that the department's then current systems and practice was unreasonable, by:

- reviewing its protocol & Memorandum or Understanding (MoU) with the Family Court. DoCS reports the new protocol will be finalised before the end of 2003;
- developing staff procedures & guidelines, and a case management system to guide relevant to Family Court matters. These full implementation of these procedures and systems will be associated with the roll-out of DoCS' new KIDS computerised client database, and revision of Business Help;
- planning a relevant Family Court training package for staff, to be implemented once the protocol is finalised.

Departmental systems for responding to Freedom of Information (FOI) applications:

In 2001 we investigated and made recommendations about the delays by DoCS in the processing of FOI applications and issues about department record-keeping practices and training of staff. We discontinued the investigation after reviewing the steps taken by DoCS to review and amend its FOI procedures and systems. We have asked DoCS to provide regular updates to assist our monitoring of the department's FOI handling.

Procedures & practices for providing services to children under five years of age in OOHC:

We conducted a group review of 23 children less than five years of age who recently entered OOHC. We examined whether the *Children and Young Persons (Care and Protection) Act 1998* was achieving its objectives of enhancing child-centred planning and early participative decision-making so that permanency plans, including restoration, could be implemented effectively. The group review identified and made recommendations about significant deficits in current OOHC service provision and systems, including non-allocation of OOHC cases, and poor case management and casework for the children, their families and foster carers. DoCS is to report back in December 2003 about its action about the recommendations.

Procedures & practices for providing services to Aboriginal children in OOHC:

In November 2001 the former Community Services Commission reported to the Minister and DoCS the outcomes and recommendations of its group review, examining service provision issues, and related systems, affecting Aboriginal children in care. DoCS has taken action about certain recommendations. DoCS advises that it intends to report to our office in November 2003 about its implementation of outstanding recommendations, including:

- its review of Aboriginal Children's Services (ACS) organisation and policies and procedures; ACS is the largest NGO service for Aboriginal children;
- development of a policy and practice framework in relation to the Aboriginal Placement Principles;

- reporting about the department's and NGOs activities and performance in relation to the care of Aboriginal children;
- practice guidelines for supporting relative and kinship carers.

Individual Funding Agreements for children & young people in OOHC:

DoCS has responded to our in-care review & inquiry action:

- *Inquiry into Individual Funding Arrangements* (IFA): IFAs are financial arrangements used by the department to purchase out-of-home care services for individual children or young people on a fee-for-service basis from non-government agencies. The Inquiry found that the department's framework for the administration of IFAs was lacking in certain key areas, including selection and monitoring processes in relation to individual services, and case management and planning issues affecting children and young people placed in NGOs on a fee-for-service basis.

- *Group reviews of three fee-for-service OOHC agencies*: in response to issues raised in complaints and by Official Community Visitors (OCVs), we undertook group reviews of three such agencies. In two group reviews we identified that the agencies were providing sub-standard OOHC services to children and young people placed by DoCS. The group reviews also identified instances of inadequate case management and planning by both the agencies and the department, and confusion about their respective roles and responsibilities.

DoCS has responded to some of our recommendations by:

- reviewing its administration of, and procedural and practice guidelines relating to, fee-for-service arrangements;
- ceasing placements of children and young people in two fee-for-service agencies pending departmental review of the agencies' systems and capacity.

DoCS is to provide formal advice about its response to all relevant recommendations by the end of 2003.

DoCS – Critical Issues Report

In April 2002 we tabled in Parliament a special report concerning significant issues relating to DoCS. A summary of key issues and the department's responses are set out below.

(a) Core Work
Priority One and workload statistics

Issue

DOCS did not appear to have any mechanisms in place to know how many reports have either been acted on, unallocated or closed under "priority one".

Outcome

We discontinued our inquiries as the Kibble Committee was set up to look at these concerns and has since reported on these issues.

(b) Family Court

Issue

Following investigation DOCS procedures for making the decision whether or not to join Family Court proceedings, and the adequacy of guidance to officers about such matters, have been found to be inadequate.

Outcome

A new draft Protocol between the Family Court and DOCS was issued in June 2002 and is with the Family Court for consideration.

In August 2002, Legal Services Branch of DoCS undertook a staff survey (4 parts encompassing 20 multi part questions) to determine the range of cases involving the Family Court that staff encountered, the usefulness of the information about the Family Court on Business help and the usefulness of the legal services intervention.

As a result of the survey Legal Services Branch redrafted some Fact Sheets for use in local offices about matters to do with the Family Court.

In addition, new procedures for legal officers have been implemented. These include:

- providing written advice to the local office within 14 days when a request is made;
- ensuring that all matters are logged on a central register within legal branch;
- ensuring that Child's Representative is always briefed on any concerns for the child held by DOCS. This briefing is to take place before any decision is made about involvement by the department in the proceedings.

DoCS is planning staff training about the new protocol with the Family Court and DoCS procedures.

(c) Risk assessments

Issue

In the majority of the DOCS files we examined there was no documentation to demonstrate a risk assessment had been completed. A new framework had been introduced but evidence suggested that risk assessments were not being completed in any format.

Outcome

There has been no indication that staff are any more compliant with ensuring documentation of risk assessments now than they have been in the past. In fact a recent response to us suggests that:

> *"While recent modifications to the current client system enable case plans to be allocated electronically, the capability and readiness of the staff to adopt this approach in the short term is at issue*."

The culture in the local offices of "doing the real work" rather than entering information on a computer has yet to be adequately addressed.

(d) Internal Operations

Record keeping

Issue

DoCS has admitted poor record keeping practices. Local initiatives have replaced any central office guidelines.

Outcome

Practice Bulletin was issued on 3 May 2002 by the department to remind staff of their recording responsibilities of information on files.

File Format

Issue

DoCS appears to have no standard case file format and Community Service Centres appear to have developed their own systems, including different types of physical files.

Outcome

A new file cover was issued to all CSCs at the beginning of September 2002. While in use across the state it was being critiqued in 8 CSCs. A project officer has been appointed and there will be further changes to the new covers following input from people involved in the pilot. We were told this was a far more complex project than initially contemplated, and there is no clear time frame for finalising it. It is part of the work being done on a case management framework.

CIS

Issue

DoCS has admitted that the current CIS is so poor it is a disincentive to staff to use the system. Exacting information from the system is very difficult and time consuming.

Outcome

Stage One of the new client system, KIDS, was introduced in October 2003.

Transfer of Files

Issue

Several of the files of children who had died showed that the transfer policy was not being complied with. Many of the managers that were interviewed did not know what the policy was. Pressures of work meant that in the majority of cases there was no official handover of files from one CSC to the next.

Outcome

This continues to be a problem. DoCS issued a practice Bulletin to staff to advise them of the current policy. This was intended to be an interim step while the department reviewed the Business Help topic.

Business Help

Issue

There are 40 Business Help topics and 200 policies and procedures. There is no clarity in how staff use Business Help and management has no way of ensuring staff refer to it.

Outcome

The survey of CSC staff conducted by the Legal Services Branch (August 2002, referred to above) shows that the majority of (the very small number of) respondents did not use the Business Help topic about the Family Court.

The hard copy of Business Link is totally unwieldy - it is huge and not indexed. However, DOCS staff are not meant to print copies because policies and practices change often and accessing the electronic version is the only was to ensure currency of topics. CSCs are advised of changes to policies by email, but there appears to be little consistency in how this information is disseminated even within individual offices. We are unaware of any change to how business help is organised or managed although we were advised that DoCS initiated an evaluation of Business Help towards

the end of 2002. Training is being offered to staff on demand. DoCS proposes to incorporate key aspects of Business Help into the new KIDS system.

Please refer to Question 29 for information concerning our investigations of the Department of Community Services' handling of child abuse allegations against employees.

38. *Has the Ombudsman's Office received any complaints concerning the role (or lack thereof) by Department of Community Services in relation to children held at Villawood Detention Centre, or any other similar matter? If so, what is the status of such complaints?*

The Ombudsman has recently received one complaint which is still under consideration. In response to verbal preliminary inquiries the department has advised that the department must seek approval from the Department of Immigration to conduct an investigation of a Risk of Harm report within Villawood Detention Centre. Any recommendations about ongoing action arising from an investigation will be considered by the Department of Immigration. However, if the department initiates a Care Application, assumes the care of a child, and places a child in foster care away from the detention centre, the Department of Immigration will defer to the department's action.

Our office will be making formal preliminary inquiries to confirm the department's jurisdiction and action about the specific case subject of complaint.

We understand that the NSW Police Service have entered into an MoU with the Department of Immigration about responding to alleged criminal matters. This also covered police involved in the JIRT teams, which comprise police and DoCS staff. DoCS reportedly were initially involved in the discussions of such a MoU, but we are unaware of any further DoCS involvement.

CORRECTIVE SERVICES

39. *What was the impact upon the Office of the Ombudsman of assuming the functions previously performed by the Inspector-General of Corrective Services, and how have the new functions been accommodated within the structure of the Office?*

In reviewing the office of the Inspector General of Corrective Services, the government determined that the main functions of that office could be performed by existing agencies, particularly the Ombudsman. As a result, the Inspector General's office closed on 30 September 2003 in accordance with the sunset clause contained in the original legislation. The primary impact on the Ombudsman is the potential for increased complaint numbers from inmates, with the withdrawal of a second complaint-handling agency. As only a short time has passed since the closure of the Inspector General's office, we are not in a position to give a definitive figure on any impact on complaint numbers to date.

Minister Hatzistergos' press release announcing the closure noted the Ombudsman already investigates the department's operations and conduct of officers, investigates and attempts

to resolve complaints and encourages the resolution of complaints. The Minister also announced his intention to provide the Ombudsman with copies of regular reports he receives from Official Visitors, the Junee Monitor and from Community Advisory Councils. These changes will further enhance our ability to fulfil an oversight role in corrective services.

In response to the changes we have established a "Corrections Unit" within the general team of the Ombudsman's office. The Unit is to comprise a senior investigation officer, two investigation officers and two complaint officers. Additionally, two front line inquiry officers will specialise in taking inmate calls. We already have a senior investigation officer and one investigation officer dedicated to dealing with corrections complaints and issues, and recruitment action is underway for the other three positions. The general team's Aboriginal Complaints Officer will also spend approximately half his time in the unit. We hope the unit will be fully staffed by December 2003.

40. *Has the Office's program of visits to correction centres during the last annual reporting period concentrated upon any particular centres because of serious complaint levels and what systemic issues have arisen?*

To date, our program of visits has largely been resource driven. In devising our visit program we recognise a number of factors about correctional centres, such as security rating of inmates, contacts we've received from inmates, and monitoring of issues from previous visits. We currently attempt to visit those centres accommodating maximum security inmates twice each year, with other centres receiving annual or less frequent visits. We also conduct unscheduled visits to centres in response to specific complaints we receive if that is required. During the current year we visited the Long Bay Hospital after we received complaints from some forensic patients about protective custody issues. We anticipate our visit program will be expanded with the establishment of the corrections unit in the office.

In the last reporting period, we identified a number of issues that we pursued with the department in a variety of ways. For example, as a result of our visits, we:

- constantly monitored and liaised with the Department of Corrective Services about changes to the former Induction Unit at Mulawa Correctional Centre;
- commenced a formal investigation about case management and placement of some inmates in E Unit at John Morony Correctional Centre;
- assessed and monitored complaints about delays in classification at Junee Correctional Centre;
- continued to examine records for those inmates in segregated or protective custody at various correctional centres to ensure compliance with legislative requirements;
- met with senior custodial and administrative staff at the Metropolitan Special Programs Centre to resolve problems following a number of complaints about buy-ups.
- conducted an audit of the implementation of the Department's policy on 'restricting and prohibiting visits to inmates and correctional centres'

41. Has there been any improvement to the handling of intelligence information and the administration of segregation procedures by the Department of Corrective Services?

We have not noted any substantial change in the way intelligence information is handled. At many of our visits we ask to see where various types of intelligence are stored, and we receive varying levels of response. We understand the department is currently again reviewing the handling and use of intelligence but do not know when that will be finalised and a copy of the report provided to us.

Segregated and protective custody procedures were substantially amended by the Crimes (Administration of Sentences) Further Amendment Act 2002. The legislated amendments came into effect on 1 July 2003. During the time after the passing of the Bill, and before the legislation commenced, the department totally reviewed and revised the standard operating procedures for segregation and protection. While we were not informed about the impending change to the legislation until the day of the second reading speech, we were subsequently involved in the process of reviewing the department's policy and procedures. The new procedures remain in the implementation stage, and are one of the matters routinely scrutinised during our visits to correctional centres.

42. Have any particular problems arisen in relation to the transfer of detainees from juvenile justice centres to correctional centres under the provisions of the Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001?

In the first nineteen months of the operation of the *Children (Criminal Proceedings) Amendment (Adult Detainees) Act* 2001, fifty-two juvenile offenders were made the subject of a section 19 order under the Act.

The vast majority of these orders directed that the offenders complete their sentences in juvenile detention, even if their sentence extended beyond their eighteenth birthday. Those not transferring to prison are predominantly those who have committed less serious offences and received shorter sentences. Thirteen have already been discharged.

By the end of August 2003, the number of serious children's indictable offenders who have been made the subject of an order under section 19 to remain in juvenile detention beyond 18 years was thirteen. Those sentenced to remain until the age of 21, the maximum age, have largely been assessed as being intellectually impaired and needing the benefit of the programs available within the Department of Juvenile Justice.

Eight of these 13, with orders to transfer to prison at some point in time, have already been transferred, all of them prior to their expected transfer date. These detainees have been either charged with an adult offence committed in juvenile detention, such as under section 60A *Crimes Act* 'assault and other acts against law enforcement officers (other than police officers)', or moved under section 28 *Children (Detention Centres) Act* 1987. Once they have been transferred to prison in this way it is rare for them to return to juvenile detention.

Those transferred early have done so mostly at around 18 years, six detainees moving between eighteen months and three years prior to the transfer date specified in their section

19 order. One detainee, an Aboriginal boy who had been ordered to spend his entire sentence in juvenile detention because of his intellectual and emotional disability and dislocated childhood, was transferred to prison at the age of 17 years and 4 months.

Monitoring of the operation and effects of this legislation will continue until mid 2005. We plan to release a discussion paper as part of the review later this year.

LOCAL COUNCILS

43. What was the outcome of the Office's focus on councillor misbehaviour and the options available for dealing with councillors who repeatedly misbehave?

Councillor misbehaviour continues to be an issue that is the subject of regular complaints received by my office. As indicated in this years' annual report one particular complaint in respect of Queanbeyan City Council was the subject of an investigation.

This investigation centred around the fact that in an endeavour to deal with councillor misbehaviour the council had amended its Code of Conduct to incorporate provisions allowing the council to suspend a councillor for a period nominated by resolution and to reduce their annual fee proportionately for any period during which they were suspended.

The investigation concluded that this action was not within the council's powers and recommended that council amend its code of conduct to remove the sanctions. Due to similar actions by other councils we recommended that the Department of Local Government issue a circular to councils to clarify sanction powers.

Due to on-going problems with councillor misbehaviour, we also recommended that the Minister for Local Government take steps to initiate amendments to the *Local Government Act* to empower an independent person or body to suspend councillors for serious and/or repeated misbehaviour, including serious and repeated breaches of a council's code of conduct.

As the current provisions of the *Local Government Act* are not sufficiently broad enough to deal with a number of situations that arise concerning councillor misbehaviour it is considered that these amendments would be of great assistance by making unacceptable behaviour by a councillor that breaches the Code of Conduct or other legislative obligations subject to independent review and sanction.

44. Have the problems with the application of ss.10A and s. 12 of Local Government Act with regard to the handling of complaints and procedural fairness been resolved? (Annual Report 2001-2001, p. 45)

In our 2001/2002 Annual Report shortcomings in relation to these provisions of the *Local Government Act* were highlighted. We had written to the then Minister for Local Government raising these concerns and suggesting that he consider amendment of the *Local Government Act* to address these difficulties and ensure that procedural fairness applied fully in the investigation of complaints against councillors.

In this submission it was noted that this protection already exists in relation to the conduct of employees pursuant to section 12(7)(a) as *"personnel matters"*. Given that councillors are elected by and ultimately accountable to the members of the community they represent, it is important that any council decision and sanctions imposed under the code of conduct be made in open council. Our concern is not in relation to the decision, but the consideration of the facts and issues preceding that decision.

Unfortunately, the *Local Government Act* has not been amended as suggested and therefore this difficulty still exists.

45. Have there been improvements to the way in which staff and councillors are dealing with non-pecuniary conflicts of interest? Has the panel approach recommended by the Ombudsman in one particular case been adopted across local councils? (Annual Report 2001-2001, p. 46)

Complaints are still received on a regular basis by our office in relation to actual or perceived non-pecuniary conflicts of interests by councillors and staff, with those in relation to councillors forming a majority of these complaints.

We understand that some councils have established panels to deal with non-pecuniary conflicts of interest as suggested in the 2001/2002 Annual Report. However, this is not a practice that has been widely adopted across the state.

While there is legislative as well as advisory guidance in relation to pecuniary conflicts of interest there is only advisory guidance in relation to non-pecuniary conflicts of interests. Our recent fact sheet "Conflict of Interest' and publication *Good Conduct and Administrative Practice : Guidelines for state and local government* and earlier publications address the issue. The ICAC and Department of Local Government publication *Under Careful Consideration: Key issues for Local Government"* also addresses this issue in part.

The issue continues to cause some difficulty for both staff and councillors in this area as well as members of the public when observing the actions of staff and councillors. In respect of councillors in particular, the onus is on them as individuals to recognise and declare non-pecuniary conflicts of interest.

We understand that the Department of Local Government plans to review the model *Code of Conduct* for local councils in the near future. One of the key challenges of this review will be to update the model to reflect work done in association with the above publications and to incorporate the latest best practice approaches in relation to the issue.

We would consider that a more definitive approach to the issue of non-pecuniary conflicts of interest in a council's code of conduct together with the introduction of a legislative sanction process for breaches of a council's code of conduct, as referred to in my response to question 43, would improve the manner in which this issue is handled by staff and councillors in the future.

46. Do all councils have in place adequate complaint handling policies?

In 1998/1999 the Ombudsman conducted a survey of the public sector's complaint handling systems in NSW. The results showed of the 154 or 78.2% of local and county councils that responded at the time 113 or 73.4% indicated that they had a complaint handling policy.

This survey also suggested that the standard of these policies varied, as did the level of the associated staff training programs and recording, analysis and reporting mechanisms.

It was also interesting to note that at the time only 9 or 5.7% of the councils that responded had a complaints handling system that conformed to the Australian Standard on Complaint Handling AS4269-1995.

While the number of councils that have adopted complaint handling policies is likely to have increased since that time, the effectiveness of these policies and associated systems depends largely on the commitment of management and the resources allocated to implementation. Without these even the best of policies will have little chance of success.

To give one example, in the last financial year, we conducted an audit of the complaint management systems at Warringah Council at the invitation of the General Manager. This was part of his general strategy to improve complaint management following adverse media the previous year. Our methodology included asking council to complete a detailed questionnaire, reviewing its policies and procedures and other relevant documents, and conducting interviews with key senior staff. We also observed the operation of its customer service centre and its case management systems.

We found a number of disparate systems in operation across council's various divisions. Not all service units had complaint procedure manuals available and none of the existing unit complaint policies were sufficiently comprehensive. Little effort had been expended to make council's complaint systems visible and accessible. There were no corporate performance standards for investigating or replying to complaints.

Council in the past had dedicated few resources and developed little infrastructure to properly support its complaint management. We found council's existing systems to record and monitor complaints to be seriously deficient. Complaint data was neither regularly reported to the Executive Management Team, nor used to improve service delivery in the council, although corrective action has obviously been taken on individual matters.

Many councils would be in similar positions.

During the audit, council's Executive Management Team adopted a new Interim Complaints Management Policy and Guidelines. A training and implementation strategy was being developed to support the roll out of the policy, due to become operational on 1 September 2003. Additional resources allocated for better complaint management included the appointment of a complaints administrator, the appointment of an Internal Ombudsman and the development of a workflow module in its Dataworks document management system to record and partly automate the processing of complaints.

Our audit report not only provided a snap shot of council's practices but also gave us an opportunity to make a series of recommendations designed to fine tune council's new policies and practices. It is to be hoped that Warringah Council, which is now under administration, can successfully implement its plans.

We were pleased that this audit was initiated at the request of the General Manager of the Council and hope to receive similar requests from other councils in the future.

LEGISLATIVE REVIEWS

47. With regard to the legislative reviews undertaken in relation to new police powers:

a. Are there any patterns emerging in the police use of these new powers?
b. To what extent is guidance, eg procedural and policy advice, and training, offered to police on the use of the new powers?
c. Have there been any particular difficulties associated with the introduction and use of the new police powers?
d. To what extent have the new police powers been used and how effectively?
e. Are there any particular aspects of the conduct of the legislative reviews that have proven difficult?

In relation to Questions (a)-(d)

We are presently reviewing the operation of a number of laws conferring new police powers. These include the Crimes (Forensic Procedures) Act, the Police Powers (Drug Premises) Act, the Police Powers (Drug Detection Dogs) Act, and the Child Protection (Offenders Registration) Act.

We have recently published discussion papers relating to our reviews of police powers in relation to drug premises, the child protection register, and criminal infringement notices. These highlight relevant issues and invite comments and submissions from members of the community, services and agencies, and others with an interest in the laws.

We have also completed our review of the operation of the additional powers conferred on police by the Police Powers (Vehicles) Amendment Act 2001. We provided a report on that review to the Minister for Police and the Commissioner of Police on 22 September 2003. The Minister is expected to table the report in Parliament in due course.

A detailed description of the current status of our various legislative reviews is set out in the Ombudsman's 2002-2003 Annual Report (at pages 94-99).

Until our reviews are completed and tabled in Parliament, we are not in a position to provide detailed answers to the questions asked in paragraphs (a) to (d).

In relation to Question (e)

As to whether there have been difficulties with our legislative review functions, one concern has been the extent of consultation before legislation conferring review functions is

introduced into Parliament. Consultation enables us to provide advice intended to improve our capacity to conduct a review. Inadequate consultation can have an adverse impact on the effectiveness of a review, particularly with respect to issues such as planning and resourcing the review team, facilitating the provision of information by all relevant agencies and the practicality of the review period proposed.

The consultation process for the Law Enforcement (Powers and Responsibilities) Act, which will require us to review police practice in three new areas of law, was satisfactory. However, there have been occasions when we have not been given adequate opportunity to comment. We raised our concerns with the Premier in July this year. We are pleased to advise that there was a recognition of the importance of consultation with our Office about the drafting of appropriate review provisions.

Lack of certainty about the dates legislation will commence can also affect preparation and planning for our reviews. When undertaking a new monitoring role, we generally receive specific funding for the review period. Negotiations for funding and recruitment of new staff are conducted on that basis. Late changes to the commencement of legislation can negate the original funding negotiations and recruitment decisions and require us to start afresh.

Difficulties relating to the timely provision of accurate and comprehensive information from NSW Police and other agencies for the purposes of our reviews remain an ongoing issue of concern. This matter was the subject of specific comment in our recent Annual Report which noted that we are:

> *... extensively involved with the relevant agencies in developing processes to capture information prior to the legislation coming into effect. ...[We] have been endeavouring to ensure that the establishment of information systems for our reviews is integrated into the planning process.*

We appreciate the resource restraints on agencies, particularly NSW Police, that may affect the collation of information during the review period. Our involvement in the planning process for the implementation of the legislation is a critical feature in developing effective and cost-efficient systems to enable us to carry out our reviews. The co-operation of agencies in these processes is essential for us to make comprehensive and accurate assessments of the legislative powers in action.

We understand the Minister for Police, Mr Watkins, has asked the Police Commissioner to reinforce with police the need to cooperate fully with us in our reviews.

It is important to note that police generally acknowledge the value of our reviews. For example, the cooperation we have received from the NSW Police Dog Unit and local police has been excellent in facilitating our observational work for the review of the Drug Detection Dog legislation.

48. More generally, are the reporting provisions negotiated by the Ombudsman in relation to legislative reviews satisfactory and have there been any delays in the provision of the Ombudsman's reports on the legislative reviews to the Parliament?

The Committee has previously expressed concern about the variation from the usual practice of this Office reporting directly to Parliament, and instead, making these statutory oversight reports directly to the relevant Minister, who then has responsibility for tabling the report in the Parliament. While it would be preferable for this Office to report directly to the Parliament, the reporting provisions are a matter for the Parliament to determine. Where an Act makes specific reference to how a report is to be presented to Parliament, that is the approach the Ombudsman adopts.

We do not consider that there have been undue delays by the Minister for Police in providing our reports to Parliament. It should be recognised that the Minister was required under the relevant legislation to conduct his own review of our reports and to prepare a report on the outcome of that review for Parliament when tabling our reports in Parliament.

FREEDOM OF INFORMATION

49. Has s.52A of the Freedom of Information Act been amended as proposed by the Ombudsman so that agencies can only use the power to review a determination in such a way that is consistent with the Ombudsman's suggestions?

No such amendment has been made.

Chapter Three - Questions without Notice

TRANSCRIPT OF PROCEEDINGS

REPORT OF PROCEEDINGS BEFORE

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

At Sydney on Tuesday, 25 November 2003

The Committee met at 10 a.m.

PRESENT

Mr P. G. Lynch (Chair)

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

BRUCE ALEXANDER BARBOUR, New South Wales Ombudsman, 580 George Street, Sydney;

CHRISTOPHER CHARLES WHEELER, Deputy New South Wales Ombudsman, 580 George Street, Sydney;

STEPHEN JOHN KINMOND, Assistant Ombudsman, Police, 580 George Street, Sydney, and

GREGORY ROBERT ANDREWS, Assistant Ombudsman, General, 580 George Street, Sydney, affirmed and examined, and

ROBERT WILLIAM FITZGERALD, Deputy Ombudsman and Community and Disability Services Commissioner, 580 George Street, Sydney, and

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

CHAIR: We have received a submission from you in the form of answers to some questions that were placed on notice. I take it that it is your wish that those answers be included as part of your sworn evidence?

Mr BARBOUR: Yes, thank you, Chair.

CHAIR: Would you like to make an opening address?

Mr BARBOUR: Yes, I would.

Thank you, Mr Lynch, and members of the Committee. The last time we formally met with you to discuss the operations of the Ombudsman was in June 2002. Since then we have met with the Committee to discuss issues of police corruption and we have also recently met with Committee members less formally. That was a valuable opportunity to discuss issues of interest to the Committee.

I would like to use my opening address this morning to discuss three particular areas that I believe are of interest and significance to the operations of the Ombudsman. First, I will outline some of the major work of my office in the past 17 months. Second, I will explore two particular areas, both because they are significant and also because they provide a good picture of the general operations of the Ombudsman and our approach to dealing with agencies and issues. Thirdly, I will flag with the Committee some particular matters concerning public reporting and explaining the role of the Ombudsman where I would value your views and input as to our most recent thoughts on those issues.

My recent annual report in Parliament comprehensively outlines the work of the Ombudsman in 2002-03. Last year we handled more than 26,000 telephone inquiries and in the first four months of this financial year we have fielded an additional 9,000. We dealt with increased numbers of written complaints against public sector agencies and more than 2,200 complaints against local councils. This trend of increased complaints has continued this year with over 1,100 written complaints received in the first four months, an increase of some 5 percent over the same period last year.

Agreements with the Police Integrity Commission to reduce the number of minor complaints notified to the Ombudsman have now been fully implemented. We estimate that more than 1,000 minor complaints from members of the public are now directly managed by police commanders. We are auditing local commands to ensure that these complaints are handled quickly and effectively. We have also pushed police to report on whether these complaints are conciliated and whether complainants are satisfied with police action. In the meantime, my office is focused on whether serious police complaints are dealt with in a timely and effective manner. It is significant in that regard that police officers continue to make complaints to us, almost 800 in 2002-03. This, I believe, is a good indicator of their confidence in how complaints will be managed.

A better knowledge of our work in child protection saw an increase of more than 1,000 notifications of child abuse to the Ombudsman in 2002-03. However, the first four months of this year shows a new trend and provides evidence of our work to increase the efficiency and fairness of child protection notifications. Notifications decreased from 710 for the four months, July to October 2002, to 534 in the same period this financial year. The decrease in notifications is in agencies like the Department of Education and Training where we have entered class or kind agreements, meaning that those agencies can deal directly with less serious complaints without notifying the Ombudsman. However, where we have worked to increase knowledge of agencies' reporting requirements, such as with the Department of Juvenile Justice, notifications are now made consistent with child protection laws, therefore there is in fact an increase in notifications this financial year.

It is not yet 12 months since the amalgamation of the Community Service Commission with the Ombudsman. In that time we have consolidated the work of both organisations, especially with respect to the oversight of the Department of Community Services and the Department of Ageing, Disability and Home Care, to increase our effectiveness in safeguarding the interests of children, young persons and disabled persons in care. At this time it is a difficult process to actually assess the full impact of the amalgamation. However, early indications for this financial year are that complaints have increased approximately 10 percent. I believe that this reflects a better understanding of our role and has been contributed to by education programs run by the office in the community sector.

This year's annual report lists some of our more significant investigations and projects and I would like to give a brief snapshot of some of those.

We have completed an investigation of plagiarism at a university which has resulted in the Minister promulgating new procedures for all universities to increase transparency in grant applications and academic publications.

We have reviewed hundreds of Department of Corrective Services decisions to limit or ban visits by particular persons to inmates, and recommended that processes are made more transparent and decisions more consistent.

We have audited how agencies report dealing with Freedom of Information applications and have found a 17 per cent decrease in full release of documents over the past five years.

We have monitored a major police Strike Force investigation about false knife searches at a metropolitan local area command, which demonstrated inflated recordings and poor supervision. We have made recommendations which have been accepted by NSW Police, which will decrease this occurring in the future.

We are measuring across New South Wales the success of policing in aboriginal communities. Our reviews have resulted in better communication between local commanders and aboriginal leaders and real improvements in the policing of aboriginal communities.

We are scrutinising the operation of new laws, including nine laws conferring new police powers and a law conferring additional powers on correctional officers.

We have inquired into individual funding arrangements for children in out of home care. This has resulted in an overhaul of these arrangements within DOCS.

We have reported on the findings of our review of the transfer of 10 people with a disability from licensed boarding houses to disability services. We have found that the transfers program is working and we have suggested further refinements.

Our recommendation that an act of grace payment be made for the cost to a fisherman of poor procedures at NSW Fisheries has been accepted.

Fines have been withdrawn by police or the Infringement Processing Bureau after our investigations.

Refunds have been given and compensation paid by local councils for unlawful fees or unreasonable actions after our inquiries.

A police superintendent has received an apology from a senior police officer for the distress caused by poor investigation of his management practices when we conciliated his complaint.

We conciliated the concerns of a father for his young disabled son at a group home, resulting in better assessment and increased support for the son and increased trust between the father and the service.

We have visited 18 correctional centres and all full-time juvenile justice centres.

We have observed Vikings policing operations as part of our review of drug detection dog legislation.

We have spoken to all student police officers at the Police Academy and hundreds of officers in local commands as part of our ongoing program to explode the myths about police complaints.

That is some of the work of the office in the past 17 months.

Since our last meeting the Ombudsman's office has grown by more than a third. Some areas, notably corrections this year, have seen our role increase. I have set up a

specialist corrections unit within my office to handle complaints by inmates. This is in part because of our anticipated work, given the expiration of the Inspector-General of Corrective Services. It is also in part because of the need to recognise and consolidate the expertise of our officers in dealing with inmates' complaints.

The amalgamation of the Community Services Commission has not been without its challenges. It has, however, brought the increased coherence of a one-stop shop to the oversight of community services in the State. In my view it has been especially successful in ensuring the appropriate oversight of the Department of Community Services to the benefit of the department, its clients, and the community, and I will return to that in a few moments.

A review and restructure of the Community Services Division has seen a more functional arrangement which should enhance our complaints work while increasing the effectiveness of our reviews and other projects. Some of the anticipated efficiencies from the amalgamation are slowly being realised. Reduced commitments to administrative services through amalgamation of corporate functions are now freeing up other officers to engage in frontline complaint resolution and investigation work, and reviews of systemic issues.

Experts from across the office, including lawyers, investigators and project managers, are now working closely with officers within the division and with a range of community sector experience to contribute to major projects and investigations.

Scrutiny of new laws conferring powers on police or correctional officers has been the other major area of growth for the office. We are currently scrutinising the implementation of 10 new laws, with another five already legislated for and awaiting commencement.

We have produced one final report and three discussion papers this year. At least one, and possibly two more, discussion papers will be released before Christmas and our DNA report will likely be the first of a series of final reports released in 2004.

It would perhaps be appropriate at this time to acknowledge that all staff at the Ombudsman's office have worked extremely hard in the past year and in making the new responsibilities work effectively they have done that without compromising, in my view, the standard of service offered and I especially recognise the work of my deputy and Assistant Ombudsman present today.

As you would be aware, the Parliament is presently debating amendments to the Privacy and Personal Information Protection Act with a view to the Ombudsman taking on the functions of the Privacy Commissioner. Without wishing in any way to pre-empt the decision of the Parliament concerning the amendments, I believe an amalgamation of Privacy New South Wales with the Ombudsman will be of benefit to the community and the administration of New South Wales.

We already have privacy expertise from our policing, community services and telecommunications intercept monitoring functions.

Our Freedom of Information jurisdiction has many points of intersection with the privacy laws. We have experience in working with public and private sector agencies. We are efficient and effective complaint handlers.

Parliament has given me strong powers to investigate and resolve difficult issues of importance to the public or an individual, and our clear understanding of administrative issues across thousands of agencies would, I believe, serve well the privacy interests of the community.

With the finalisation of any decisions as to this and other bills presently before the Parliament, which may confer additional responsibilities on the Ombudsman, I believe that the office has now grown to what should be its maximum size for the immediate future. This is primarily to allow a proper settling in and melding of these new areas. Because I am concerned to make sure that the Ombudsman continues to provide a high quality service to the community and Parliament, I may resist any proposals for significant additional responsibilities.

If I am concerned that a proposal is not an appropriate fit, having regard to our other functions, or if I believe the functions or responsibility to be better undertaken outside my office, I will take steps to bring this to the attention of the Government, this Committee and, if necessary, Parliament.

I am pleased to report though that for each of the new functions conferred on the Ombudsman, the Government has generally engaged in a negotiated process. This was especially the case concerning community services and the amalgamation with the former Commission. Such negotiation enhanced the protections and safeguards which are the objects of these new laws.

In legislation review a failure on one occasion to fully consult has meant that my preferred arrangements for reporting to Parliament and obtaining information for the review were not fully considered by the Government or Parliament.

I have raised this issue with the Premier and I am pleased to note the Government's positive response in relation to any future laws.

Our increased responsibilities have served as a sharp reminder of the need for exemplary standards of service and integrity of the Ombudsman. We acknowledge that if we ask other agencies to look closely at their administrative practices and conduct, our practices need to be of the highest standards.

I continue to personally review those matters where a complainant is dissatisfied with the initial handling of a matter by my office. We have tightened our code of conduct and are completing a review of office policies.

We have successfully implemented a new document management system which integrates with our existing complaints database and provides an increased capacity to share information within the office, and we have also enhanced security across the office and were the first public sector agency in Australia to be accredited as complying with the Australian Standard for information management security.

To better demonstrate to the Committee our approach to enduring issues in public administration, I would like to provide two brief overviews of our work in discrete areas, firstly, conflict of interests and secondly, the Department of Community Services.

Conflict of interests have continued to compromise the integrity and work of some Government agencies.

Our investigations this year have included the much publicised misconduct of Chris Puplick in his roles as Privacy Commissioner and President of the Anti-Discrimination Board. My primary finding was that he dealt with a complaint of a good friend to both agencies without declaring his friendship or taking steps to minimise or eliminate his own involvement in the complaint.

This very serious matter and other conflicts and administrative failings uncovered during the course of the investigation had the clear potential to undermine public confidence in the handling of complaints by both agencies. Outcomes of the investigation have included proposals for legislative change to reduce the possibilities of conflict of interests for the ADB President and recommendations that the same person not head two separate and discrete organisations.

We handled a complaint about a conflict of interest by a senior bureaucrat in managing a contract awarded to a university where her husband was employed. We urged the department to conduct its own investigation in those circumstances and the investigation resulted in a number of significant findings and a review of the agency's conflict of interests policies.

We examined unlawful suspension powers implemented by Queanbeyan City Council which could have had the effect of allowing a majority of councillors to negate the election of another councillor. The clear potential for a conflict of interest in exercising these powers resulted in our recommendation that an independent person or body be given the role of determining any suspension of councillors. Recent Government announcements indicate that this recommendation has been accepted.

We are also scrutinising an extensive investigation by New South Wales Police of complaints about relationships between students and instructors at the Police Academy. The clear potential for any personal or intimate relationship to conflict with an instructor's role as teacher and assessor at the academy is readily apparent. The investigation has also prompted a review of the academy's professional distance guidelines.

Beyond these and other complaints we have handled, we have taken a whole of Government approach to increase awareness of conflict of interest issues. We have published fact sheets, forwarded to agencies and local councils, dealing with conflict of interests and bias. These include information on identifying and assessing and dealing with conflict of interests.

We have reviewed our good conduct guidelines, available to all Government agencies and local councils, with a separate chapter dealing with public interest and conflicts of interest. In addition to providing guidelines to assist agencies, it gives a list of additional resources for their consideration.

Given the seriousness of the conflict of interests issues managed by our office this year, we have also conducted a review of our own code of conduct and introduced a separate and more detailed conflict of interests policy to assist officers in identifying and managing possible conflicts in their work.

It is because of our work across many Government and non-Government agencies that we have been able to identify and practically address emerging issues such as this, which may compromise fair and effective administration.

Because we are the primary oversight agency for complaints about Government agencies, we have also become, in my view, more adept at managing key relationships in a productive framework.

Our work with the Department of Community Services provides a good study of this and demonstrates the advantages for agencies and the community.

In May 2002 I tabled in Parliament a special report to Parliament highlighting critical issues that touched on almost every area of DOCS operations. I reported at that time that child protection interventions had become as much a matter of good luck as good management.

Since then the jurisdiction of the Ombudsman to oversight various aspects of DOCS has been consolidated. We now deal with complaints about child abuse by employees, responses by DOCS to child protection notifications and community services provided or funded by DOCS.

It is fair to say that there are significant moves on foot at DOCS. Those are due in part to a fresh approach with a new Minister and a new Director-General and also additional funding for hundreds of new frontline positions. The Director-General has been publicly quoted as stating his commitment to work with this office for the benefit of children and young persons.

We have successfully negotiated a Memorandum of Understanding which sets out the arrangements between our organisations. We have agreed on arrangements for matters such as information requests by Ombudsman officers and interviews with DOCS staff and notifications of child abuse allegations against DOCS employees. The memorandum provides for dispute resolution, monitoring the implementation of our recommendations, as well as regular liaison. What the memorandum means is that instead of wasted efforts in trying to get information or speak to officers, this work can occur within clear guidelines. The focus for our officers and DOCS staff can instead be on solving and resolving complaints or improving systems and procedures.

At a senior level, Mr Fitzgerald, Ms Barwick and I meet regularly with the director general and other senior staff of DOCS to establish effective working relationships where concerns can be highlighted and a response quickly sought. This is preventing serious issues degenerating into a paper war.

I have recently received from Dr Shepherd a further response to my special report. We are closely assessing this response. It does, however, highlight some of the changes such as a new computer system, better record keeping, plans for improved foster carer recruitment, a review of risk assessment arrangements and clearer arrangements between DOCS and the Family Court, which are aimed at addressing key issues raised in our report of April 2002. In my view, these are positive steps.

For me, the challenge is to manage our grave responsibility as an oversight agency for DOCS while at the same time not intervening in a manner that limits the effectiveness of the changes which are being brought in.

We know from complaints and telephone inquiries that there remain substantial concerns about the way DOCS goes about its business. We know that children and young people remain at risk. While DOCS managers are making the right noises, progress on the ground, where there must be real impacts for the benefit of children and young persons and those who care for them, are not as fast as we would like.

Our investigations and program of audits are being conducted in a framework that balances these competing imperatives to add value, facilitate good change and not unnecessarily divert attention or resources from the renewal process going on in the department. This framework of interaction with DOCS is, in my view, constructive and appropriate. We can focus on appropriate resolution or investigation of concerns without the need for a polemic. The framework is reflected in our dealings with agencies such as NSW Police and the Department of Corrective Services.

I know I have spoken at length, but much of the reason I have done that is because the recent work of our office highlights a number of significant issues, in my view, for your consideration.

The Ombudsman is quite unique within the administrative landscape of New South Wales. We have a jurisdiction that extends well beyond the public sector. We are directly accountable to Parliament and not to Government. This Committee too performs a distinct and important role in holding the Ombudsman to account for the way we conduct our business.

There are a number of particular matters that I wish to raise with the Committee. They are issues which, in my view, go to the heart of the Ombudsman's role as an officer of the Parliament.

The first matter is my obligation to report to Parliament. Two separate issues arise here for the Committee's consideration. First is a proposal to make more regular reports to Parliament about key functions of the Ombudsman. To date the Ombudsman has reported annually on all business areas at the same time, including meeting formal statutory annual reporting requirements. We are presently considering a proposal to report on each of our key functions separately and at distinct times. For example, we may report on community services or police complaints in April, another operational area in June and our general work with our formal annual report in October. This will bring a focus to key areas of accountability and provide an increased profile for each of the important aspects of the office's work. The reports would be scheduled at regular intervals throughout the year. More

regular reporting may enhance parliamentary and public debate about distinct and important issues affecting the community. It will also avoid all of these matters being bound up in a single report to the possible detriment of all of them. I would welcome your thoughts on this particular proposal.

The second matter is special reports. These are, of course, in addition to my annual reports and I have made seven such special reports to Parliament since being appointed Ombudsman. I will continue to report to Parliament on matters where I consider there is a significant public interest in doing so. In saying this, I am aware that some persons have encouraged more special reports from this office. My own view is that special reports should generally be reserved for those matters where agencies refuse to comply with significant recommendations. Special reports can then bring to the Parliament and community's attention the matter in issue for debate and resolution. This would generally only be done as a matter of last resort where discussions had failed to make any headway and it is a testament to the standing of this office and the quality of our reviews and investigations that we are mostly able to persuade agencies to accept our recommendations. Sometimes it may also be necessary to report to the Parliament on matters where a public debate is already occurring to help inform that debate. Often this is the only manner in which I can provide relevant information which may assist decision makers. While others may have a different view, my opinion is that special reports should only be used sparingly, lest their impact dissolves and they become of limited use. This is a similar view to that held by my predecessors. I would, however, welcome and be interested in any views of the Committee members about this particular matter also.

The final matter I raise is what I perceive to be an increasing trend over the past 12 months for politicians and senior public figures to misrepresent or mistake the role and practices of my office. Most recently, in debates concerning amendments to child protection legislation, the debate surrounding the Inspector General of Corrective Services and the proposed amalgamation of Privacy NSW with the Ombudsman, statements have been made which in my view were not accurate and should not have been made.

In raising this matter with the Committee I recognise and I respect the important role of politicians to engage in vigorous debate about new laws and the role of the Opposition to oppose. I also welcome constructive criticism about the operations of my office. I recognise that my reports will be used by both sides in a political way. That too, in my view, is quite appropriate. Such is a direct consequence of the subject matter of those reports and the fact that they deal, as they do, with agencies' and departmental practices. The difficulty, however, is that the standing of the office of the Ombudsman as an officer of the Parliament may be diminished by comments that are misleading or inaccurate. In making my office the sport of a debate, members may reduce my capacity to highlight and resolve important issues of public administration.

It is inappropriate for me to in any way enter these debates through public statements. I provide already to all members of Parliament, both members of the Legislative Assembly and Council, copies of all of my reports on the day they are tabled. Copies of and information relating to the Ombudsman's publications are also made available. These Committee proceedings are also publicly reported and available to all members. My officers and I have always been available and willing to discuss matters which touch on our work with

politicians, subject of course to the constraints of our secrecy provisions. Many members from both Houses do contact us about our work.

This Committee is made up of members of both Houses. It includes members from the Government's side, the Opposition and cross-benches. Some members have, and new members will develop, an expert knowledge of the Ombudsman, our jurisdiction, practices and procedures. I would be interested, therefore, in the Committee's views as to any role members of the Committee might play in clarifying, with their colleagues, issues concerning the role of the Ombudsman and the functioning of my office to help limit the degree of misleading or inaccurate information entering parliamentary debate.

In conclusion, it has been a full and varied period since I last appeared before the Committee. My senior officers and I welcome the opportunity to appear before you today to discuss our work and seek your input into these important issues affecting the work of the Ombudsman.

CHAIR: Could I ask a question arising out of some of the things you said a little earlier in your address: Did I understand you to say you would be reluctant to take on any more functions?

Mr BARBOUR: I think, apart from those currently before Parliament, my view would be that we need a time to further settle in those new jurisdictions and with the recent additions to the office I think the office has grown fairly rapidly and, whilst to date there has been no diminution in the quality of work and our representation of the interests of people, I think that there is a genuine risk that if we do not have time to consolidate that might be a problem, so I would resist any further jurisdiction coming in the immediate future.

CHAIR: That is not from a philosophic base that you now have the entire field covered, but it is about letting it settle and making sure that the organisation does not take on too much too quickly?

Mr BARBOUR: That is correct. We essentially set a number of standards or benchmarks in terms of good public administration. I think it is important that we have the capacity to consolidate so that we do not err in relation to that.

CHAIR: In relation to the increase in jurisdiction, what sort of consultation have you had with Government about those expansions and is that consultation before it goes to Cabinet or afterwards?

Mr BARBOUR: Generally the consultation has been quite good and it is before it goes to Cabinet in relation to new areas of responsibility. I think there is a recognition that it would be inappropriate to consider putting whole areas of responsibility or new jurisdiction at the office before having some degree of consultation. That consultation has been carried out fairly openly and it has provided an opportunity for us to raise particular concerns that we might have with what the proposal contemplates.

CHAIR: What about proposals for legislative reviews where you have a role for looking at particular laws. When are you consulted about that? Is that as a fait accompli or is it at an earlier stage of consideration?

Mr BARBOUR: Consultation is a little bit more patchy in relation to legislative reviews, but generally at a sufficiently early stage to allow us to have valuable input. As I mentioned in our answers to questions on notice, there was one particular occasion where that was not the case. We drew the Premier's attention to that and we received a response which indicated that that would not happen again in the future.

CHAIR: And it has not happened again?

Mr BARBOUR: No.

Mr KERR: In relation to your opening address and your answers to the Chairman's questions about resisting proposals to give you further responsibilities, in the event of you becoming a resistance leader, what sort of resistance campaign would you contemplate?

Mr BARBOUR: Well, I think what I would do is speak honestly about the potential consequences or risks associated with putting new jurisdiction in. At the end of the day it is a decision for Parliament, but I think it is important that Parliament base its decision on an informed view coming from my office about some of the risks that might ensue or some of the potential conflicts. For example, if it were proposed to put a jurisdiction into my office which in some way threatened the independence of my office then clearly it would be important for me to publicly indicate that I saw that risk.

Mr KERR: You spoke about dealing with students at the Police Academy and dispelling some of the myths about police complaints. Could you tell us what some of those myths have been?

Mr BARBOUR: There has been a range of myths over a long period of time about how complaints are handled. My Assistant Ombudsman, Police, is currently endeavouring, through an extensive campaign of presentations and discussions, to deal with some of those directly. They range the gamut from misunderstandings about how the complaint system works through to the notion that criminals use the complaint system inappropriately as a way to avoid prosecution; that there are large numbers of vexatious or mischievous complaints that are made; that the Ombudsman requires the police to deal with complaints in particular ways which are not necessarily true. It is essentially what I would put into the category of folklore and I think it is important for us to deal with that because that is the way perceptions are built about systems and we want to make sure that police understand fairly and openly and with a great degree of accuracy how the complaint system works.

Mr KERR: Dealing with that mythology, do you say that criminals do not use the complaint system inappropriately; that there have been no instances of that?

Mr BARBOUR: There probably have been a couple of instances, but our report to Parliament several years ago I think dispelled that very clearly. The statistics indicated that there were very, very few matters in a significant sample of complaints to demonstrate that there was any real risk of that occurring.

Mr KERR: But it does happen; it is not entirely mythical?

Mr BARBOUR: I think it is possible. I think the myth is that it is used extensively. That is what we are trying to dispel.

Mr KERR: You complained about people's representatives making misleading statements in debate in Parliament, I take it. Were they confined to factual matters? I mean could what was being said be objectively shown to be false?

Mr BARBOUR: I think that, had members reviewed the material contained in our annual reports or other documents that we provided, they would have perhaps presented information differently. I think the concern is that parliamentary debate and consideration of issues in Parliament is a very important process. One would like to think that, if there is information available on which to base facts being put forward or positions being put forward in relation to particular legislation, that material would be used effectively.

Mr KERR: When this misrepresentation came to your attention did you take any action in relation to it?

Mr BARBOUR: It is not something that has not been happening for a long period of time. As I said in the opening, I think the concern for me is that in recent periods it has become a little bit more pronounced and a bit more regular.

Our usual practice was to write to the particular politician to provide factual information and refer them to excerpts from our annual report or previous reports to Parliament. Quite frankly it would be an inappropriate use of our resources to do that now because it happens far too frequently and that is why I have asked the Committee for its assistance in relation to these particular issues.

The Hon. PETER BREEN: I got one of Mr Barbour's letters from something I said in Parliament and it was very helpful. I misunderstood the role of the Ombudsman in relation to investigating Corrective Services and in the course of the debate about the Inspector-General of Prisons, I think I inadvertently suggested that the Ombudsman did not have any power to investigate policy matters.

Mr BARBOUR: Thank you for raising that and if you do not mind I will use that as an example.

The Hon. PETER BREEN: I found that very helpful.

Mr BARBOUR: This was the intention. The issue that we particularly raised with you was firstly, as you stated, that we had no jurisdiction in relation to policy issues and the second area where there was a slight misunderstanding was that we had no jurisdiction in relation to staff of the Department of Corrective Services, officers of the department.

We wrote to you explaining that we did in fact did have jurisdiction in relation to those and also provided some additional information about areas where we had jurisdiction and the Inspector-General of Corrective Services did not. That is one of the ways we have tried to deal with this in the past.

The Hon. DAVID CLARKE: It would seem to me that your positive work has been far reaching and comprehensive and carried out in a way that Parliament would have intended and hoped that it would have been carried out, particularly in giving relief to many people who were up against laws, new laws, conflicts of interests, protection of children, and it seems that the office appears to be working in a very positive way in that regard.

In relation to what you see as inaccurate statements by Parliamentarians, what means have been available to you to correct what you see as those inaccuracies, apart from letters to the Parliamentarians concerned? Have there been other avenues open to you to enable you to correct what you see as inaccuracies and if not, what would your suggestions be in this regard?

Mr BARBOUR: The challenge is that there are not many options for me as an independent office holder reportable to Parliament. The risk for me in correcting errors is that I would be seen to be entering the political debate and siding in some way with a particular position. I would not do that because the risk to my office and to the integrity of my office would be too great and it would be likely to be misinterpreted and referred to inappropriately.

The Hon. DAVID CLARKE: The integrity of the office could be adversely affected if incorrect information is being publicised out there as well.

Mr BARBOUR: That is the very reason why I raised it with the Committee. It is an extremely difficult issue for our office to deal with in an effective way and any assistance that the Committee members can give me as to how we ought handle it, I would be grateful for that assistance. There is no easy response. There is nothing that readily comes to mind.

I think that it is the nature of politics that there will be sharp exchanges, lots of debate. Nobody wants to see that change. I suppose the bottom line for me is that given that I report to Parliament and given that the reputation of my office can be negatively affected, quite unreasonably or inappropriately by errors in debate, that there needs to be some consideration given to how we might address those issues to better inform people, so as to remove the potential for there to be misinformation.

I hasten to add that I am not suggesting that I think this is done with intent to cause difficulties. What I am hoping to do is work with Members to ensure that if we can give them any better information or level of information to assist in their understanding about our procedures and practices, I am happy to do that.

We certainly already give quite a considerable amount of information, but if the Committee can also assist with ideas or indeed play some role, that would be something that I would welcome discussion of at some point also.

CHAIR: The problem of the Committee playing a role of course is that we are all partisan figures around the table and it is obviously a matter that I have turned my mind to at various times, but it seems to me that a Committee Member coming out in trying to respond or advise another politician that they are wrong, that feeds into a bigger part of the debate.

Mr BARBOUR: I suspect that what more I had in mind, and maybe this is something that the Committee can consider, but if Committee Members in their respective party framework were able to indicate that they were available for people to come and speak to them about these sorts of issues before speeches were made or debate was entered into, there might be a capacity to assist in terms of provision of better information.

I certainly would agree with the Chairman's position that once somebody has made up their mind to say or do something it is much more difficult for Committee Members, particularly cross-party, in a way that is not going to be conducive to their particular role.

I was thinking more of the calibre and possibility of Members being a resource, if you like, for their respective colleagues in terms of information and access to information prior to people entering into debate.

CHAIR: That is based on the premise that those who enter into the debate do want information and want to get the facts right.

The Hon. PETER BREEN: Quite often, particularly with the proliferation of oversight bodies, it is not always easy to work out who has jurisdiction over what, and the Inspector-General and your office is a good example, I think, and so the continued reduction in oversight bodies and concentrating them in your office, I think that one positive aspect of that would be less likelihood of there being confusion about the role of different bodies.

The other thing is that quite often the Government has a particular agenda on a bill or on an issue and the Government introduces legislation or briefs members about their ideas behind legislation, and then if for one reason or another it does not work for the Government, they cannot get the support they need, they then refer Members to organisations such as the Ombudsman.

It happened in the privacy legislation, for example. The Government struck a brick wall in the Upper House with the privacy legislation and then sought to deflect the problem off to the Ombudsman, saying if you cannot work it out or you have issues to raise, go and see Mr Wheeler.

The problem always is that there is going to be a political spin on anything that comes into the Parliament and so it is not always possible to get an independent assessment, even if you ask one of us. We would naturally be biased. The cross-bench, for example, to a man and woman, has been opposed to the privacy legislation and that position can only be resolved by extensive negotiation and discussion and I suspect a lot of the differences they have are misunderstandings, but there is not the forum, particularly with the time constraints of legislation to do any of that.

Mr BARBOUR: I certainly take your point and we do get contacted by Members from both Houses to check on information, things like jurisdiction, what our procedures are. We are very happy to provide that sort of information to the limits of our secrecy provisions, which means that everything that is on public record, all about procedures, the way we deal with things, our jurisdiction base, are all areas where we can happily answer questions or confirm people's understandings, or deal with lack of understanding about particular issues.

The Hon. JAN BURNSWOODS: I wanted to clarify that the issues you are talking about would have come up overwhelmingly in debate on the major changes. You mentioned the problem has come, so I assume that it is privacy or child protection discussions for the Inspector-General of Corrective Services, but most of the things you are talking about would be in debate on major pieces of legislation?

Mr BARBOUR: It is.

The Hon. JAN BURNSWOODS: It may be that the problem could solve itself in the next year or two. The Parliament is not heavily engaged in debating those sorts of things.

Mr BARBOUR: I think certainly you are right, and the position you have put is accurate, that the increase we have noticed is certainly a corollary of further discussions in relation to additional jurisdiction and responsibilities. I think that even if we do not get any new jurisdictions in the foreseeable future, given the breadth of our responsibilities now and the areas that we do have involvement with, I think there is going to be regular discussion about issues to do with our office in Parliament, whether it be in terms of amendments to current legislation, or other issues. I think it is just the nature of the spread of jurisdiction and responsibilities that we have now and I think that is partly why there is a sense of greater urgency in my mind to try to come up with a way of dealing with that more effectively because I suspect that it will be an ongoing pattern or trend over a period and I would hate to see that damage the standing of the office, not only in the minds of other Members of Parliament but obviously in the minds of people within the community who want to use it.

The Hon. JAN BURNSWOODS: I was going to suggest that if the problem tended to concentrate on particular pieces of legislation it might be relatively easy for the Committee and the Members to play the role, but if your prediction of remarks coming up all over the place on a debate, it is much harder for Committee Members to even keep an eye on the process, let alone do anything much about it.

Mr BARBOUR: There is certainly a range of issues which underpin our current thinking about releasing more individual and separate reports annually and this is one of factors as well that goes to that. There may well be an outcome if we do focus on reporting on specific areas of discrete business operations within the office, to ensure that there is perhaps a greater awareness of what we are doing in those particular areas, rather than us doing one big document at the end of each year as we have been doing traditionally.

CHAIR: The other risk to that is that by putting out more and more reports you create more and more targets. How many reports would you envisage doing?

Mr BARBOUR: At the moment what we would envisage doing is picking out our key areas, so we would have one on police, one on community services. We might link community services and child protection together, or look at doing that separately. We have not really thought that through. We would welcome any views you might have, and our general area which would cover public authorities, local councils, and we would obviously have to, under the law, do an annual report and so what we would probably do is use that as a vehicle for one of those areas, so doing it that way we would get four, possibly a maximum of five in a year, so we would space them out every two months, two and a half months.

CHAIR: Is report preparation and those sorts of things going to impose a greater workload within the office?

Mr BARBOUR: There would be a minor spike in terms of workload as we introduce this, but essentially the work that we need do to pull together our existing report would be duplicating this, it is just that we publish them separately.

The exercise this year of trying to keep our annual report to approximately 200 pages, which we thought was the maximum size we should inflict upon anyone, was extremely challenging with the number or new areas and responsibilities and what it meant was that we had to write the report in, we believe, a much more hard hitting and more detailed focus than what we would have normally done.

The capacity for us to report separately would allow us to provide more detail, more case studies, and more information, but certainly there are some pros and cons to that.

The Hon. PETER BREEN: Just arising out of your initial remarks, you indicated that you were doing some work on people visiting inmates. You were seeking to make the process more transparent and I think you said you were going to limit visits by certain groups of people. Did I misunderstand that?

Mr BARBOUR: We are currently doing a very extensive investigation into decisions made by the Department of Corrective Services to limit visits to particular prisoners or against particular visitors to those prisoners. That has been coordinated by Greg Andrews. If you would like specific information about that, I am sure he would oblige.

The Hon. PETER BREEN: I am curious about the culture, for want of a better word, that is developing, whereby people are being restricted in terms of access to prisoners. The present Minister has a particular view that he does not want prisons treated like zoos and people just going in for voyeuristic purposes. I do not think that is a legitimate concern personally, but I know the Minister thinks it is a concern and there are other authorities in England which suggest that is a problem in prisons, but I wondered whether that is an issue that you are focussing on.

Mr ANDREWS: No, the investigation that the Ombudsman is referring to arises from individuals who actually breach the rules by being found with drugs or other contraband, or engaging in some sort of other conduct that causes problems in visits, and as a consequence of that their visiting privileges are actually withdrawn. It appears about every year that 450 or so people have their visiting privileges affected in some way either by being restricted to non-contact visits or in the main actually being banned from visiting for a period of 12 months or a couple of years. We were concerned about how that system was working, whether it was fair, and we did an audit, we looked at every second case over a period of a year to work out how the system was operating, and we have prepared a report which is actually in its draft stage currently with the Minister.

The Hon. PETER BREEN: You may not want to answer this, but did you look at the matter of Bilal Skaf where he is alleged to have smuggled out to his mother a plan of how to escape? It is the most bizarre allegation I have ever seen.

Mr ANDREWS: I think that was one of the cases that was caught in the audit, but that is a classic case where someone will try to take something into a gaol or take something out and there are clear laws against that, and what happens is that not only do all those people face the possibility of a criminal charge but, as an administrative action, the commissioner is able to stop them visiting for an indefinite period.

The Hon. PETER BREEN: The problem I always have with that is that it seems to me that there is nothing of any concern that could be smuggled out of a prison, and for someone to draw a map of their cell and the features of the cell and to give it to someone else would seem to me to be fairly innocuous, yet it was such a big issue and caused a revamping of the rules of prison visits. It just did not seem to me that the issue justified the response that it got.

Mr ANDREWS: It is probably not appropriate that I give a view on that particular case, but I think you have to remember that there is a long history in the department of concerns about any internal layouts or security arrangements being smuggled out of gaol. If you remember, the plans of Katingal many years ago ended up in the household of a well-known criminal and they facilitated a huge breakout from what was regarded as the strongest gaol in the country.

The Hon. DAVID CLARKE: I guess the incident that the Honourable Peter Breen referred to may not be of concern, but then of course it may be of concern.

Mr ANDREWS: That is right, it is often not clear.

The Hon. PETER BREEN: I was concerned for Mr Skaf because he was in trouble with all the other inmates for giving information to his mother.

The Hon. DAVID CLARKE: I am concerned about the community as well.

The Hon. PETER BREEN: But if it degenerates to an extent where you have to wonder really whether it is just being overblown by the tabloid press, that I think is a good example.

CHAIR: Whilst these may well be legitimate points, I am not sure that they are necessarily relevant to this Committee's deliberations. The Committee is on the Office of the Ombudsman, not on the state of prisons.

The Hon. PETER BREEN: Mr Barbour, you said that the increased acceptance of the one-stop shop was a result of the integration of the Community Services Commission. I got the feeling from that that you actually favour the idea of a one-stop shop and one large oversight body as opposed to a lot of smaller ones?

Mr BARBOUR: There are some positives and some negatives in relation to a single organisation having a large area of responsibility, and I think they are obvious. We certainly think that there is a great deal of continuing lack of understanding about where people should take particular problems. That was what prompted us in part a few years back to suggest that there ought to be an initial one-stop shop office set up to deal with initial inquiries and complaints coming in so that members of the public had one place that they

could go to with their complaint and that office would then put to the particular agency that had responsibility for dealing with it the particular complaint.

The Hon. PETER BREEN: Do you still favour that?

Mr BARBOUR: Well, we do. We had a lot of work done on it and unfortunately funding was pulled by Treasury in relation to it, but I must say, with the advent of the Community Services Commission coming in to us, and also if Privacy comes in, many of the areas that are obviously linked would in fact be in the one organisation and there are obvious merits in relation to that. We spoke earlier about members of Parliament, notwithstanding a lot of information that we give them about our office, having a degree of misunderstanding about what our jurisdiction is, what our responsibilities are. That could only be greater in the general community, and so the capacity for the general community to go to one place knowing that that agency was able to deal with a range of issues I think is significant. The other benefit is that that agency is able to deal with a lot of issues that have enormous synergies in terms of relevance with one another.

The point I raised in the opening about privacy is that privacy and freedom of information go hand in hand. There are enormous benefits in linking them. We are responsible currently for FOI. There are a lot of negatives that flow from having Privacy in a separate organisation when most government departments have officers that deal with both and are currently confused about how they both interact and how they operate. What we hear from them is that they would welcome having one agency responsible for both of these areas so that they had one body to deal with and the one agency was responsible for issuing guidelines and papers that were in fact consistent with one another across different areas that were relevant. So I think there are some significant benefits, yes.

The Hon. PETER BREEN: When I was first elected to Parliament the idea of a one-stop shop for complaints was actually very popular in the Premier's Department. I can recall a meeting of the cross-bench with the Premier's Department in which a merger of all the agencies, including the Independent Commission Against Corruption I might say, into the Office of the Ombudsman was mooted as the Government policy of the day. I personally support the idea of the one-stop shop and I think that having one complaints authority like the Ombudsman is better than having a proliferation of different agencies. I expressed that view at the time. Mine was a minority view, I recall. In your answers to written questions you have said that, even if Treasury provided the funding, you would not be in a position to take up the one-stop shop proposal or advance it any further at this stage. I wanted to raise with you the possibility that, if the Government policy of three or four years ago in relation to this one-stop shop were to be reinvented in some way, would there be any prospect of the Ombudsman taking over the work of the Independent Commission Against Corruption? I do not want to appear biased about it or to have any vested interest, but it seems to me that the work of the Crime Commission could incorporate a lot of the work of the Independent Commission Against Corruption and complaints investigations and other aspects of the ICAC could be taken over by the Ombudsman. That originally, I think, was the proposal put forward by the Premier's Department. Would you see that as a possibility?

Mr BARBOUR: The role and functions of the Ombudsman have grown significantly and the key which holds those functions together is that those functions have in common either a complaint handling, an audit or scrutiny function. The ICAC is separate and distinct

from that function. It is not a traditional complaint handling body or an auditing agency, it is a corruption fighting and prevention agency, and I think there is a distinct difference between the two roles. Certainly as long as I am Ombudsman I would resist any attempt to have the ICAC merge with the Ombudsman's office - I do not think that is a good fit at all - and that is what I was getting to in my opening. Where I do think functions fit well with my office, then I am happy to look at it openly and, if it can be worked out, then contemplate it, but where they do not fit I think it is very important for me to state that I do not think they do fit.

Certainly the one-stop shop idea, as far as I am aware, has been in large part a longstanding policy of the Labor Party, it has been around for some time, and prior to the last election it was the policy of the Liberal Party as well, as announced by the leader of the Opposition, so clearly there is cross-bench support for that, but I think what we need to do is we need to move slowly with that for fear that we might make a decision which on the surface seems to be a good one but which, after closer analysis, may not necessarily be as wise as we think. Certainly we would look very carefully at any sort of proposal which further increased our operations.

The other thing you mentioned about the one-stop shop call centre idea, we have simply said that at this stage what we have in terms of new work, the growth and, over a fairly short period of time, the problems and administrative factors associated with that and the fact that with the Community Services Commission entering in, with the Inspector General of Corrective Services no longer in existence but us performing part of that role and with the prospect of Privacy coming in, they were three of the key agencies with which we would have been setting up that organisation anyway, so the need for it to some extent has been reduced a little, but certainly we would like to settle down our own jurisdiction before we facilitate another one-stop shop idea. I think it is an idea that continues to have merit and certainly something that could be revisited down the track.

The Hon. PETER BREEN: I think Adele Horan recently in the *Sydney Morning Herald* suggested that you were becoming a monster agency. I am just wondering if you can identify any other community watchdogs or oversight bodies that might be the subject of a take-over, for want of a better word, in the future?

Mr BARBOUR: I cannot see--

The Hon. PETER BREEN: You have them all?

Mr BARBOUR: No, and it has not been my policy, I hasten to add. As I said before, there needs to be a synergy in terms of function and responsibilities. There are many watchdog agencies that have a range of functions or different responsibilities and you would need to look very closely at whether there was an appropriate fit. If I could give one example: the Health Care Complaints Commission. That would not, in my view, be a good fit with the Office of the Ombudsman. If it were put forward as being something that ought come in I would have reservations about it, certainly as it is currently structured and certainly given its breadth of responsibilities. It has a prosecutorial function which is very inconsistent with the role of this office. Now I have used that example and I want to assure the Committee members that it is hypothetical and no one has approached me or discussed it with me, but it is one of the agencies that was going to join us in the one-stop shop because there are

some cross-overs of responsibilities. We have responsibility over the Department of Health in relation to administrative matters; they have responsibility over health service providers. We need to work effectively with that agency and sometimes we get complaints that are destined for them more appropriately and vice versa.

The Hon. PETER BREEN: Could I ask one more question arising from your opening statement, and you can pull me up if I am out of line. I wanted to ask about the Chris Puplick matter, since you raised it in your opening statement. First of all, it seemed to me unusual for you to release to the Daily Telegraph under the FOI legislation a copy of your report.

Mr BARBOUR: We did not do that. That was a request made on the Attorney General and the Attorney General released the report. We are not under the jurisdiction of the FOI Act and would not be able to respond to a request of that kind.

The Hon. PETER BREEN: Were you surprised that the Attorney General released the report?

Mr BARBOUR: Well, if he is required to release the report under the Act, I would be surprised if he did not comply with the legislation. That would be something that would concern me.

The Hon. PETER BREEN: I do not think it was a public report at that stage, was it?

Mr BARBOUR: No, but that is not relevant to the issue of whether or not it is required to be released under the FOI Act. If it is not covered by any of the exemptions under the Act, then the Attorney General is obliged to release it.

The Hon. PETER BREEN: I accept that, but I am surprised by it. It did cause an enormous amount of adverse publicity and, I would have thought, unfair publicity given that it was a current investigation.

Mr BARBOUR: The only information that I put into the public arena in relation to that matter was confirmation early on that we were conducting an investigation, which was our standard practice, and an item in the annual report which went in of necessity because it was a significant investigation not only in relation to who it involved, but also in relation to the resources used to deal with the matter and so I would properly report on that to Parliament.

The Hon. DAVID CLARKE: In other words, it was an investigation you carried out in the way that you would normally carry out such an investigation?

Mr BARBOUR: Absolutely. In addition though to a normal investigation, it was also the subject of a Royal Commission power hearing, using our Royal Commission powers.

The Hon. JAN BURNSWOODS: Still on the issue of what Mr Breen described as the monster, we did ask a question, question number 6, in relation to the one-stop shop. In your answer you mentioned the power to enter into agreements under Part 6 of the Act. You say that you have entered into formal agreements with health care complaints, for instance, and

others. Does that process, referring complaints and sharing information, potentially mean quite a large sort of bureaucracy, either in the Ombudsman's office or across the different bodies?

Mr BARBOUR: Not at all. It is simply a legal device which allows us to provide advice from one agency to the other, to avoid duplication of work and to ensure that the right agencies get that information and are able to deal with one another.

It was an alternative that was put forward, given the problems with the one-stop shop, to ensure that we are able to do that. If anything, it cuts down on bureaucracy rather than adds to it. It assists the agencies to do their work more effectively. It does not facilitate a one-stop shop for members of the public, and that is a slight distinction between the two.

The Hon. JAN BURNSWOODS: It does not, for instance, enable one of those agencies to say to whoever may ring them up or write to them: Look, you have come to the wrong place but do not worry about it, we can pass you on to the right place?

Mr BARBOUR: Most agencies when they are contacted by phone will refer the person to the right place and will provide them with contact details of the right place, as distinct from passing on direct complaints or direct material that comes in. These measures allow us to provide much more information between agencies than we were able do before.

The benefit of the one-stop shop idea, in our view, was that any member of the public who had a particular problem and did not know where they were supposed to go, could contact one number and that one agency could provide them with information and assistance and also could accept their complaint and then refer it on automatically to the relevant agency.

The Hon. PETER BREEN: Arising out of your response to the other questions asked about the Chris Puplick matter, you indicated that you used your Royal Commission powers. I assume that was in the context of interrogation. Can you clarify that for us?

Mr BARBOUR: I would not use the word interrogation. Mr Puplick and a number of staff and others appeared on summons before me to answer questions and that was pursuant to the exercise of my Royal Commission powers.

The Hon. PETER BREEN: Did you advise them that they had the right to have a lawyer present?

Mr BARBOUR: Absolutely. Not only was that advice provided, as it always is, irrespective of who comes before this office on a Royal Commission basis, but there are also documents that are settled by senior counsel and those documents are provided to everybody in advance as well, setting out how the process will be conducted, what their rights and entitlements are, and details about any of the other issues that are general issues that they potentially have concerns about.

The Hon. PETER BREEN: Did you make a recommendation as a result of exercising those powers?

Mr BARBOUR: I prepared a report on my findings in relation to the matters and that report was provided to the Attorney-General, as the responsible officer.

The Hon. PETER BREEN: Did you also make a recommendation or referral to the Independent Commission Against Corruption?

Mr BARBOUR: I subsequently, as noted in my annual report item, referred various issues to the Independent Commission Against Corruption after the Daily Telegraph published documents which suggested that the evidence given to me might not have been accurate by Mr Puplick, and I thought it appropriate in those circumstances to refer those issues to the ICAC for them to conduct an investigation.

The Hon. PETER BREEN: Going back to my earlier question about the ICAC, given your Royal Commission powers and the way you exercised them in the Chris Puplick matter, would you see any circumstances in which you could deal with the matter yourself, without needing to refer it on to the Independent Commission Against Corruption?

Mr BARBOUR: We had concluded our investigation at that stage. The information was coming from an external party. It related directly to matters that had been the subject of a hearing before my office, and could potentially lead to a view that criminal conduct had occurred. In those circumstances, given the definitions of corrupt conduct and the role of ICAC to investigate those matters, it was far more appropriate for them to conduct that investigation.

My office does not have the capacity to investigate matters in those circumstances to the degree that the ICAC can.

The Hon. PETER BREEN: You do have the power to determine that something is criminal conduct, or has the potential to be criminal conduct?

Mr BARBOUR: If it was something that we were already investigating, that is a potential finding that we might make, but if we did make that we would probably refer it off to the DPP for consideration.

The Hon. PETER BREEN: Why would that have a different outcome, you deciding that there was potential for criminal conduct, as opposed to the ICAC coming to the same conclusion?

Mr BARBOUR: Because I wanted to make sure that things were seen to be independent and fair. If there was an issue surrounding Mr Puplick's evidence to me, I thought it much better that that issue be assessed by somebody other than me.

The Hon. DAVID CLARKE: You did it in fairness to the individual concerned?

Mr BARBOUR: The entire investigation was conducted in a manner which was extremely fair to Mr Puplick.

The Hon. PETER BREEN: You do not think he was prejudiced by having it referred on to the ICAC?

Mr BARBOUR: No. The only reason it was referred to ICAC was because of the possibility of corrupt conduct having been committed by Mr Puplick, nothing to do with my teams.

The Hon. PETER BREEN: It was a question of criminal conduct, was it not, not corrupt conduct?

Mr BARBOUR: Corrupt conduct is defined in part as potential criminal conduct under the ICAC legislation.

The Hon. PETER BREEN: Are you saying that you did not have any authority to reach a decision about corrupt conduct?

Mr BARBOUR: No, I am saying that taking into account all the circumstances, I believed that the ICAC was the most appropriate body, the fairest body, and the appropriate investigator for the particular issues that had arisen after I had concluded my investigation.

Mr KERR: Arising from that, I take it that having exercised your Royal Commission powers, Mr Puplick did not have the right to remain silent in terms of any questioning by you?

Mr BARBOUR: At the end of the day Mr Puplick can refuse to answer any questions if he wants to. If he does that I may draw adverse conclusions in relation to that, but I did not require or compel Mr Puplick to answer anything that he said he was not prepared to answer.

Mr KERR: He appeared under summons and I think you mentioned documentation being settled by senior counsel. Does that relate to the rights of the witness? Is the term witness correct?

Mr BARBOUR: Yes. All of the procedures that we adopt in relation to the exercise of our Royal Commission powers have been referred to and subsequently settled by senior counsel, to ensure that we were exercising those powers appropriately.

Documentation is given to anybody prior to coming along either as a witness or as subject of investigation to those proceedings. There are entitlements in relation to legal representation set out. There are details about the procedures to be followed set out. In addition to the written documentation, there is always contact made by the staff working with the officer who is presiding at the hearing, to ensure that they have not only received that information, but they have considered it and to confirm whether they want to raise any issues in respect of it.

CHAIR: That documentation is not specific to the Puplick matter, it is generic?

Mr BARBOUR: No, it is general and there was no departure from the standard practice in relation to this matter at all.

Mr KERR: Were the terms of those documents settled by one senior counsel or a number of senior counsel?

Mr BARBOUR: We do not have the resources to get things settled by more than one senior counsel.

Mr KERR: Who was that senior counsel?

Mr BARBOUR: Peter Garling.

Mr KERR: That documentation would have been served on Mr Puplick?

Mr BARBOUR: Yes.

Mr KERR: Would he have issued a receipt?

Mr BARBOUR: No.

Mr KERR: What is the nature of serving him?

Mr BARBOUR: My recollection is it was actually handed to him personally by two of my senior staff, to ensure that there was no issue surrounding him not receiving the information.

The Hon. PETER BREEN: I understand that Mr Puplick was questioned for a period in excess of seven hours. Is that standard procedure in your office, to interrogate someone for that length of time?

Mr BARBOUR: No, it is not and Mr Puplick was questioned for a long period of time, but that was specifically at his request. During the course of the questioning of Mr Puplick he was asked on at least three occasions whether he would like to adjourn, whether he would like to have the matter go over to a further day. On each occasion he specifically requested that he wanted the matter to be concluded that evening. He did not care how long it took and we wanted to accede to his request in those circumstances.

It created enormous inconvenience to do so with court reporters, but we were able to manage to meet his prerogative.

The Hon. PETER BREEN: He was questioned for a lengthy period, I understand in excess of seven hours, without a legal representative. Did he have a support person?

Mr BARBOUR: No, and he chose not to have either a legal person or a support person.

The Hon. PETER BREEN: Do you think there would be circumstances that might arise in any case, not this case necessarily, but in any case where you would use your Royal Commission powers, to insist that that person either have a support person or a legal representative?

Mr BARBOUR: No. Certainly if somebody is subject to investigation it is made clear to them that if they want to have a legal representative there and the role that legal representative can perform, that is all made clear, but at the end of the day I believe that the head, particularly, of two Government agencies is able to make a decision whether he wants to have legal representation or not.

CHAIR: You cannot force him to do that.

Mr BARBOUR: No, and I think it would be grossly improper to do so.

The Hon. PETER BREEN: Not only was he the head of two Government agencies, but I think he was the head, or part of at least 20 different boards or tribunals. It seems to me that that particular complaint about a potential conflict of interests applies to numerous people in the public sector and people in the private sector as well, for example, who might be on the boards of several companies.

It seems to me that if that is going to be a benchmark about conflict of interest, how many different boards or tribunals you serve, it would exclude half the public service.

Mr BARBOUR: That is not the issue as far as we are concerned. I agree with you that there are a lot of people who perform a range of functions which have inherent in those functions the potential for conflict.

The issue for those people and the issue for Mr Puplick is to acknowledge that conflict, to recognise that it existed and to put in place procedures to ensure that nothing improper occurred. That is what our guidelines go to. Our guidelines and our instructional documents recognise that the nature of public service these days is such that potential conflicts will potentially exist.

The key is that where they do exist people need to recognise them, particularly when they are obvious ones, and put in place procedures to deal with them effectively. If taking on more than one job causes you to have a conflict which you are not able to deal with by putting in place administrative procedures, then I think you need to think very carefully about whether that is a desirable thing for you to do.

Mr KERR: The interview extended for more than seven hours and there is a record of interview, I take it?

Mr BARBOUR: Yes. I am not agreeing with that timeframe because I do not have the details with me. It was a long interview and there has been a lot of press speculation about it. I do not have the record of interview and so I cannot be precise. I am certainly happy to accept that it was a long interview and I think it was in the order of around six hours, but without that detail I cannot be precise.

Mr KERR: Certainly with notice would you be able to provide the Committee with the length of time?

Mr BARBOUR: Absolutely.

Mr KERR: During the course of that interview you suggested to Mr Puplick that you were happy to adjourn the matter?

Mr BARBOUR: Yes.

Mr KERR: Did you suggest to him at any point of time that he might get legal representation?

Mr BARBOUR: Without going through the transcript I cannot be definitive about that, but I would expect that my answer would be no, that I did not do that, only because I knew that he was well aware of the capacity for him to do that if he wanted to.

The Hon. DAVID CLARKE: That was specified in the documentation you gave him beforehand.

Mr BARBOUR: It was specified in the documentation, in our oral contact with him, and also in my opening statement to him.

CHAIR: I might move on to a couple of questions about the review of the Law Enforcement (Controlled Operations) Act, which is of interest to the Committee. We had the benefit, if that is the word, of a briefing from the Minister for Police about it last week.

In the answers you have provided to the questions on notice in relation to that review, you indicate that you consider that the general policy objectives of the Act remain valid and the terms of the Act remain appropriate for securing those objectives.

You have also indicated that there have been some problems experienced in the operation of the Act, especially with reference to the interpretations of the Ombudsman's functions and powers. Do you consider those issues to be significant and does the current situation undermine the terms of the Act as they relate to the Ombudsman's jurisdiction, functions or powers to oversight the Act?

Mr BARBOUR: Yes. My answer to question 9 of the questions on notice sets out the details of the difference of opinion that I have had with the Commissioner of Police on the adequacy of the new application form used by NSW Police for controlled operations. Legal advice that both the commissioner and myself have received is to the effect that the form is technically sufficient to meet the legal requirements of the Act. However, I still consider that it does not provide a clear or adequate audit trail to easily demonstrate that the mandatory requirements of the Act have been satisfied.

If I can give you some reasons for that: In the past, my inspecting officers have generally not had to seek further information from the decision maker to show how they had satisfied themselves of the mandatory considerations under the Act and there is a range of mandatory considerations that the Committee would be aware of under the legislation. This was because information about each of those criteria was usually set out separately in the application form and it was easy to see that sufficient information was before the decision maker to enable them to form an opinion on each matter. With the new form, that information may be buried in the general description of the operation and the criminal or corrupt conduct it seeks to address, or it may not be there at all.

So, firstly, the actual inspection task becomes much harder and it will take longer. Secondly, if my officers are not satisfied that there is sufficient information in the application itself, they may then be duty bound to seek further information from the person who authorised the operation, and this is where the real problem arises and there is real potential to significantly undermine the effective monitoring of compliance with the Act. That is because the commissioner and I have conflicting advice about my powers to seek such further information.

The commissioner sought advice from the Solicitor General who, in my view, read the Ombudsman's powers in a very narrow and prescriptive way. If correct, the interpretation is that there would be an unintended consequence in the enactment. Essentially the advice says the Ombudsman's monitoring functions are restricted to issues concerning the maintenance of documents and the provision of relevant reports. That is that we can concern ourselves with the information provided in the application, but not enquire about how or why the decision maker was satisfied of the matters required under the Act.

The advice I received from independent senior counsel was that that was not correct. However, I suspect that there is a likelihood that when I try to use those powers, in my view available to me, to seek further information, the commissioner will rely upon the advice of the Solicitor General. In the submission that I made on the review of the Act I said that if the Ombudsman's monitoring function under the Act was reduced to such a level it would be nothing more than a charade. I would be doing little more than making sure that for each controlled operation there was an application and operational plan, an authorisation and a follow-up report and the fact that there may be no reasonable grounds for approving the application would be an irrelevant issue. Clearly this was not what the Act envisaged when it was setting up the accountability provisions for controlled operations.

The Ombudsman's inspection powers under the controlled operations legislation are imported from the Telecommunications (Interception) (New South Wales) Act under which the Ombudsman has a much narrower function. There it is ensuring compliance with the record keeping requirements of the Act. Under the Law Enforcement (Controlled Operations) Act it is a much wider function ensuring compliance with all the requirements of the Act, including code of conduct issues. I therefore believe that if there is limitation on the Ombudsman's powers it results from an unintended drafting error where these powers are imported from one Act to the other. It seems to me sensible that this problem is cleared up by the review. It requires only a simple amendment, but if it is not fixed up it certainly has the potential to seriously undermine accountability under the Act.

One additional thing that I think is important to remember with this is that under the telecommunications and listening devices legislation there is in fact an affidavit that is sworn and that affidavit goes before a judicial office holder before an authority is given. There is no such measure in relation to controlled operations. They can be approved without that sort of scrutiny.

CHAIR: As I understand the material I have seen, whilst the police might have a problem with the forms, that seems to have been a problem of comparatively recent invention. When it was with the undercover unit it was not a problem, and it has become a

problem when it has gone to the court and legal services branch. It does not seem to have been a problem with the other agencies that would be using the powers under the Act.

Mr BARBOUR: That is exactly right.

CHAIR: These points, of course, were made in your submission to the review?

Mr BARBOUR: In the submission, yes.

CHAIR: Were there any other points in your submission to the review where there were differences of opinion between the Office of the Ombudsman and the police or any of the other agencies?

Mr BARBOUR: There was a further issue in relation to the review which relates to a particular new technique or way of operating in relation to controlled operations. It once again is a conflict with NSW Police about particular issues, but the nature of that information, if I am to go into it in detail, I think ought to be left to closed session because it could potentially provide information relating to a controlled operation in a manner which could have not only unintended consequences in respect of the operation but also could potentially be in breach of the legislation, so I am happy to go into that in closed session, if you wish.

CHAIR: The Ministry for Police told us that there were no significant differences of opinion during the review of the Act.

Mr BARBOUR: Well, there was certainly a member of staff from the Ministry present when those issues were in fact discussed.

CHAIR: One of the other issues that arises out of the review of the Act relates to a proposal to have model legislation for all jurisdictions in relation to controlled operations. Do you hold any fears in relation to that happening or the implications that might flow from it?

Mr BARBOUR: No. I have some information that I can provide to the Committee in respect of that in some detail rather than going through it orally, but certainly there was a discussion paper released in relation to that issue in February. Interestingly, we didn't find out about it until after the closing date for submissions, but the intention of the model provisions is that they will only apply to cross-border investigations and we really do not know how many of those there are going to be. So for purely local investigations confined to one jurisdiction, the local laws on controlled operations and the use of surveillance devices will continue to apply unaffected. However, given the discrepancies in local laws, the initiative is also seen as a way of encouraging jurisdictions to provide for the same investigatory powers in those local laws. It is also assumed that there will be national consistency in areas of assumed identities and witness anonymity protection and that will be achieved through uniform legislation which will apply to all investigations, both intra and cross-border. There is no role contemplated for the Ombudsman in relation to assumed identities or witness anonymity, it is only in relation to controlled operations and electronic surveillance that we may have a role, and certainly we would think that if the operation was largely contained within our State then we would continue to have a role in respect of that, but I am happy to

provide some more information that we have prepared by way of background on that, if you would like.

CHAIR: I would like to see that and I suspect other Committee members might. What process of consultation were you involved in with the most recent review of the controlled operations Act? Was it simply a matter of being asked for a submission by the Ministry and nothing else?

Mr BARBOUR: Essentially, yes. The Ministry wrote to us on 18 February announcing the review and inviting a submission by 30 April. We made a preliminary submission on 24 April, but we asked for the opportunity to provide further submissions later, given a range of issues which we have canvassed to some extent and the fact that we were getting legal advice in relation to them. We had a meeting with a representative of the Ministry, and police at our office on 1 April to discuss some of these issues.

On 7 May 2003 we received written advice from the commissioner. He indicated that the continuing concerns might be addressed in the review. We were not persuaded by his submissions and we decided to seek senior counsel's advice on the issues. On 8 May Assistant Ombudsman Andrews wrote to the Ministry informing them of this and requested the opportunity to make a further submission subject to getting that advice. We were told that that would not present any difficulties and that a further submission would be welcomed. We had some delays in obtaining the legal advice. We eventually received it and made a further written submission to the review on 3 November and to date we have received no acknowledgment of that submission. We have also not been provided with copies of other submissions and we have not been invited to comment upon any issues raised in them. We have also not as yet been provided with or asked to comment on any draft report that may be prepared in respect of the review.

CHAIR: In the submission that you made did you deal with any of the issues that the inspector had identified in his first review, things like retrospective approvals and time limits for authorities?

Mr BARBOUR: Yes, we dealt with both of those comprehensively from our perspective in relation to that. I understand that we have provided a full copy of our submission to the Committee. The submission dated 3 November 2003 is an eleven page submission, but it does take up those issues that Mr Findlay raised during the first review.

CHAIR: And would it be fair to say that the gist of your submission is that there is no basis on the statistical material you have seen to go down the path of extending the time limits in the Act?

Mr BARBOUR: That is correct.

CHAIR: Has your office been involved in any consultation with the Ministry in the review of the Police Act?

Mr BARBOUR: Not that could be described as in any way extensive. We were invited on 7 August last year to make a submission. We did that on 17 October. In December and January an officer from my office contacted the Ministry to establish progress of the review.

In January of this year we were advised that NSW Police had made their submission and that a report or discussion paper would not be available before the election. On 5 August this year contact from the Ministry was made about the possibility of workshops on Part 8A and Part 9 of the Police Act. We were asked our view regarding any change necessary. We referred the Ministry to our submission which dealt comprehensively with that issue. We were told that we would be advised of any workshop in due course. We are not exactly sure what that workshop is to do. Since that time there has been no contact by the Ministry with my office concerning the review and we have not been provided with a copy of the submission made to the review by NSW Police.

CHAIR: The other consultation I was interested in was the review of the PIC Act. There was a discussion paper that was presented as though it was a formal review. Has there been any consultation with your office since the tabling of that discussion paper?

Mr BARBOUR: No.

CHAIR: If I could turn to counter terrorism, the Terrorism (Police Powers) Act provides the PIC with the ability to investigate the conduct of police officers using the powers provided for under that Act. That Act says that the PIC is the only body with any powers of review for police actions authorised under that Act. Does that then preclude altogether your office from having any role in relation to misconduct or complaints? Can the PIC refer matters to you if they choose not to investigate them?

Mr BARBOUR: We do not believe it is a problem. It is noted that section 13 of the Act appears to apply only to the authorisation of the exercise of the special powers conferred by that legislation and not to the exercise of special powers by police officers. It is our view that police exercising special powers will continue to be subject to the complaints processes of Part 8A of the Police Act.

The Hon. PETER BREEN: Just on that question of scrutinising powers, I think earlier you said that there were 10 new laws involving police powers and correctional officers that you were reviewing. Does that include the anti-terrorism powers of the police legislation?

Mr BARBOUR: No.

The Hon. PETER BREEN: You do not have any specific brief to review those?

Mr BARBOUR: No. The extent of the reviews is consistent with the document I circulated when we met in September, and that document is still current except with regard to the information that I provided about our reviews.

The Hon. PETER BREEN: The review of the DNA legislation, I think you indicated that that is coming out of the blocks early next year.

Mr BARBOUR: Yes.

The Hon. PETER BREEN: Is it late, about a year and a half late? Am I right about that?

Mr BARBOUR: No. Part of the problem is that there were amendments, further amendments to the legislation, which changed things halfway through and that caused some difficulty. We anticipate that there will be an initial report handed down on the first part of that in, I think, March 2004 and that will be hopefully in a draft form for me before the end of this year.

The Hon. PETER BREEN: Will that incorporate the new legislation that is proposed to set up the Innocence Panel, or the DNA Review Panel, or will you not be touching that?

Mr BARBOUR: We have no statutory role to review that.

The Hon. PETER BREEN: It is likely that when the legislation is available that you will have a role to review it, based on what has happened in the past with that legislation and similar legislation. If the legislation were to be tabled in February, is there any prospect that you would include it in the review if it was tabled in March?

Mr BARBOUR: No. I would anticipate that if there was going to be a review of the Innocence Panel in the legislation that that review period would probably be for a period of time to allow for there to be a report made about how it is working, which is the traditional input we make as a consequence of our reviews.

If that was the case and it was typical of our other reviews, I would imagine that we would not be reporting on the Innocence Panel legislation until one or two years after its introduction. There would not be an opportunity to comment on that specifically in terms of the DNA report. The DNA report is pursuant to specific responsibilities under the legislation.

The Hon. PETER BREEN: Have there been complaints about the Innocence Panel?

Mr BARBOUR: The Innocence Panel is not within our jurisdiction in any event.

The Hon. PETER BREEN: So if someone did complain about it, they would not complain to the Ombudsman?

Mr BARBOUR: If they did complain to us we would probably refer them to who we thought would have the best opportunity of reviewing those issues, which would probably be the Innocence Panel in the first instance, to look at it themselves.

I note that the review of the Innocence Panel, which was tabled recently by the Minister, has in it a recommendation that the Ombudsman have a complaint handling role in relation to the Innocence Panel. I simply note no view in relation to that, other than that was the first time we had seen that.

The Hon. PETER BREEN: That was Judge Findlay's review, I think.

Mr BARBOUR: Yes, that is right.

The Hon. PETER BREEN: That review also said that there were serious conflicts between the role of the police in prosecuting offenders on the one hand, and in having control of evidence and seeking to help exculpate the same people on the other hand. It

occurs to me that the Ombudsman ought to have some role to play in the Innocence Panel, or the DNA Review Panel, as it will now be known.

Would you propose using your resources to investigate prison affairs to deal with that, or would you propose setting up a new section to deal with that?

Mr BARBOUR: I would not want to speculate on that. Until it became the responsibility of my office I would not expend a great deal of time looking at how we might do it. Certainly if it were the intention of Parliament to have a role for us in respect of that we would need to look at it.

There is a range of issues that cross over with that responsibility and potential privacy responsibilities as well, if we end up getting that function, so they are all the things we would need to look at, depending on what avenue was proceeded along.

The Hon. PETER BREEN: In your response to the questions on notice about prisons, you said that part of the duties of specialist senior investigators in the general team is to monitor complaint trends and issues in their areas of expertise and you gave the example of specialist corrections staff to review all prison cases recorded in a thing called Resolve. Can you explain what Resolve is?

Mr BARBOUR: Resolve is our database system, our complaints management tool.

The Hon. PETER BREEN: It is not limited to prisons?

Mr BARBOUR: No. Resolve operates across the office.

The Hon. PETER BREEN: In relation to prisons, is there any tendency or any observations that you can make about particular complaints? I notice in that same response that Resolve captures areas where there are particular concentrations of complaints. Can you indicate what the main complaints are in the prisons system?

Mr BARBOUR: It does. The section on corrections in the annual report provides a significant amount of detail. It starts on page 44 and you will see that it not only deals with numbers, but on page 47 there is a table which details the nature of correctional centre complaints, and it basically breaks down the number of complaints as against the particular issue.

You will see from that table that the predominant issues that are the subject of complaints basically are around daily routine and loss of property type issues, but there is a complete and detailed breakdown there.

CHAIR: While we are talking about prisons and corrections, what has been the impact of the removal of the Inspector-General as an avenue for complaints? Has that lead to an increase in complaints to your office?

Mr BARBOUR: Not a noticeable increase at this stage, and that may be a consequence down the track, but we do not envisage a huge increase because there was already a duplication happening. The most significant things that we have been working on

are the recruitment of additional staff to deal with our expanded corrections role, which will allow us to actually do a lot of things in the corrections area which we were not able to do, which we effectively doubled with the Inspector-General in the course of doing that.

We have recently recruited one of the positions and there are a couple more still under way. What we will then have is a dedicated unit to deal with these issues, and then we will be able to provide a greater quality service in that area than we have been able to in the past.

The Hon. DAVID CLARKE: You indicated in your opening remarks that there had been some investigation into inflated figures put out regarding the collection of knives by some divisional offices of the police. Am I correct in that?

Mr BARBOUR: Yes.

The Hon. DAVID CLARKE: Can you elaborate on that, what it is about?

Mr BARBOUR: Certainly. We received a complaint in November 2001 from a police officer and that complaint was about other officers in the Blacktown Local Area Command who he said were creating false records of knife searches, or conducting unlawful knife searches. He alleged that a cause for that, for the inflated statistics, was encouragement by senior officers to actually drive up statistical data and contact with members of the public and so on.

There was an extensive investigation of that matter. We were of the view that the investigation was conducted to a satisfactory standard, but the outcomes needed further attention by police. In particular we agreed that there was no evidence of corrupt conduct, but we were concerned to ensure that officers received proper management guidance and education about the recording of police powers, including knife searches.

Following the making of the report in that matter, police have agreed to report on knife searches more clearly, so the statistics focus not only on the number of searches but measures including a proportion of searches that actually result in knives being found, which was an anomaly uncovered during the course of the investigation.

In addition, there will be an ongoing audit of local command records of knife searches and we are awaiting final advice about these matters from New South Wales Police.

The Hon. DAVID CLARKE: You also indicated you are getting some 26,000 telephone calls a year, apart from those inquiries by way of e-mail and mail, I assume. What is the waiting time for those calls to be answered? Have you done any investigation on this?

Mr BARBOUR: We do. We regularly monitor that issue and we have introduced a far more advanced system of equipment to deal with our inquiries over the last 12 months. That area is managed by Mr Andrews and he can provide more specific detail about that, but certainly there is a regular monitoring. We are very concerned to ensure that people do not stay on the phone any longer than is necessary.

We also have a process that people go through where, if they are waiting on the phone, they are provided with information which may in fact answer the query that they are ringing

up about, and obviate the need for them to actually speak to one of our inquiry staff at the end of the call.

Mr ANDREWS: I do not have the figure on the top of my tongue unfortunately, but all I can say is that we, over the last two years, have actually increased the whole resources in that area. We have actually now got a substantial number of staff who do nothing but specialise in answering the phones, and that is quite a challenging job because of the breadth of jurisdiction that we have and the sort of knowledge that they need to have about how Government functions.

As the Ombudsman mentioned, we actually introduced a new software system a few months ago that allows us to establish various queues for telephone calls, so we can assign staff with specialist knowledge on to queues that handle inmate complaints for instance, or local government complaints, and it also is allowing us to monitor the actual waiting times and things like that. We are becoming a bit more sophisticated in running a mini telephone call centre.

The Hon. DAVID CLARKE: You are saying that the whole operation has been streamlined and waiting times have dropped appreciably?

Mr ANDREWS: I think so, yes.

Mr BARBOUR: Can I just add in relation to that, although we identify those as preliminary inquiry, oral inquiry type contacts, the focus on those is where they are within our jurisdiction and we are able to resolve them quickly over the telephone, we will do that. There may be the opportunity to try to do that while someone is still on the line or, alternatively, we will ring them back once we have contacted the agency they have the problem with. There is a real effort to try to deal with them as quickly as possible without the need for them to become formal complaints, as such, in writing.

We have a new capacity now with legislative amendment which allows us to take on board oral complaints, as complaints for the purposes of our legislation where appropriate. That means that in cases where we need to action something very quickly, or there are particular limits to someone being able to put their complaint in writing, we are able to deal with it more effectively.

The Hon. DAVID CLARKE: Referring to the area dealing with the protection of children, I think you have indicated that you have had some complaints coming through from people who feel that they did not get satisfaction from DOCS. Is that right?

Mr BARBOUR: I think most of the complaints that we get in relation to DOCS have some degree of problem, satisfaction level, concerns about the quality of service, attached to them. We have, as a result of the Community Service Commission being amalgamated with the office, the capacity now to deal with a lot of those once again in a preliminary fashion, without the need to formally investigate them or start a paper war.

We are certainly active in trying to do that. The complaints that we are getting, and the fact that we are getting increasing numbers, suggests that there are still lots of problems and certainly the material that comes from community visitors and also the material that

comes in from complaints and our own inquiries and reviews, suggests that there is still a lot of work to be done.

The Hon. DAVID CLARKE: Have you come to a view as to the reasons for those problems? Do you think that it is a lack of funding for DOCS, or staffing, or training? What would you see as some of the problems?

Mr BARBOUR: I think the position, we would say, has not changed from what we set out in report, the DOCS critical issues, in April last year. There is a whole range. It is an holistic situation and there is a whole range of problems that contribute to these difficulties.

Part of that has been remedied by a recognition that there was a need for considerable additional resources to be put in. That is starting to happen. We are hopeful and optimistic that that will help in areas where resource problems are endemic, but there are also significant administrative problems, information exchange problems, lack of consistency in terms of processes and procedures, which are all documented in our report.

We are dealing with those in a very systematic way and, as I mentioned in the opening, we have recently had a further report back from the Director-General in response to that report about some of the new initiatives and they include things like a new computer system which is designed to plug up some of the gaps that the previous computer system did have.

In addition, there are new procedures for exchanging information between CSCs in different areas, so those sorts of things are happening.

CHAIR: In your annual report you talk about a major inquiry into the Supported Accommodation Assistance Program. What more can you tell me about that?

Mr BARBOUR: Well, it was certainly a major inquiry. It started under the commission and it has continued under the Office of the Ombudsman and it has been now put into a preliminary report which is currently with the DOCS Director General and the Minister to consider and comment back. It was an extensive inquiry. We conducted very extensive research and questioning of providers about a whole range of issues in an area which clearly has significant problems. The problems that we focused on in the report were predominantly access and exit policies, but perhaps Robert can provide the Committee with more detail about that.

Mr FITZGERALD: Very briefly, as the Ombudsman has indicated, the report was extensive. We contracted the Australian Institute of Health and Welfare to do a survey of all SAAP funded services in New South Wales, and there are over 390 of those. There was a 79 percent response rate to that inquiry or to that survey. We also examined policies of 80 agencies.

The recommendations and the findings are, as Bruce has indicated, with the Minister and with the department at the moment, but it is a report that will have significant ramifications for the whole sector. In short, whilst the findings are still preliminary, there is a clear indication that there is a very large level of exclusion of certain categories of people from the homeless persons system. The reason for that is that people are presuming risk, not

actually assessing that risk. For example, the highest levels of exclusion are around people with mental health conditions. The fact that a person has a mental health condition is not of itself a reason for exclusion. The only reason for exclusion would be behaviours that are evidenced as a consequence of that, yet workers, because of the pressures they are under, will tick the box "mental health" and that person is excluded. That is not an assessment of risk; it is a presumption of risk and those sorts of issues will be identified. There are many categories of exclusion taking place for SAAP service receivers, and that report will highlight those, as well as people being exited early from the program - "early" being earlier than what would have been anticipated under the program guidelines. So I think this report will be very significant for the sector.

Our approach will be a service improvement approach. It is not to cast blame, but rather to say, given that these exclusions are occurring, how better can we manage it, given that that system is the system of last resort. If you cannot enter a SAAP service, you cannot enter any service, so exclusion here means denial of service almost in its entirety. So this is a very significant report.

I just make one comment: The reason we did this inquiry was because we were concerned about the issues, but it is also an area where the complaint system itself will never tell you what is happening in that service system. Because of the vulnerability of the clients, because of the itinerant nature and short-term placement arrangements, normal complaint handling processes will never tell you what is happening, so this was a way of entering the system through one of our many functions and to look at an area which you would not otherwise pick up, so it is a very valuable report in that regard, but it is a very substantial piece of work and hopefully it will be concluded within the next two months.

Mr BARBOUR: One of the other problems in that area is that community visitors do not actually visit SAAP services and so, as Robert indicated, getting information through the normal channels is extremely difficult and that led to the inquiry. The other thing is that, as he indicated, service improvement is the key. It is an extremely challenging area and it has been a fascinating process for me to start to become far more aware of these particular problems and issues that arise in community service provision because there is no doubt that these service providers are dealing with extremely difficult situations; they are undoubtedly under-resourced in large part; they do not necessarily have particularly strong training around a whole range of issues, not the least of which is matters that relate to potential exclusion of people, and they are of course dealing with a segment which would probably be described as the most vulnerable segment in the community, so trying to balance those issues and come up with a way ahead in terms of a productive process which would allow for service improvement has been one of the challenges of the review.

CHAIR: What have been the results of the audit of health care needs of residents who are currently living at the Mannix Children's Centre? There were some recommendations made I think by the former Community Services Commission. Have they been implemented?

Mr FITZGERALD: The Mannix Children's Centre, for the benefit of members, was a service operated by a non-profit organisation. Following our report by the Community Services Commission the service eventually relinquished its auspice and the auspice was taken over by the Department of Ageing, Disability and Home Care and Mannix is now a Government run service.

The second thing is that, following our report, the Government indicated that Mannix children's home would in fact be devolved. That devolution was due to have taken place last calendar year and that was delayed. It was then meant to have taken place this calendar year and has again been further delayed. Notwithstanding the delays in the devolution, we understand that there has been current activity such that all of the residents of that service will be out of that home hopefully in the first part of next year.

The third point I would make is that, following our report, the department actively engaged the services of the health department or the area health service. There was a significant improvement of the quality of care for the residents of that service and we understand that, subsequent to the department actually taking ownership of that service, that quality of care has continued to be reasonably high. The reports from the visitors who visit that service, together with our own reports, would indicate that there had been a significant improvement in the health care of those residents since that report and the audit indicated that. We provided a copy of the audit to the Minister and to the department and there had been significant progress on most of the issues. I am happy to give you more details if you want, but I have to say that overwhelmingly there was an improvement. The biggest improvement will come when the residents are placed in community services. The devolution of Mannix is taking place at the same time as the other service that was also under the auspice of that non-Government agency but now is in the control of DADHC, which is called Whitehall, and also a Government run facility called Grosvenor, so those three services are being devolved contemporaneously. We would only encourage that devolution to take place at the quickest possible rate, but certainly since our report there have been significant changes both now and we hope into the future.

CHAIR: Out of curiosity, where is Whitehall?

Mr FITZGERALD: Whitehall is at Revesby, I think, yes.

Mr KERR: Do you get complaints about delays in terms of replies to correspondence from government agencies or departments?

Mr BARBOUR: We do indeed get complaints of that kind, yes. The reason I was uncertain about what you were asking there was because I know that we are guilty of in fact delaying a response to you in relation to a matter and I thought your question was going to be directed at that and then you confused me by raising government departments. We do, yes.

Mr KERR: Since you raised that other matter, I was a little surprised to receive a reply from you where you said that you could not ascertain why the delay had occurred in your office.

Mr BARBOUR: I was anxious to respond to you in those circumstances because I thought that there had been an unacceptable amount of time go by. I thought it was best to respond to you and then to have a more detailed look at what happened, and we have certainly ascertained what the problem was. I would like to think that we, as an organisation, are immune from administrative inefficiencies, but regrettably I think everybody has one or other. I would like to think that we have got processes in place to deal with them quickly

when they do happen and we certainly accept responsibility and, wherever possible, ,provide reasons.

CHAIR: In relation to the Guardianship and Protected Estates Legislation Amendment Act, is there any proposal to amend schedule 1 of the Ombudsman Act so that complaints concerning the conduct of the Protective Commissioner will fall within the Ombudsman's jurisdiction?

Mr BARBOUR: I am unable to answer that, I do not know. Certainly, until such an amendment takes place, it is going to be very difficult to look at complaints in relation to that particular agency. We have made that point abundantly clear.

Mr KERR: I was wondering whether you had read Peter Ryan's biography?

Mr BARBOUR: I personally have not read it, but I did get a summary of it because we thought that it was important to have a look at it, given our professional responsibilities obviously, but I personally have not read it, no.

Mr KERR: The summary probably would have brought to your attention what he said about the Ombudsman, I take it?

Mr BARBOUR: He did not actually say that much about me, which I was relieved to have reported to me.

Mr KERR: You have not made any phone calls to him? He did raise matters in that he thought there should be a review of the PIC and the Ombudsman's Office.

Mr BARBOUR: Well, I did not need to read his book to know that that was his opinion.

Mr KERR: Have you spoken to him since his retirement?

Mr BARBOUR: No.

CHAIR: I understand there is some legal advice being sought with DOCS on the issue of DOCS' responsibilities for risk of harm assessments. I am wondering what the background to that is?

Mr BARBOUR: As part of the negotiations that we have been undertaking with DOCS around how we were going to work with the agency, given its future development and change and our memorandum of understanding, it became clear that on a range of issues we had different views and those issues were in a number of areas and related to strictly, I guess, legal interpretation. That particular issue was one. The reporting requirements for a 30 day notification period in relation to child abuse allegations was another. The exchange of information and DOCS' responsibility to provide information and whether section 248 of its legislation allows it to provide other agencies with information, whether they need to make findings in relation to their investigations, are all contained in a brief which we have been working on which I understand has been concluded and we have agreed on counsel and we are getting counsel's advice on those issues. I have made it clear that if Mr Shepherd is right

in relation to his view about how the legislation works and we see that as being an impediment to our responsibilities, we will seek legislative amendment. I suspect, however, he might seek legislative amendment if we are successful.

Mr KERR: Could I ask which counsel has been briefed in relation to that?

Mr BARBOUR: I think Mr Basten.

CHAIR: If there are no further questions from members of the Committee, that brings this session to a close.

Mr BARBOUR: We have prepared a detailed submission on the controlled operation issue that we had concerns about. If you would prefer to simply receive that in camera, we can do that rather than have me go through it.

CHAIR: That may be easier.

Mr BARBOUR: I also have a copy of the opening address which I would formally table as well.

(Documents tabled)

Mr KERR: I think the former Police Commissioner, Geoff Schuberg, has done a report in relation to police promotions and reforms of the police promotion system. Would that be of interest to your office?

Mr BARBOUR: Absolutely. We are aware that he was given that task. I am unaware of whether it has been formally completed and whether there is a report available, but when there is a report available it would definitely be of assistance to us.

Mr KINMOND: I understand that it has either been completed or is close to completion and I have received a telephone call about the terms, the sorts of things that it might be referring to.

Mr KERR: I would think it would probably be in a draft form anyway and discussed with the stakeholders. Would you regard your office as a stakeholder in relation to that?

Mr BARBOUR: Certainly it will have an intersection in relation to our responsibilities and I think that would be a prudent course, yes.

Mr KINMOND: As to whether we receive a draft copy of that report and are requested to respond to it is a matter that I cannot comment on. It is possible we may not be given a copy.

Mr KERR: It would be a wise course of action if you were involved in the process.

Mr BARBOUR: It certainly would not hurt.

CHAIR: The process was commenced with very little consultation with you as well. Just in relation to the written submission, we have to get that. It will be covered by confidentiality. I think that in essence it relates to an issue of controlled operations.

The legislation was originally designed to allow police in relation to criminal offences to gather evidence about serious wrongdoing and there is a process where that behaviour is allowed. There is some suggestion that police might now be using that not so much to investigate but to get admissions out of people, which is a significant move away from what it was originally intended to do. That is perhaps something we understand from the submission. That is covered by confidentiality.

The Hon. JAN BURNSWOODS: It will be in confidence.

CHAIR: Yes.

(The witnesses withdrew)

Appendices

APPENDIX 1 - MINUTES

PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND POLICE INTEGRITY COMMISSION

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

Wednesday 28 May 2003 at 6.30pm

Room 1254, Parliament House

Members Present

Mr Breen, Ms Burnswoods, Mr Clarke, Mr Corrigan, Ms Hay, Mr Kerr and Mr Lynch.

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General Business

The Chairperson

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- flagged future Committee activities such as visits to the agencies and general meetings with the Ombudsman, the Inspector of the PIC and the PIC Commissioner.

....

The Committee adjourned at 6.55 pm until Wednesday 18 June 2003 at 6.30 pm.

Chairperson

Committee Manager

PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission
Tuesday 25 November 2003 at 10.00am
Jubilee Room, Parliament House

Members Present
Mr Lynch (Chair), Ms Burnswoods (Vice-Chair), Mr Breen, Mr Clarke, Mr Corrigan, Ms Hay and Mr Kerr

In attendance: Helen Minnican, Hilary Parker, Pru Sheaves

GENERAL MEETING WITH THE NSW OMBUDSMAN

The Chair opened the public hearing at 10.00am.

Mr Bruce Alexander Barbour, New South Wales Ombudsman, Mr Christopher Charles Wheeler, Deputy Ombudsman, Mr Gregory Robert Andrews, Assistant Ombudsman, General Team, and Mr Stephen John Kinmond, Assistant Ombudsman, Police Team, affirmed. Mr Robert William Fitzgerald, Deputy Ombudsman and Community Services and Disability Services Commissioner and 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 were tabled as part of the sworn evidence. The Chairman questioned the Ombudsman and his executive officers, followed by other Members of the Committee. The Ombudsman tabled his opening address and answers to supplementary questions on the review of the Law Enforcement (Controlled Operations) Act. The answer to Supplementary Question 7 is confidential.

Questioning concluded, the Chairman thanked the witnesses and the witnesses withdrew. The hearing concluded at 12.17pm and the Committee adjourned until 2.00pm.

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Chairperson

Committee Manager

APPENDIX 2 – ANSWERS TO SUPPLEMENTARY QUESTIONS

GENERAL MEETING WITH THE NSW OMBUDSMAN

25 NOVEMBER 2003

SUPPLEMENTARY QUESTIONS

Review of the Law Enforcement (Controlled Operations) Act

1. *In your answers to the Questions on Notice you indicate that you consider that the general policy objectives of the Act remain valid and the terms of the Act remain appropriate for securing those objectives. However, you also have indicated that there have been problems experienced in the operation of the Act, with reference to the interpretation of the Ombudsman's functions and powers. Do you consider these issues to be significant and, does the current situation undermine the terms of the Act as they relate to the Ombudsman's jurisdiction, functions or powers to oversight the Act?*

My answer to question 9 of the questions on notice set out details of the difference of opinion I have had with the Commissioner of Police on the adequacy of the new application form used by NSW Police for controlled operations. While legal advice received by both the Commissioner and myself is that the form is sufficient to meet the legal requirements of the Act, I still consider it does not provide a clear and adequate audit trail to easily demonstrate that the mandatory requirements of the Act have been satisfied.

In the past, my inspecting officers have generally not had any need to seek further information from the decision maker to show how they had satisfied themselves of the mandatory considerations under the Act. This was because information about each criteria was usually set out separately in the application form and it was easy to see that sufficient information was before the decision maker to enable them to form an opinion on each matter. With the new form, that information may be buried in the general description of the operation and the criminal or corrupt conduct it seeks to address or it may not be there at all.

So firstly, the actual inspection task becomes much harder and will take longer. Secondly, if my officers are not satisfied that there is sufficient information in the application, they may be duty bound to seek further information from the person who authorised the operation. This is where the real problem will start and has the potential to significantly undermine the effective monitoring of compliance with the Act.

That is because the Commissioner and I have conflicting advice about my powers to seek such further information. The Commissioner sought advice from the Solicitor General and he read the Ombudsman's powers under the Act very narrowly, and if correct, interprets them in a way that I believe would have been an unintended consequence of the enactment.

Essentially the advice says the Ombudsman's monitoring functions are restricted to issues concerning the maintenance of documents and the provision of relevant reports- that is, we can concern ourselves with the information provided in the application but not inquire about how or why the decision maker was satisfied of the matters required under the Act.

The advice I received from Senior Counsel says this is not the case.

However, I suspect there is a high chance that the next time I try to use my powers to seek further information, the Commissioner will rely upon the advice he has from the Solicitor General and block me and we will end up in the Supreme Court.

In the submission I made to the review of the Act, I said that if the Ombudsman's monitoring function under the Act was reduced to such a level it would be a charade. I would be doing little more than making sure that for each controlled operation there was an application and operational plan, an authorisation and a follow up report. The fact that there may be no reasonable grounds for approving the application would be an irrelevant issue.

Clearly this is not what the Act envisaged when it set up the accountability provisions for controlled operations.

The Ombudsman's inspection powers under the controlled operations are imported from the Telecommunications (Interception) (NSW) Act under which the Ombudsman has a much narrower function. There it is ensuring compliance with the record keeping requirements of the Act. Under the Law Enforcement (Controlled Operations) Act it is a much wider function, ensuring compliance with all the requirements of the Act including code of conduct issues. I therefore believe that if there are limitations on the Ombudsman's powers, it results from an unintended drafting error where these powers were imported from one Act to the other.

It seems to me sensible that this problem is cleared up by the review by a simple amendment. If not, it has the potential to seriously undermine accountability under the Act.

2. *Did your submission to the review raise any of these issues, or other matters, that are or have been the subject of differences of opinion with other parties to the review?*

Yes, in my further submission to the review I set out the problem over the dispute about the Ombudsman's powers in great detail, including quotes from the relevant legal advisings and recommended that the matter be clarified by a suitable amendment.

3. Your answers to the Questions on Notice also provide an account of the difference of opinion between the Ombudsman and the NSW Police on the forms currently used for controlled operations, and the extent of the Ombudsman's powers under the Act. Do you consider these issues to be relevant to the terms of the review (that is, whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives), or are they purely administrative matters?

The form used to make applications for controlled operations is not prescribed under the legislation as are the forms for authorisations and variations. Therefore, essentially it is an administrative issue and normally would not be considered relevant to determining whether

the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. However, I think it has become relevant to the review as the Solicitor General's advice suggested that the application form might be prescribed by regulation to resolve the matter. I do not know whether NSW Police in their submission requested this but if they did then it is a significant issue because I believe prescribing the form in the way NSW Police currently use it would certainly detract from the objective of accountability under the Act.

As I stated in my submission:

> It must be remembered that the controlled operations approval process is essentially a paper based process. It contrasts with the most closely related processes of obtaining a warrant for a telecommunications intercept or a listening device where affidavits must be sworn before a judicial member who may take the opportunity to inquire further of the applicant as to their reasons for any statements made. While the chief executive officer might also seek further information from an applicant, we have not sighted any case during our inspections of NSW Police records where this is evident. In 2002-2003, of 202 applications made by members of NSW Police, only one application was refused.
>
> Accordingly, the integrity of the approval system is very dependent upon the adequacy and completeness of the written applications and operational plans. Parliament has seen fit to require the conduct of controlled operations to be predicated on the satisfaction by the chief executive officer that a number of thresholds have been satisfied. The legal requirement and good administrative practice demand that the decision maker bring an independent mind to those considerations. If a prescribed form simply required in respect to these matters a statement of belief in the form (for example, of "I believe the nature and extent of the proposed controlled activities are appropriate to the suspected criminal activity") this would not in my view provide a sufficient basis to satisfy the chief executive officer as to whether in fact the controlled activities were appropriate. While other information (for example, in the operational plan) may provide further information in this respect, it is by no means certain. In addition, the grounds of the applicant in forming the relevant belief remain obscure.

4. *How are the issues concerning the forms currently in use being dealt with - -are they being dealt with separately to the review and, if so, what progress has been made to resolve these matters?*

I have been provided with no information on how the review is progressing so am not in a position to tell you whether this issue is being considered as part of the review or not. I have certainly been trying to resolve the differences of opinion with NSW Police directly.

I recently sent the Commissioner the draft sections of my Annual report as they applied to NSW Police wherein I set out my views about the dispute over the application form and the other matters canvassed. I suggested to the Commissioner that we meet to try and resolve the issues. The reply I received from the Commissioner made it clear that he continues to rely upon the advice he has received and is not prepared at this stage to change his procedure. The Commissioner recognised that the move away from the procedures adopted by the other law enforcement agencies might not be helpful to the Ombudsman in his monitoring role, however, he believes it was consistent with key elements of the legislation and quoted the Hon John Della Bosca MLC in the second reading speech where he observed that it is "vital that operatives be free to investigate as opposed to completing paperwork". The

Commissioner did however place on record that NSW Police remains committed to both the intention of the legislation and assisting the Ombudsman in his function of monitoring its application. I plan to have some constructive round table dialogue with the Commissioner in the near future to try and further progress this issue.

5. *What consultation has occurred with the Ombudsman's Office in relation to the second review of the Act?*

- The Ministry wrote to the Ombudsman on 18 February 2003 announcing the review and inviting a written submission by 30 April 2003.

- We made a preliminary submission on 24 April 2003. We asked for the opportunity to comment on any submissions from the law enforcement agencies as they relate to the oversight of the Act by this Office or propose changes that might impact on accountability. We also offered to provide clarification on any of the matters raised or to make further submissions on any specific issues of concern.

- On 1 April 2003 Mr Hoenig, the Executive Officer of the Review, accompanied NSW Police representatives to a meeting at our office where concerns about a particular controlled operation and the impact of the new application form being used by police were discussed. Mr Hoenig observed the meeting but did not participate to any great extent. The police undertook at that meeting to make written submissions on the matters

- On 7 May 2003 we received that written advice from the Commissioner. He indicated that continuing concerns might be addressed in the review. Consequently. as we were not persuaded by the submissions, we decided to seek Senior Counsel's advice on the issues.

- On 8 May 2003 Assistant Ombudsman Andrews wrote to Mr Hoenig informing him of this and requested the opportunity to make a further submission to the review on receipt of that legal advice.

- Mr Hoenig confirmed by email on 15 May 2003 that a further submission would be welcomed and considered. He undertook to contact Mr Andrews when a final draft report was completed.

- Following some delays in obtaining the legal advice, the Ombudsman made a further written submission to the review on 3 November 2003.

- We have received no acknowledgement of that submission or had any other consultation with the review. We have not been provided with copies of other submissions or been invited to comment upon any issues raised in them. We have also not as yet been provided with or asked to comment on the draft report of the review.

6. *Did the Ombudsman make submissions on any of the issues identified by the Inspector in the first review of the Act as being matters for further consideration during the second review eg retrospective approvals, time limits for authorities? Is there any statistical data obtained through your oversight of the Act that would assist in determining the need for some of these proposals? Do you consider these issues to be matters of substance or relatively minor matters aimed at fine-tuning and improving the Act?*

Yes our further submission to the review did canvass these issues. The former Inspector of the PIC, Mervyn Finlay, carried out the first review of the Act. His report on the review's outcomes outlined two important issues that he believed needed more time for reflection. The first related to whether there was a need for retrospective approval for unforseen activities undertaken during a controlled operation. The second related to whether there was a need to extend immunity from prosecution to include law enforcement activities conducted in preparation for a controlled operation.

Any issue of retrospective approval for illegal acts or extending immunity from prosecution to certain conduct are important issues of public policy and in my mind are certainly matters of substance that go to the heart of the controlled operations legislation. Mr Finlay recognised the gravity of these issues and thought they were so important that there should be more time allowed to judge the effectiveness of the Act's provisions and to see what operational difficulties would be presented without these powers before recommending their incorporation into the Act.

With respect to the first issue, that is retrospective approval for unforseen activities undertaken during a controlled operation, our inspections over the past three years have revealed very few cases where any such activities have been reported. If there are any problems or any unavoidable unauthorised illegal conduct, it is usually included in the report that the principal law enforcement officer is required to present to the Chief Executive Officer within two months of the completion of the operation. We are not aware of any substantive cases of detrimental action arising from such activities. Accordingly, from our perspective there does not appear to be any pressing need to pursue such an amendment.

In respect to extending immunity from prosecution to include activities in preparation for a controlled operation, again we have not come across any case where significant detrimental action (either actual or anticipated) arising from pre-application activities has been mentioned in applications for controlled operations. I suspect however, if there were problems, they might be separately reported so we may not be aware of them. I suggested to the review that they seek specific submissions from the law enforcement agencies on this issue for that reason.

8. *What are the implications for the NSW Ombudsman of the move towards model legislation for all jurisdictions regarding powers in cross-border investigations, including controlled operations, assumed identities, electronic surveillance devices and witness anonymity?*

Proposals for cross border investigation powers for law enforcement came out of the Leaders Summit on Terrorism and Multi-jurisdictional Crime held in April 2002. The Summit agreed to introduce model laws for all jurisdictions and mutual recognition for a national set of powers for cross border investigations covering controlled operations, assumed identities, electronic surveillance devices and witness anonymity.

A discussion paper was released in February 2003 for submissions. We understand the Joint Working Group is close to publishing their final report and model bills.

The intention of the model provisions is that they will only apply to cross border investigations—that is, investigations which do or are reasonably anticipated to cross

jurisdictional borders. For purely local investigations, being investigations that are confined to the one jurisdiction, local laws on controlled operations and use of surveillance devices will continue to apply unaffected. However, given the discrepancies in local laws, the initiative is also seen as a way of encouraging jurisdictions to provide for the same investigatory powers in those local laws.

In the areas of "assumed identities" and "witness anonymity protection" it is envisaged that national consistency will be achieved through uniform legislation which will apply to all investigations, both intra-jurisdiction and cross border. There is no role contemplated for the Ombudsman in relation to assumed identities or witness anonymity—it is only in relation to controlled operations and electronic surveillance that we may have a role.

Monitoring Controlled Operations

In terms of the proposed cross border controlled operations powers, each jurisdiction will be able to determine which body will have the responsibility for oversight within that jurisdiction. It would not make sense for the Ombudsman to be the monitor of within state controlled operations and have some other body monitoring cross border controlled operations conducted by the same agencies so we assume if NSW adopts the proposals we will be the monitoring body.

The legislation requires the CEO to provide to the oversight body *each six months* a report setting out the particulars of:

a) Number of formal and urgent authorities granted or refused
b) Nature of the criminal activities
c) Nature of the controlled activities
d) Details of illicit goods involved
e) Number of authorities cancelled

These details are not as extensive as the current notification requirements in NSW, for instance, they do not detail number of participants, although the model bill provides that the oversight body may require the CEO to provide additional information covering any authorised operation to which a report relates.

The notification requirements in the model bill are also less than the NSW notification requirements in terms of frequency. Under NSW legislation each individual authority is notified to the Ombudsman whereas under the cross border proposals only a six monthly report is envisaged.

The inspection function is complimentary, to inspect the records for the purpose of ascertaining whether the requirements of the model provisions are being complied with – however, the model bills do not include any specific powers to enable the monitoring authority to perform this function.

The annual reporting provisions of the oversight body are complimentary to NSW except that the report is provided to the Minister and the CEO may address the Minister in relation to whether anything ought to be excluded from the report. The Minister is then required to table the report to Parliament. As you know, under the current NSW law, it is the independent monitoring agency, the Ombudsman, that makes the annual report to Parliament.

The requirements for the CEO to be satisfied of certain threshold matters when granting controlled operations is largely similar to NSW, it includes an extra requirement that the operation is extra territorial but does not require compliance with a code of conduct as in NSW.

Surveillance Devices

The proposals are designed to regulate the use in cross border investigations of listening devices, tracking devices, data surveillance devices as well as other devices prescribed by regulation. Warrants will be issued by judicial officers as they currently are.

Again each jurisdiction will determine which inspecting body will have responsibility for oversight in that jurisdiction. In NSW there is currently no independent monitoring of the use of these types of surveillance devices although it has been recommended by the Law Reform Commission. I provided information to the committee in the previous questions on notice on why we believe the Ombudsman should be the monitoring agency with respect to listening devices

Under the initial cross border proposals, the relevant inspecting body must from time to time inspect the records to determine

a) Whether the records are accurate
b) Whether the chief officer is complying with his or her reporting requirements

The discussion paper does not include any specific powers to enable this monitoring function. These monitoring functions are also more akin to current functions under Telecommunications Interception Acts than controlled operations. They are narrower functions focussed on record keeping requirements rather than general compliance with the Act.

The inspecting body must make a written report to the minister at 6 monthly intervals.

The law enforcement agency must report to the issuing court certain details in relation to each warrant

Provisions dealing with communication and destruction of information received are in similar terms to those in the Telecommunications Interception legislation.

It is difficult to say what is likely to be the real impact upon this office if the cross border powers go ahead—that depends on whether the Ombudsman is made the monitoring body and the actual number of cross border controlled operations and cross border surveillance warrants issued. We certainly have the skills, methodologies and experience to do this work. Monitoring the use of surveillance devices would be a completely new area but as it is envisaged it is very similar to the work we currently do in respect to monitoring the telephone tappers.

Review of the Police Act

9. *Could the Ombudsman outline the consultation that occurred during the review of this Act? Has there been any follow up consultation with the Ombudsman since the submissions were received by the Ministry for Police?*

On 7 Aug 02 the Ombudsman was invited to make submission to the Ministry for Police on the review of the Police Act by 18 Oct 02. On 17 Oct 02 the Ombudsman provided a written submission to the review.

In Dec 02 and Jan 03 an officer from the Ombudsman contacted Mr Hunt, Ministry review officer to establish the progress of the review. In Jan 03 we were advised that NSW Police had made their submission, and that a report or discussion paper would not be available before the election.

On *5* Aug 03 Mr Hunt contacted an officer from the Ombudsman and advised of proposed workshops on Pt 8A and Pt 9 of the Police Act. Mr Hunt asked our view regarding any change necessary and was referred to our submission. Mr Hunt said he would advise of any workshop in due course.

Since that time we are not aware of any contact by the Ministry for Police with the Ombudsman concerning the review of the Police Act.

Review of the PIC Act

10. What consultation has occurred with the Ombudsman following the release by the previous Minister for Police of the Discussion Paper on the review?

The Ombudsman received a copy of the Discussion Paper 'Report on the Review of the Police Integrity Commission Act 1996' from the Ministry for Police on 20 December 2002.

On 15 January 2003 we made a brief submission on recommendations concerning the extension of the Commission's jurisdiction to civilians (rec 3), the question of legal professional privilege (rec 14), and opportunities afforded by the police complaints computer system c@ts.i (rec 15).

Since that time, we have been asked by the Inspector of the Police Integrity Commission (in Mar 03) for submissions to his inquiry and report into Police Integrity Commission practice and procedures.

We are not aware of any further contact by the Ministry for Police with the Ombudsman and concerning the review of the Police Integrity Commission Act.

Consultation on legislative proposals generally

11. Prior to consideration by Cabinet, what level of consultation usually occurs with the Office on legislative proposals that impact on the Ombudsman's jurisdiction, functions or powers or the work of the Office?

With proposals made by central agencies co-ordinated by Cabinet Office that directly affect our functions, we are now always consulted. For example, in the recent proposed changes to the child protection functions of the Ombudsman and the proposed changes to the privacy legislation, as well as the incorporation of the Community Services Commission, we were consulted throughout the process.

However, occasionally there are proposals that slip by without us having the opportunity for input. For example, the Committee would be aware from our Annual Reports and meetings that for some time we have been recommending amendment of the Local Government Act to enable meaningful sanctions against individual councillors whose conduct breaches the code of conduct or otherwise seriously disrupts the business of council.

The Local Government Amendment Bill 2003 was recently introduced which provides for such a system. It enables the Director General of the Department to suspend councillors in certain circumstances including on the basis of a report of the Ombudsman. The amendment bill also greatly enlarges the jurisdiction of the Independent Commission Against Corruption into this area of maladministration that was formerly the exclusive province of the Director General and the Ombudsman.

We were advised that the general proposal was being prepared but were not consulted on the details of this bill.

Similarly, there have been a number of amendments to schedules 1 and 2 of the Freedom of Information Act over the past few years that exempt bodies or types of documents from the coverage of the Act which we have not been consulted about.

Counter Terrorism Coordination Command

12. The Terrorism (Police Powers) Act 2002 provides the PIC with the ability to investigate the conduct of police officers using the powers provided for under this Act. Section 13 of the Act states that the PIC is the only body with any powers of review for police actions authorised under this Act. As the PIC is mandated to only investigate the most serious forms of police corruption, will the PIC be able to refer other serious misconduct matters and complaints against police acting under the authority of the Terrorism Act to the Ombudsman for investigation as is the case und the existing police complaints system?

This is not a matter that, to our knowledge, has arisen at this time.

It is noted that s 13 of the Act appears to apply only to the authorisation for the exercise of the special powers conferred by the Terrorism (Police Powers) Act and not to the exercise of the special powers by police officers. It is our view that police exercising special powers will be subject to the complaints processes outlined in Part 8A of the Police Act.

We note that this view is reflected in the explanatory memorandum for the Bill, which stated, concerning the relevant clause, that it 'prevents the validity of an authorisation from being challenged in any court or legal proceedings including an investigation into police or other conduct under any Act other than an investigation under the Police Integrity Commission Act 1996'.

It is also reflected in the second reading speech 1 of the Premier on introducing the Bill. In part the Premier stated: 'Clause 13 makes it clear that the decisions of senior police are reviewable by the Police Integrity Commission. The Ombudsman's jurisdiction to oversight complaints about the inappropriate exercise of the powers under the bill is not affected'.

1 Hansard Extract . Legislative Assembly . 19/11/2002 . Terrorism (Police Powers) Bill