# EIGHTH GENERAL MEETING WITH THE NSW OMBUDSMAN

# REPORT OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN & THE POLICE INTEGRITY COMMISSION


DECEMBER 1999

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**DECEMBER 1999**

PARLIAMENT HOUSE
MACQUARIE STREET SYDNEY 2000
TEL: 02 9230 2737 FAX: 02 9230 3309

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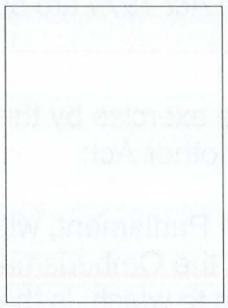
# COMMITTEE MEMBERSHIP

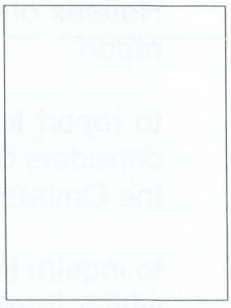
## LEGISLATIVE ASSEMBLY



Mr P Lynch MP
**Chairperson**

The Hon D Grusovin MP
Vice-Chairperson

Mr M Kerr MP

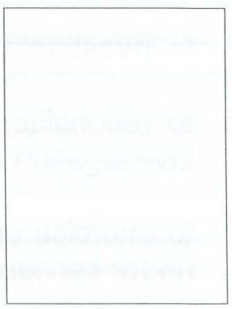


Mr W Smith MP

## LEGISLATIVE COUNCIL

The Hon P Breen MLC

The Hon J Gardiner MLC



The Hon J Hatzistergos MLC

**Secretariat**

Ms H Minnican - Director
Ms T Bosch - Research Officer
Ms H Parker - Committee Officer
Ms N O'Connor - Assistant Committee Officer

# 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 section 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 1974* 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

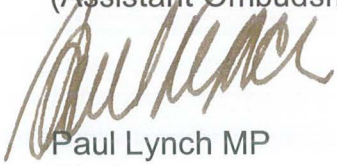
The Eighth General Meeting between the Committee and the NSW Ombudsman was held on 3 November 1999 and provided valuable information to the Committee on a range of issues dealt with by the Ombudsman.

Legislative changes have had an impact on the way in which police complaints are handled and there has been a considerable improvement in the number of these complaints resolved informally. However, in her responses to the questions on notice, the Ombudsman details a number of concerns in the police area, for example the quality of formal briefs of evidence, policing of domestic violence, seeking independent advice and police use of capsicum spray. In the general area, the Office of the Ombudsman dealt with complaints against 270 different public authorities. These complaints are becoming more complex and taking longer to resolve. The Office also initiated a series of customer service audits which will assist the targeted organisations to identify deficiencies and improve standards of service.

Since the last General Meeting, the Ombudsman's jurisdiction has increased to include auditing the implementation and impact of new police powers and significant functions in the area of child protection. The work done by the Ombudsman in these areas assists agencies to focus on their responsibilities and safeguards the rights of adults and children in the community. The Ombudsman's new child protection jurisdiction involves a substantial increase to the workload of the office, requiring the appointment of a new Assistant Ombudsman and specialist investigation team. It also involves a significant extension of jurisdiction into the private sector, as the Ombudsman has jurisdiction over designated non-government agencies.

This is the only General Meeting the new Committee will conduct with Ms Irene Moss as Ombudsman, as she is leaving to take up the position of Commissioner of the ICAC. Over her five years of office, Ms Moss has been successful in raising the public's expectations about the accountability and integrity of their officials and the standard of service they provide. She has played a major role in educating the public sector about complaint handling and has made the many services provided by the Ombudsman's Office more accessible to a wider section of the community. The Committee has always found Ms Moss and her officers to set a standard for openness and responsiveness which could serve as a benchmark for any public sector organisation.

The Committee wishes Ms Moss every success in her future career and also thanks her for her participation in the meeting, as well as the four officers who attended with her: Mr Chris Wheeler (Deputy Ombudsman), Mr Greg Andrews (Assistant Ombudsman - General), Mr Steve Kinmond (Assistant Ombudsman - Police) and Ms Anne Barwick (Assistant Ombudsman - Children and Young People).



Paul Lynch MP
Chairman

# COMMENTARY

## 1. Reporting provisions

***Police Powers (Vehicles) Act 1998*** - Section 16 of the *Police Powers (Vehicles) Act 1998* provides for the Ombudsman to scrutinise the exercise of the powers conferred on police officers by the Act, and to furnish the Minister and the Commissioner of Police with a copy of a report on the Ombudsman's work and activities conducted in accordance with this section. The Ombudsman is to monitor the operation of the Act for the first twelve months from the date of assent.

Under Section 17 of the Act, the Minister must conduct a review to determine whether the policy objectives of the Act remain appropriate for securing those objectives. The Minister's review is to be undertaken as soon as possible after 12 months from the date of assent and a report on the outcome of the Minister's review is required to be tabled in both Houses of Parliament within 12 months after the expiry of the period in which the review must be undertaken. The Ombudsman's report must be considered by the Minister as part of the review under section 17 and the Minister must include a copy of the Ombudsman's report in the report on the review of the Act.

***Crimes Legislation Amendment (Police and Public Safety) Act 1998*** - The Ombudsman performs a similar monitoring role under the *Crimes Legislation (Police and Public Safety) Act 1998*. Section 6 of the Act provides for the Ombudsman to scrutinise the exercise of the powers conferred on police officers through the amendments made by the Act to the *Summary Offences Act 1988* and the *Crimes Act 1900*. This monitoring role is performed for the twelve month period following from the commencement of section 6 of the Act and the Ombudsman must report on the work and activities undertaken by the Office for this purpose, as soon as practicable after the twelve-month period has expired. Section 6(3) of the Act requires the Ombudsman to furnish a copy of the report to the Minister for Police and the Commissioner of Police.

Section 7(1) of the Act provides that the Minister for Police is to review the Act to determine whether the policy objectives remain valid and whether the amendments made by the Act remain appropriate for securing those objectives. The Minister's review is to be undertaken as soon as possible after one year from the commencement of section 7 of the Act and a report on the outcome of the review is to be tabled in both Houses of Parliament, within twelve months after the end of the review period. The Minister's report must include a copy of the report received from the Ombudsman in accordance with section 6 of the Act.

### COMMENT

Under sections 27, 30 and 31 of the *Ombudsman Act*, the Ombudsman normally reports direct to the Presiding Officers of the Houses of Parliament. The Committee recognises that reporting mechanisms contained in the *Police Powers (Vehicles) Act 1998* and the *Crimes Legislation (Police and Public Safety) Act 1998* constitute a departure from this practice. Both statutes require the Ombudsman to report in the first

instance to the Minister for Police and, in the case of the knife powers legislation, to also report to the Commissioner of Police. The Minister in turn is required to present the Ombudsman's reports to the Parliament on her monitoring roles as part of his reports on the reviews of each Act .The Committee also acknowledges that there have been occasions in the past where the Ombudsman has reported to a Minister on a referral. However, in the case of such ministerial referrals the Ombudsman has had the option of reporting to Parliament.

The Ombudsman has advised the Committee that the reporting arrangements under this legislation have not posed any problems in relation to the conduct of her work but that she preferred to report to Parliament on statutory assignments. During the course of the eighth General Meeting, the Ombudsman was constrained from commenting on the contents of her reports as the relevant legislation gives responsibility for making public the Ombudsman's findings to the Minister, upon completion of his own reviews.

The Committee is of the view that as the Ombudsman is an independent statutory officer, accountable to the Parliament, it is a matter of general principle that the Ombudsman should report to the Parliament rather than the Executive. Arrangements to the contrary should be the exception rather than the rule and should not be encouraged as they fetter the Ombudsman's ability to report directly to the Committee on work undertaken by the Office. It is important that the Ombudsman should be able at all times to discuss fully with the Committee current projects being undertaken by the Ombudsman which may involve the use of considerable Office resources.

In situations where the Ombudsman is required to report to a Minister, the Committee intends to monitor the application of this reporting mechanism to ensure that the Ombudsman's reports are presented within the statutory time frames allocated. Any instances of delayed reporting, or Ombudsman reports subsequently being tabled by the Minister only in part, will be examined closely by the Committee and viewed as an encroachment on the Ombudsman's independence.

## 2. Local Government

In her evidence to the Committee, the Ombudsman outlined a number of issues which have arisen in relation to her jurisdiction in the local government area, in particular, legal costs incurred by local councils and the proposed options available to alleviate such costs.

The Committee has forwarded the evidence given in relation to local councils to the Minister for Local Government, the President of the Local Government Association and the President of the Shires Association. Evidence concerning the Land and Environment Court has been forwarded to the Attorney General. Advice has been requested from these parties on the issues outlined by the Ombudsman and the Committee will review the matters in light of the advice, having regard to their impact on the jurisdiction of the Ombudsman and the work of the Office.

## 3. Protected Disclosures Act 1994 & internal reporting systems

The Committee will examine the issues raised in the Ombudsman's answer to question 4.1 concerning the *Protected Disclosures Act* as part of its review of the Act, recently referred by resolution of both Houses of the Parliament.

The Committee also will continue to monitor the Ombudsman's review of internal reporting systems within public sector agencies and will question the Ombudsman at the next General Meeting on the progress made by agencies towards remedying the problems identified in her evidence and in her answer to question 4.2. The adoption and implementation of internal reporting systems by public sector agencies also will be examined as part of the Committee's current review of the *Protected Disclosures Act*.

## 4. Freedom of Information & complaints about contracted services

In its report on matters arising from the seventh General Meeting with the Ombudsman (August 1998), the previous Committee indicated that it would consider whether there was scope for a separate inquiry on amendments to the *Freedom of Information Act* which had been proposed by the Ombudsman as a means of addressing problems identified in relation to the application of FOI to private contractors engaged by the public sector.

The previous Committee was particularly concerned about the implications for the accountability of private contractors using public sector funds and resources to provide services, goods or other things under contractual arrangements with public sector agencies. It concluded that the Ombudsman had provided examples of "serious, unacceptable instances of contract provisions being used by public sector agencies to evade accountability and external scrutiny". Recommendation 8 of the Committee's report contained proposals for lines of inquiry to be taken on this matter with the Ombudsman and Auditor-General.

In light of the Ombudsman's latest evidence, this Committee will review the earlier report recommendation and propose new terms of reference for an expanded inquiry which would include issues not canvassed at the seventh General Meeting. For example, the operation of freedom of information schemes under the *Freedom of Information Act*, the *Local Government Act*, and the *Privacy and Personal Information Protection Act*, and the impact of these schemes upon the jurisdiction of the Ombudsman and the work of the Office.

Recent changes to the Ombudsman's jurisdiction also highlight the importance of such an inquiry in relation to accountability and the growing interface between the public and private sectors. Under the *Ombudsman Amendment (Child Protection and Community Services) Act 1998* the Ombudsman's jurisdiction has been expanded to include oversight of designated non-government agencies.

## 5. Controlled Operations

Since the Committee's General Meeting with the Ombudsman, a bill entitled the Law Enforcement (Controlled Operations) Bill 1999 was introduced in the Legislative Assembly on 11 November 1999 and has passed through all remaining stages in the Legislative Assembly. The bill is currently awaiting the Minister's second reading speech in the Legislative Council.

One of the objects of the bill is "to enable a chief executive officer of an agency to delegate his or her functions under the Principal Act to certain other officers within the relevant agency". The explanatory notes to the bill state that this would enable the Commissioner of Police to delegate any of the Commissioner's functions under the Act, other than the delegation power, to no more than five persons who must be of or above the rank of Superintendent. A chief executive officer of any other law enforcement agency covered by the Act also may delegate such functions to no more than one person.

In his second reading speech on the bill, Mr Bryce Gaudry MP, on behalf of the Minister for Police, explained that the power of delegation is aimed at improving the operational efficiency of agencies engaging in controlled operations. According to Mr Gaudry,

> ***It is vitally important for law enforcement officers to be able to respond as quickly as possible to suspected criminal activity. The proposed amendments include several initiatives directed at improving agencies' operational effectiveness. A rapid response to drug trafficking depends upon obtaining an authority to conduct controlled activities. At present, in agencies other than the Police Service, only chief executive offices [CEOs] can approve a controlled operation. CEOs needed to be able to delegate the authority to ensure expeditious approvals for these operations.***
>
> ***It is proposed to amend the Act to allow the CEOs of agencies to delegate to senior members of their law enforcement organisations who are responsible for drug investigations and other import and areas of criminal investigation the ability to authorise controlled operations. (NB proof copy to be checked against final Hansard)***

It is the Committee's view that while a power of delegation should exist, it should be exercised with caution, and generally only considered in the types of circumstances outlined by the Assistant Ombudsman (General) in evidence during the General Meeting. For example, where an authority is required in urgent circumstances and the CEO is unavailable.

The Committee also notes that the proposed legislation would give effect to many of the recommendations contained in the report by the Inspector of the PIC on the operation of the Act, for which both the Ombudsman and Commissioner of the PIC have indicated support.

# OMBUDSMAN'S OPENING STATEMENT

It is with mixed feelings that I appear before this Committee for the last time. Whilst I naturally look forward to the challenge of my new position, I feel extremely fortunate to have held the office of Ombudsman at this particular juncture in the evaluation of public administration. Over the five years that I have been Ombudsman I think it is fair to say that awareness, appreciation and demand for public sector accountability has noticeably increased. Standards of conduct expected from public officials have become much more clearly articulated and departures from those standards less likely to be tolerated.

It is no coincidence that the jurisdiction of the Ombudsman's Office has increased in line with rising expectations about the integrity of public administration. Looking back, I am proud to have participated in the considerable expansion in the jurisdiction of this office to include witness protection, controlled operations, other auditing roles such as our review of the implementation and effects of new police powers and, most recently, our significant new functions in the area of child protection.

In the short period of time that our Child Protection Team has been functioning, we have already received in excess of 330 notifications of allegations of child abuse. At this early stage the majority of notifications have come from the education sector and most notifications involve physical assault of boys. Approximately one in five notifications has contained allegations of sexual abuse of children, ranging from sexual harassment to criminal charges. Fifty allegations of serious sexual abuse of children in substitute care and in schools have been made. These have involved both boys and girls. It is still very early days, however, and we are anticipating changes to these early notification patterns once all organisations covered by the legislation have notification procedures in place and they become operational.

Whilst I feel privileged to have been able to build up these new areas of jurisdiction from scratch, my period of office has also coincided with changes to the way in which the office's existing functions have been conducted. At the time I took up my appointment as Ombudsman the Royal Commission into the New South Wales Police Service had commenced its massive inquiry into the operations of the Service. Through this process our civilian oversight role in relation to police complaints was affirmed and recently we have driven major changes to the system for handling and oversighting police complaints.

As my response to the questions on notice indicate, the impact of these changes is beginning to show. From both the complaints received about police over the last year and our review of the manner in which the Police Service is handling these complaints, we have identified some issues of particular concern in the Police Area. In my responses to the questions on notice I have set out at length our concerns about the quality of some police briefs of evidence, the misuse of capsicum spray by some police, the police response to incidents of domestic violence, police failure to seek out or act on advice from the Director of Public Prosecutions about criminal charges and the failure by some police commanders and investigators to properly investigate complaints

about police.

I stated at the outset my belief that expectations about public sector accountability have become greater. One manifestation of this has been a rise in public expectation about the delivery of government services. The interest shown at all levels of government in creating full customer service systems is evidence that this challenge is being addressed across the public sector. During the time that I have been Ombudsman it has also been edifying to observe a dramatic escalation in the demand for our program on complaint handling in the public sector.

In 1998-99 we made customer service a major focus of the Office. Under the auspices of our mystery customer project we initiated a series of customer service audits. These audits are designed to test this standard of frontline customer service provided to members of the public by a range of public authorities selected on the basis of their high volume of public interaction. What we have found so far is that the level of service provided within the authorities has been very uneven. For example, staff at the Department of Fair Trading were courteous and helpful when spoken to but 58 percent of calls we made to them did not actually connect.

Staff at Marrickville Council were similarly helpful and courteous when we visited them in person but when we wrote letters 40 per cent were never replied to. The Department of Industrial Relations performed extremely well, responding to written correspondence and exceeding its own internal standards for turnaround times. By contrast the department achieved only a 40 per cent performance achievement against its own standards for responding to emails and 20 per cent of all emails we sent were not replied to at all.

We are using the results of these audits to provide feedback to the authorities concerned, helping them to identify deficiencies, and as a means of improving standards of service. It is also hoped that the process will assist authorities improve their understanding of the customer's perspective and reinforce standards to their staff. To date the customer service audits we have performed have yielded very positive results. We have been advised by the Director-General of the Department of Fair Trading that more staff have been appointed to its telephone call centre to better cope with the number of calls, and that the telephone system is being upgraded to deal with their difficulties in attending to calls.

Although our mystery customer project is ongoing, we have set out in some detail the results of our first three customer service audits in this year's annual report. I have also used this year's annual report to draw attention to further issues in public administration that have come to our notice through the course of our work. The first relates to freedom of information. This year marks the tenth anniversary of the *Freedom of Information Act* and a review of this important piece of legislation is well overdue. In the 10 years that it has been in operation ad hoc amendments have been made to the Act without any overall review of how they interact, leading to unintended complexities and even direct contradictions.

Developments in information technology, judicial decisions in New South Wales and elsewhere on rights to access government information and public sector reforms, such as the increasingly common practice by public sector agencies to contract out their functions and activities to bodies not subject to the *Freedom of Information Act*, all threaten the ongoing relevance, impact and effectiveness of the Act in its current form. A further compelling reason for a comprehensive review of the *Freedom of Information Act* is the existence now of up to three separate regimes for seeking access to and amending documents in certain circumstances.

In the State sector information can be accessed under the *Freedom of Information Act* and soon under the *Privacy and Personal Information Protection Act*. In local government the radical access to information provisions in the *Local Government Act* established a third mechanism. The existence of these three separate systems has created or is likely to create considerable confusion for both the public and persons responsible for administering the relevant legislation. The other issue that I wish to briefly mention relates to local government administration and concerns the current levels of legal expenditure by local councils, particularly on court costs.

I am taking this opportunity to raise the matter because despite concerns expressed by me and the former Ombudsman, and despite the work of the Public Accounts Committee, councils have shown themselves unable or unwilling to address this significant burden on resources and there has been no appreciable reduction in the level of legal expenditure by local councils in this area. We have been attempting to develop initiatives which would cut down the incidence of councils going to court. Use of costs awards is one measure that we have proposed. When a council has blatantly abused the decision-making process and refused development applications that are in full accordance with the relevant planning instruments and council's own development control policies, there is a case for costs being awarded to successful appellants, particularly where a council has rejected the advice of its professional staff.

The Land and Environment Court already has the discretion to award costs but the present practice is to only award costs in exceptional circumstances. At this stage our proposal has not been endorsed. The time has now come to give consideration to more radical solutions. One proposal that deserves serious consideration is to refocus the jurisdiction of the Land and Environment Court in particular circumstances on a review of the fairness and appropriateness of the decision of the council rather than a full merits review of the application. This is not a proposal that I am endorsing at this point but it is one that I have advanced in order to stimulate debate around this important issue.

Before concluding, I would like to share with you somewhat final impressive figures. Since the doors of the Ombudsman's Office opened, more than 126,000 formal and 172,000 informal complaints have been brought to this office. In the last year alone over 7,000 written complaints and over 23,000 oral complaints were brought to this office. As I prepare to stand down as Ombudsman I am very pleased to be able to report that not only is the Office providing more services but it is also providing them to a greater diversity of people than ever before. Over the past five years we have made it a

strategic priority to improve the accessibility of our services for all members of the community. The establishment of an Aboriginal Complaints Unit, recruitment of a youth liaison officer and an enhanced access awareness program have played an important role in this achievement.

Finally, I would like to formally farewell all Members of the Committee. In so doing, I would like to acknowledge the constructive relationship that has existed between the Committee, the Office and me over the course of the last five years. This Office has at all times welcomed scrutiny and, in accordance with practices we promote among the public sector agencies, we pride ourselves on operating as openly as possible. I have always been committed to working with the Committee to produce a better service for the whole community. While we have not necessarily agreed with everything that has been put to us in that time, we have always taken on board any comments made around the table and have either tried to clarify the issue, explain our position or introduce necessary changes to our policies, procedures or practice in response. From my personal experience, the input from this Committee has helped to keep us focused and has, on occasions, forced us to step back or reconsider aspects of the way in which we exercise our functions and the priorities we give to various activities or projects.

# QUESTIONS ON NOTICE

# 1. COMPLAINT LEVELS & STATISTICS

## GENERAL

1.1 What general complaint trends have been noted in relation to oral and written complaints since the release of the Office's Annual Report in November 1998?

| | 1997/98 | 1998/99 | percentage change |
|---|---|---|---|
| written complaints (formal) | 8,245 | 7,321 | -11% |
| • police | 5,034 | 4,402* | -13%* |
| • other | 3,211 | 2,919 | -9% |
| oral complaints (informal) | 17,425 | 23,082 | +32% |
| inquiries | 2,695 | 2,490 | -8% |

* In addition, we audited 403 "non-notifiable" matters originating from within the Police Service.

As the table above shows, there has been an overall decrease in the number of formal complaints received in both the police and general areas since the last annual reporting period. In the same period there has been an increase in the number of informal complaints. Explanations for these trends are provided in the responses to questions 1.3 and 1.4 below.

In terms of the breakdown of complaints, complaints about police continue to constitute the largest proportion of the Office's workload.

| Subject of complaints/inquiries | 1997/98 formal | 1998/99 formal | 1997/98 informal | 1998/99 informal |
|---|---|---|---|---|
| Police | 61% | 60% | 16% | 15% |
| Departments | 13% | 13% | 18% | 16% |
| Councils | 12% | 11% | 11% | 10% |
| Correctional centres | 6% | 7% | 11% | 10% |
| FOI | 2% | 2% | 2% | 1% |
| Bodies outside our jurisdiction | 6% | 7% | 29% | 36% |
| information requests | | | 13% | 11% |
| child protection | | | n/a | 1% |

## 1.2 How do the figures for written complaints received compare to complaints finalised for the 1998-9 annual reporting period?

Overall in 1998/99 we received 7,321 written complaints. In that same period we determined 7,792 written complaints.

| | written complaints received | complaints determined |
|---|---|---|
| Police | 4,402 | 4,809 |
| Public authorities | 967 | 1,004 |
| Local councils | 824 | 838 |
| Correctional centres and the Dept of Corrective Services | 434 | 452 |
| Correction Health Service | 28 | 27 |
| Dept of Juvenile Justice | 16 | 20 |
| FOI | 140 | 132 |
| Bodies outside our jurisdiction | 510 | 510 |

# POLICE AREA

## 1.3 Have there been any significant changes to the Office's police complaints profile for the 1998-9 annual reporting period and what impact has the introduction of the new police complaints legislation had upon police complaint figures?

The police complaints profile has been affected by the recent legislative changes, although the full extent of the impact is still too early to predict. Together with broader reforms, such as the Police Service restructuring in mid 1997, the new complaints legislation has made local area commanders responsible for a broader range of management decisions, including how to investigate and resolve the bulk of complaints about their staff. Improvements in the Police Service's handling of less serious complaints accounts in part for the fall in formal complaints from 5,034 in 1997/98 to 4,402 this year.

Significantly, this year's fall has been accompanied by an increase in informal or oral complaints about police from 3,316 to 3,561. Complainants are being encouraged to direct grievances to their local area commanders and, where appropriate, try to have their concerns resolved without the need for a formal written complaint. We are also aware that commanders are much more conscious of the need to resolve less serious matters informally and expeditiously at the local level, to prevent them escalating into formal written complaints.

The number of complaints subject to attempted conciliation increased to 29% in 1998/99 from 28% in 1997/98 and 25% in 1996/97. The increase in the use of conciliation coincides with legislative amendments removing the requirement on the Police Service to conciliate particular types of complaints and, placing instead, onus on commanders to decide which matters are appropriate to resolve informally. For the first time in several years, there is also a marked improvement in conciliation outcomes. In 1997/98, 28% of conciliation attempts failed. This fell to 23% in the period from July 1998 until the legislative changes took effect in March. The rate continues to fall. Since March, just 18% of attempts at informal resolution have failed.

The 1998/99 complaints profile shows an increase in the number of complaints investigated (from 13% in 1997/98 to 20% in 1998/99). The reason for the apparent increase in investigations are legislative changes removing preliminary enquiries as a separate category, and reclassifying some enquiries as investigations. Adverse findings were made in 40% of cases in which such a finding is possible - compared with 38% in 1997/98. (No formal adverse finding is possible with complaints declined at the outset or with those conciliated). In terms of adverse findings it is worth noting that 85 police officers were criminally charged following investigations into complaints in the past year, and that the largest proportion of adverse findings were made in relation to information (eg inappropriate access to confidential information/providing false information), management issues and breach of police rules or procedure.

## GENERAL AREA

### 1.4 What are the complaint trends and statistics for the General Area during the 1998-1999 annual reporting period?

| | Written complaints - 1997/98 | Written complaints - 1998/99 |
|---|---|---|
| public authorities | 1095 | 967 |
| local councils | 976 | 824 |
| correctional centres | 456 | 434 |
| corrections health service | 32 | 28 |
| Department of Juvenile Justice | 14 | 16 |
| FOI | 171 | 140 |

**(I) Statistics**

In 1998/99 there was an overall decrease in the number of formal complaints across most areas of our general jurisdiction. In analysing the significance of the drop in figures overall it is important to bear in mind that in 1997/98 there were dramatic increases in the number of complaints over previous years, due in part to a large number of complaints concerning the one issue. **Viewed over the longer term, this year's drop in formal complaints is a minor fluctuation in an otherwise general upward trend in complaints.**

There are several possible factors accounting for the decrease in formal written complaints in the General Area between 1997/98 and 1998/99. For a start, there was no single issue that prompted a large volume of complaints. A more general explanation is the considerable training in complaint handling across the public sector undertaken by this Office in the last couple of years, which has raised awareness amongst public authorities of the value of having an effective complaints system in place. We have also observed the appointment of increasing numbers of complaints officers throughout the public sector. This development demonstrates a greater willingness by public authorities to assume ownership of complaints.

In relation to complaints about FOI, the decrease in numbers is partly attributable to the commencement of the operations of the Administrative Decisions Tribunal (ADT). The District Court's FOI external review function has been transferred to the ADT, which offers a more flexible and accessible review process. It appears that greater numbers of complainants are now proceeding directly to the ADT than ever went to the District Court.

**(ii) Trends**

Specific trends within the General Area are difficult to discern because of the large number of authorities within our jurisdiction and the enormous diversity of complaints we receive. In 1998/99 we received wide ranging complaints concerning, but not limited to, government trading enterprises such as Sydney Water, land tax, legal aid, health, transport, pollution and housing issues. In fact, we dealt with complaints against some 270 different public authorities.

Complaints about universities have increased noticeably over the course of the last year. This greater readiness by students to complain about university services appears to be a consequence of increasing fee levels and the rising numbers of full fee paying students. The complaints we have dealt with suggest that most universities need to improve their services in terms of enforcing proper codes of conduct, simplifying and clarifying their regulations and providing reasons for decisions wherever practicable.

A further observation that can be made about the complaint profile in the General Area is that, consistent with the experience of Ombudsman Australia wide, we have noted that complaints brought to us are increasingly complex, and taking longer to deal with. This is possibly due to the greater likelihood of lower level matters being dealt with at the agency level, the greater preparedness on the part of members of the public to pursue difficult issues, and the expansion in the volume of regulation affecting members of the public.

We are also dealing with increasing numbers of difficult complainants. Such complainants are less likely to be satisfied with the response of the public authority concerned, and will often have unrealistic expectations about what can be achieved by this Office. By their nature, difficult complainants are more persistent and demanding, so dealing with such grievances can be very time consuming.

The following trends are discernible in the complaints received about local councils:

1. There has been a large increase in the number of complaints about enforcement

and engineering issues.

2. We continue to receive a significant number of complaints raising concerns about conflicts of interest on the part of councillors and staff. In our view, the codes of conduct for all councils should be modified to incorporate the 13 integrated strategies for managing conflicts of interest proposed in *Under Careful Consideration: Key Issues for Local Government* (ICAC/DLG, 1997). We have raised this matter with the Department of Local Government, and it has recently issued a circular to councils reminding them of their need to review policies, such as the code of conduct, following the recent council elections.

3. A number of cases have come to our attention where the actions of one or two councillors are interfering with the capacity of councils to operate effectively. Such cases are highlighting the limitations in councils' codes of conduct and meeting practice, as well as the *Local Government Act* itself, to address the consequences of such conduct. I have recommended to the Minister for Local Government that consideration be given to introducing an externally triggered power of suspension for use in serious circumstances to deal with the most extreme cases.

## PERFORMANCE MEASURES

### 1.5 What initiatives has the Office undertaken towards the development of benchmarking performance measures?

Performance measures are established at the corporate, team and individual staff levels.

The Corporate Plan 1999-2001 sets out our corporate measures. These are generic measures applicable to activities of each of the investigative teams or office wide measures of achievement. Our annual report each year includes data on the key measures from this set of performance indicators. We would be interested in feedback from the Committee on the adequacy of these reported measures.

Each investigation team develops an annual activity plan which incorporates performance indicators. Results against these performance indicators are reported to the Ombudsman annually (usually with a mid year update as well). Certain of the performance indicators, particularly the workflow statistics, are monitored on a monthly basis and feedback given to teams for supervisory purposes. Workload performance statistics are formally reported to the Management Committee each month in an Operation Review report from each team.

All staff have performance agreements which include performance measures. In addition to ongoing supervision and feedback, a formal performance appraisal is carried out on each officer on an annual basis. That takes into consideration the performance achievements of the officer against those performance targets.

The office is currently taking part in a pilot program with other Australian Ombudsman to develop some comparative performance indicators to be used in a national

benchmarking exercise. Agreement has been reached with six other Ombudsmen on a range of indicators using common definitions of inputs. The performance indicators include measures of throughput, average turnaround times and age profiles of open cases, complaint loads of investigation staff and average cost of complaints among others. Data from the 1998-99 year is being pooled to calculate a national average for each indicator. The national averages will be used to compare the performance of each individual office. Significant deviations from the national average will be used as starting points to benchmark processes among the different offices. It is recognised that deviations will be expected and that they may not necessarily indicate superior or inferior performance, but rather be the outcome of factors such as different case mixes, different levels of case complexity, and differing statutory procedural requirements. Exploring the explanation for any significant differences that arise is seen as the most beneficial aspect of the benchmarking exercise. The outcome of the first round will be reported to the annual meeting of the Australasian Ombudsmen next year.

# 2. NEW LEGISLATION

## 2.1 What action has been taken by the Office in the performance of the new statutory roles and responsibilities assigned to the Ombudsman under recent legislation *(Crimes Legislation Amendment (Police and Public Safety) Act 1998; Police Powers (Vehicles) Act 1998; and the Ombudsman Amendment (Child Protection and Community Services) Act 1998)*?

### 1. *Crimes Legislation Amendment (Police and Public Safety) Act 1998*

Under the *Crimes Legislation Amendment (Police and Public Safety) Act*, which commenced operation on 1 July 1998, we were made responsible for scrutinising the exercise of the powers conferred on police by the Act for the first twelve months of its operation. The results of this scrutiny are required to be reported to the Minister for Police and Police Commissioner. In accordance with the legislation our report will be presented to the Minister in mid November.

Quite apart from the fact that the report remains to be finalised, I am constrained by the legislation from commenting on the contents of the report. By stipulating that we report to the Minister for Police and the Police Commissioner, the legislation makes it clear that it is not our role to make public our findings. This is the responsibility of the Minister for Police, upon completion of his own review.

Although it would be inappropriate for me to foreshadow the findings of our report, I can outline the process engaged in for the purpose of discharging our statutory responsibility.

From the outset, we recognised that the statutory obligations placed on our office supplemented our existing role in dealing with any complaints arising from the implementation of the Act. A research project was established in September 1998 to coordinate and conduct a range of activities to give effect to our responsibilities.

To assist in promoting the project, and in identifying key research questions, a discussion paper was prepared and circulated in December 1998. The discussion paper stated that the project would focus on whether the new powers were being used properly, fairly and effectively. It also canvassed the issues that had been raised during the Parliamentary debate on the Act.

We identified a number of individuals and organisations as having an interest in the project, or capable of providing assistance, and involved them from the outset. These included youth groups, legal organisations, the Bureau of Crime Statistics and Research, academics, and the Police Association. Significant cooperation and input was received from the Police Service.

Information recorded by police on their computer system, COPS, was essential but not sufficient for monitoring police use of the powers. We believed that it would be particularly useful to gain an appreciation of how the powers were being integrated into standard police practice, particularly the policing of public space. We realised that it was difficult to examine the operation of the new powers in isolation from other powers and practices, and needed to understand the relationship between police practice, the other

powers available to police and the new powers.

Our strategy was to observe police by accompanying them in the course of their work to gain a more complete picture of police procedures and practices. In the early stages of implementation, there was a perception that the powers were used more often in specific operations rather than in the course of day to day policing. For this reason, we arranged to observe particular policing operations. Research practice elsewhere, as well as common sense, indicated that police were likely to modify their behaviour in response to being accompanied by our researchers. This was factored into our planning.

With the assistance of the Police Association, we have also conducted focus groups with police officers on the new Act. These groups offered an understanding of the views and considerations taken into account by police in applying the new powers. The frank approach of the participants provided much insight into the implementation of the Act.

Similarly, interviews conducted with young people, youth workers and youth organisations have provided interesting and useful points of view. The potential adverse impact of the powers on young people, particularly in public spaces, was a significant feature of the Parliamentary debate on the legislation, and consideration has been given to this aspect in the course of our research. The concern of youth organisations meant that monitoring and evaluation of the powers was also conducted by several groups, and the results have been made available in submissions to our project.

Significant input into various aspects of the project has also been provided by the Department of Education and Training, local councils and the Department of Local Government, the Family Court, the State Debt Recovery Office, the Infringement Processing Bureau, and the Youth Justice Conferencing Scheme.

## 2. *Police Powers (Vehicles) Act 1998*

While similar in purpose to the *Crimes Legislation Amendment (Police and Public Safety) Act*, the operation of the *Police Powers (Vehicles) Act* has been very different in practice. It has become apparent that the vehicles power is used far less often than the broader search powers, and is mostly used in response to specific events, not as part of active policing operations.

A number of initiatives have been undertaken regarding our monitoring of the legislation, including:

1. briefing the Police Service on our research requirements;
2. obtaining COPS data relating to the police use of the new powers;
3. reviewing training on the application of the powers; and
4. seeking information from local area commands on the nature and extent of the use of the powers.

Our monitoring indicates that there appears to be some confusion among police as to the nature of these new powers, and the relationship with other powers to stop and search vehicles generally. As a consequence, our research strategy has been adjusted to take into account the need for clearly defined and understood powers in this area.

## 3. *Ombudsman Amendment (Child Protection and Community Services) Act 1998*

One of the first actions taken to give effect to our new jurisdiction was to establish a Child Protection Team within the Office, headed by an Assistant Ombudsman.

In the early stages of this new jurisdiction an important priority has been community liaison, including advising agencies of legal and procedural issues relating to the legislation. As part of our broad education program we have conducted in excess of 110 briefings with over 70 groups, including:

1. all designated government agencies;
2. representatives of designated non-government agencies; and
3. representatives of organisations interested in or affected by the legislative changes, such as unions, employer bodies, parent organisations and community sector peak organisations.

Meetings with the six designated government departments and other public authorities, such as local councils, focused on incorporating our notification procedure into each agency's existing internal reporting and risk assessment structures.

Meetings and briefings with agencies has made apparent the need for clear advice and answers to key questions. Guidelines explaining key concepts in the legislation and providing advice on how to meet the statutory obligations have been distributed to designated agencies, public authorities, and interested parties.

One of our key functions under the legislation is to keep under scrutiny the systems for preventing child abuse by employees of designated agencies. As part of this brief, we will be developing best practice guidelines to inform agencies of effective ways to prevent child abuse. Tools for auditing agency practice will include audits, and meetings with staff and users of services.

We have made it a priority to work closely with other agencies with responsibilities in the area of child protection to avoid duplication, maximise coordination and make the best use of resources.

Under the *Community Services (Complaints, Appeals and Monitoring) Act* we can enter into arrangements with the Community Services Commissioner regarding the cooperative exercise of our respective functions, as well as class and kind agreements in connection with child abuse matters, and to disclose information to each other. To date we have developed an interim protocol. It was agreed that an interim approach was more useful until experience can better inform a final agreement. The main features of the interim agreement are:

- the exchange of a bi-monthly schedule listing complaints and notifications relating to the agencies within the jurisdiction of both the Commission and ourselves;
- the handling of complaints about joint investigative teams by the Ombudsman; and
- a strategic monthly meeting and a six monthly joint review of the protocol.

We have also met with the Commissioner for Children and Young People to discuss the development of appropriate information technology systems and to flag privacy issues.

In June this year, the Interagency Investigative Forum was established for the purpose of facilitating communication on the development of ideas and best practice initiatives. The forum, which has already met successfully on two occasions, will focus its work on:

- enhancing child protection systems in designated agencies;
- developing risk assessment models in the employment context;
- developing models for managing allegations of child abuse against employees;
- developing models for best practice in child abuse/protection investigations;
- providing information to agencies on legal and ethical child protection issues;
- providing an avenue for research;
- utilising the range of agencies child protection experience; and
- communicating the form activities across the sector

The forum is chaired by this Office. Other members of the forum are drawn from the Commission for Children and Young People (CCYP), the NSW Police Service, the Department of Community Services, the Department of Health, the Department of Education and Training (Case Management Unit and Industrial Relations Service), the Department of Sport and Recreation, the Department of Juvenile Justice, and the Catholic Commission for Employment Relations.

Our other primary statutory function in this new area is to oversee the investigation of, and management response to, child abuse allegations and convictions against employees covered by the Act. As agency awareness of the requirements of the Act improves, we are receiving greater numbers of notifications. Over the last few months, the rate of agency notifications to us has significantly increased. As of 20 October 1999, we had received 56 complaints, 330 notifications of allegations of child abuse, and 617 inquiries about child protection matters. Of the notifications received, physical abuse allegations predominate. At this early stage, boys outnumber girls as the alleged victims of abuse by employees by a ratio of two to one, while the employees the subject of these allegations are more than 30% more likely to be males. Many of these notifications indicate a potential failure by some agencies to help staff deal with children behaving in a disruptive manner.

Approximately one in five notifications has contained allegations of the sexual abuse of children, ranging from sexual harassment to criminal charges. Of the most serious sexual abuse matters alleged, girls are somewhat more likely than boys to be the alleged victim, representing over 90% of the alleged victims of non-criminal allegations of inappropriate behaviour of a sexual nature.

Under the legislation we can respond to notifications in one of three ways: oversight, monitoring or direct investigation. Of the notifications received to date, our response has been as follows:

| | |
|---|---|
| Oversight | 89% |
| Monitor | 6% |
| Direct investigation | 2% |
| Decline | 3% |

## 2.2 Will additional funds and resources be required for the Office to discharge the Ombudsman's new statutory functions?

It is still too early to determine the adequacy of our funding in the Child Protection Area. Referral patterns are quite skewed as smaller agencies are still putting in place their procedures and training programs for staff. However, if emerging trends continue we would expect to see about 70-80 new notifications per month. Currently we have one person assessing all new notifications. The continuation of current notification patterns will have ramifications for the turnaround time of assessment and acknowledgment.

At this stage it is not clear how many notifications will require direct investigation by our Child Protection Team. There are signs that some agencies do not have the resources to conduct investigations properly, particularly where there is a conflict of interest. Further, there is evidence of systemic problems in some larger organisations. These situations should be directly investigated by this Office.

We are being reviewed by Treasury in February/March to determine the adequacy of our funding. We are currently preparing a statement of strategic outcomes and performance indicators for the purposes of this review. This will be the appropriate time to demonstrate adequacy of resourcing.

We were pleased to receive additional funding to carry out our reviews of the implementation of expanded police powers under the *Crimes Legislation Amendment (Police and Public Safety) Act* and the *Police Powers (Vehicles) Act*. We would not have been in a position to conduct these projects without this additional funding. The actual performance of these tasks has also involved the expenditure of core resources. Our experience on these projects will be taken into account in budget estimates for any future projects of a similar nature.

# 3. POLICE AREA

## 3.1 To what extent has the *Police Service Amendment (Complaints and Management Reform) Act 1998* impacted upon the Police Area of the Office's operations and has the new legislation resulted in streamlining and improvements to the management and oversight of police complaints?

### (i) Impact of the new legislation on the Police Area of the Office's operations

As a result of the legislative changes to the system of dealing with complaints, our power to scrutinise the Service's complaints processes has been strengthened. In practice this means that:

1. Our work is increasingly focused on the performance of police commanders and investigators and on monitoring the adequacy of police investigations, the adherence to statutory safeguards and the sufficiency of management action.
2. In conjunction with our focus on police commanders we have recently directed more resources to our powers of direct investigation. In the six months prior to the commencement of the legislative changes in March, we issued two section 16 notices. In the six months following the commencement of the amendments, we issued fourteen notices as part of our strategy to better hold the Police Service to account. In this regard, it is worth noting that a number of investigations have targeted police commanders and investigators who have failed to properly investigate complaints.
3. We are making greater use of our auditing powers with respect to less serious police internal management matters and other non-notifiable matters, in particular s160(1) and (2) of the *Police Service Act* which require us to inspect the records of the Police Service at least once every 12 months and to keep under scrutiny the system established within the Police Service for dealing with complaints.

The legislative changes do not diminish in any regard our role in oversighting the Police Service investigation and resolution of all complaints from members of the public, both minor and serious, to ensure that all complaints are dealt with properly and effectively.

### (ii) Streamlining

The legislative (and structural) reforms have given the Service the tools it needs to develop fairer, faster and more effective complaint processes. Some of the specific features that streamline the process include

1. Legislative provision specifically requiring investigators to conduct the investigation of complaints in a timely and effective manner, and requiring the Police Service to keep complainants informed of progress of inquiries, advise them of outcomes and seek their views on the way the matter has been handled.

2. Devolution of decision making to line commanders.

   Further streamlining should flow from administrative developments, such as the forthcoming integrated information system which on completion will give us and the PIC faster access to relevant complaint related data held by the Service.

### (iii) Improvements

Our oversight shows that while some commanders are using the increased flexibility of the revised complaints scheme to respond more quickly and effectively to issues as they arise, not all commanders and investigators are dealing effectively with complaints.

Although the mechanisms exist for faster turnaround, we are not confident that complaints are being finalised more quickly. In the first part of next year we hope to complete an evaluation of Police Service performance against a number of indicators, including:

1. turnaround times;
2. complaint satisfaction;
3. deficient investigations rate;
4. deficient management decisions rate;
5. changing profile of management decisions in response to unprofessional conduct identified.

We expect to expand our auditing program to keep under scrutiny other aspects of the Service's complaints processes. Of particular interest is how the Service uses its discretion to determine how to handle complaints and its compliance with basic legislative safeguards including the requirement to consult complainants and assess their satisfaction with the police response.

Of some concern to us are the results of audit of 403 non-notifiable matters, which uncovered instances of where allegations had not been recorded appropriately or notified to us as required by legislation. We have requested that the Police Service identify the reasons for the recording and notification deficiencies and that the problems be rectified as quickly as possible.

## 3.2 What are the critical issues for the Police Area?

Apart from monitoring the Service's general complaint handling performance, we are currently focusing on a number of issues of public interest.

### Quality of formal briefs of evidence

Complaints over the past year have revealed several instances of poor practice in the preparation of police statements. There have been a number of cases where statements have been prepared, without acknowledgment, on the basis of non-contemporaneous notes, other people's recollections of events or with the assistance of fellow officers. In one case, an officer forged his partner's signature on a statement.

Deficiencies in relation to the preparation of statements for court have the capacity to undermine confidence not only in the Service, but in the criminal justice system itself. Since charges are laid and considered on the basis of statements and briefs prepared by the police, police statements must be prepared in a way that ensures they are accurate and fair. Failure to maintain appropriate levels of integrity and professionalism can result in unwarranted anguish, expense and inconvenience for the various parties. It can also result in the conviction of the innocent and the acquittal of the guilty.

It is essential that judicial officers can have confidence in the integrity of the Police Service's role in the criminal justice system. Matters that undermine that confidence have broad ramifications when judicial officers begin to question the veracity or reliability of police statements.

We have brought these concerns to the attention of the Police Service. In response, the Service has advised that it is undertaking a project to improve the quality of criminal briefs. We have made it clear that issues relating to statement preparation and testifying at court should be considered as part of that project. We have also sought advice on how the Service proposes to improve brief preparation generally, including mandatory reviews of all prosecutions involving inappropriate conduct by police.

**Policing of domestic violence**

Despite the implementation of a number of initiatives by the Police Service, complaints, inquiries and submissions to our office continue to raise concerns about the police response to domestic violence. Responding to domestic violence is a significant policing responsibility. Last year alone, police responded to 77,000 reported domestic violence incidents. Complaints have revealed failures by police officers to comply with legislative requirements and police guidelines, as well as weaknesses in police investigation of incidents of violence. Such cases highlight the need for a swift and appropriate police response to protect and support victims and prevent violence from escalating. A failure to act can have tragic consequences.

In response to ongoing concerns, we embarked on a project to examine the policing of domestic violence. This project has culminated in the production of a special report, which will be presented to Parliament in the very near future.

(1) In preparing the report we analysed complaints, submissions to our discussion paper, and recent studies in the area. We surveyed local area commands on the domestic violence training they had conducted. We liaised with community groups, government agencies and, of course, the Police Service on a variety of issues.

(2) The report's focus is on assisting the Police Service to improve its service delivery in this vital area. For example, our office recommends the Service systematically collect and analyse domestic violence data from its system to allow local, regional and state wide comparisons to be made. This would enable the Service to target its scarce resources in a more informed way, consistent with "smart policing" initiatives in other areas.

(3) We also recommend that the Service include its response to domestic violence as a performance indicator in its corporate plan and improve accountability

mechanisms for local area commanders. This would include commanders having to report to the Commissioner on their command's response to domestic violence at Operation and Crime Review Panels.

Other key recommendations include that the Service:

1. develop adequate guidelines and training for police on the issue of witness protection, including the need for threat assessments and use of the Witness Security Unit in extreme cases;
2. clarify its guidelines on the service of orders and summonses at the local level, including guidance on priorities, accountability mechanisms and keeping victims adequately informed;
3. review its selection process for Domestic Violence Liaison Officers and systems for determining the resources which should be dedicated to this role in each local area command;
4. evaluate the quantity and quality of training provided for general duty officers across the Service.

We also recommend that the adequacy of police response times to domestic violence incidents be considered by the Audit Office in its audit of police responses to calls for assistance.

**Seeking independent advice**

A number of cases during the year highlighted the need for an understanding of the circumstances where it is advisable for the Police Service to seek, and heed, the advice of the Director of Public Prosecutions. In one case, charges laid by the police in relation to the assault and murder of an off duty constable were subsequently withdrawn. The police handling of the investigation was criticised by the Crown Prosecutor and DPP advice to the Attorney General stated that in relation to at least one of the persons charged, there was insufficient evidence to warrant laying the charges. In another case, concerning an alleged assault by an officer, the Police Service rejected DPP advice that there was sufficient evidence to commence criminal proceedings against the officer.

The DPP has informed us that there is no general obligation upon police, either in law or practice, to seek his advice before laying charges. However, it is a step frequently taken especially in cases of unusual complexity or sensitivity. He also suggested that there would be merit in the Police Service agreeing to guidelines or a protocol for the seeking of advice before charging, even if the document did nothing more than to identify broad category of cases in which that should occur.

The Service has since advised us that the Police-DPP Prosecution Standing Liaison Committee is in the process of developing an enhanced "advice protocol", particularly relating to consultation and advisings on the sufficiency of evidence in investigations and prosecutions. It is intended that this advice will be made available to DPP prosecutors and police in the near future.

We have recommended that Service-wide policies and practices should be developed on:

1. the circumstances in which the Service should seek advice from the DPP regarding possible criminal charges against a police officer;
2. the circumstances in which it is appropriate for the Service not to charge an officer where the DPP has advised that there is sufficient evidence for a charge, as well as the appropriate level at which such decisions should be made.

We have also suggested case studies should be used to enable a practical understanding of the sorts of issues that should be taken into account by police in deciding whether to seek the advice of the DPP.

**Police use of capsicum spray**

Since 1998 police have been issued with capsicum spray to assist in defusing dangerous situations.

Police are only authorised to use capsicum spray to:

1. protect human life - theirs and others;
2. control people where violent resistance or confrontation occurs or is likely to occur; or
3. protect against animals.

The Police Service has taken a number of positive steps to safely introduce capsicum spray for use by its members. They include developing appropriate guidelines and training programs and only issuing the spray to officers who have completed the training.

However, we have received a number of complaints alleging inappropriate or possibly improper use of capsicum spray. In some instances police have used capsicum spray to control situations where other less forceful options would have sufficed. Assessing when violent resistance or confrontation is *likely to occur* and making appropriate decisions about how to respond also appears to present difficulties for some police.

Also of concern is police resorting to capsicum spray in custody situations when people are already under police control. An early police study revealed 25% of incidents involving capsicum spray occurred in custody. High rates of secondary contamination were reported as a result.

These factors have lead us to commence an investigation into the Police Service's policies and practices with respect to the use of capsicum spray.

The Service, in responding to a requirement to produce information, indicated that:

1. monitoring capsicum spray use occurs locally through supervisors checking officers' computer entries on COPS in relation to events and identifying inappropriate use of the spray;

2. the Deputy Commissioner's office also oversights capsicum spray use through daily summaries of significant events;
3. capsicum spray is now on personal issue to police, removing the need to securely store and record the movements of canisters;
4. an ultra violet dye contained in capsicum spray, which can be seen on people sprayed for up to 24 hours, is considered a reliable deterrent to the unauthorised use of the spray by police.

The Service appears overly reliant on officers recording details about their use of capsicum spray on COPS as a means of detecting inappropriate use. On a practical level, COPS entries tend to be brief and, by definition, made from the involved officer's perspective. This may limit their usefulness as an accountability mechanism. Local area commands may also have inconsistent practices in relation to police using the spray which the Service is not at present equipped to detect.

The Service also relies on people coming forward within 24 hours to complain as a deterrent to unauthorised use.

While our office supports police having access to capsicum spray for use in appropriate situations, our investigation is considering ways to better regulate police use of the spray and improve police accountability.

## 3.3 What has been the Police Service's response to the recommendations contained in the Ombudsman's reports on *Officers Under Stress* (June 1999), *The Norford Report* (August 1999), and the *Loss of Commissioner's Confidence* (August 1999)?

***Officers Under Stress***

Immediately prior to our original report to the Police Service, the Service introduced some revised critical incident procedures to overcome shortcomings in the existing system that we had identified. These procedures closely involved local area commanders in the management of incidents affecting officers within their command. Commanders were to be notified of any critical incident and decide on the nature of the response required, including the use of critical incident debriefing teams where appropriate. Commanders were also to be responsible for monitoring the situation of the officers involved in the incident.

The Police Service committee established to consider our recommendations conducted a survey of police which revealed some disturbing trends:

1. Only 60% of officers involved in critical incidents had been offered support.
2. Of those who were offered support, 72% were not offered further assistance after initial intervention.
3. 18% of those interviewed indicated a clinically significant reaction to the incident; only half of this 18% had received assistance.
4. More experienced officers were significantly more likely to be affected.

5. A third of those surveyed were unaware of the Service's psychology and welfare units.

The committee developed a proposal which suggested improvements to policy and procedure to overcome the problems involved. Some components of this proposal were accepted by the Police Commissioner's Executive Team in April 1999, while other aspects have been referred back to the committee for "clarification" and further consideration.

The committee had extensively discussed the possible use of directed professional assessments in the context of support for, and management of, officers under stress. However, a year after our original report to the Service, the committee had not formulated a firm proposal on this issue. We expressed concerns about this in our special report to Parliament, and recommended that the Service should urgently develop mechanisms and guidelines for managers to obtain professional reports about officers under stress.

In August 1999, the committee advised us that it was considering draft guidelines for the ongoing evaluation of officers' psychological fitness for duty. A formal recommendation has since been made to the Commissioner.

***Loss of Commissioner's Confidence***

Our two principal recommendations in this special report to Parliament were that:

1. the Commissioner facilitate prompt completion of the current project reviewing the present s181D guidelines to ensure that overly restrictive limits are not imposed regarding the nature of information that may be put before him when considering officers for removal. In particular, the s181D guidelines should ensure that, where relevant, officers' prior complaints histories are taken into consideration in any determinations under the process; and
2. key stakeholders in the loss of confidence process meet in early 2000 to discuss ways of streamlining the process.

We have received a positive response to both these recommendations. On the day of our special report to Parliament about the matter, the Commissioner said that he would ensure that relevant complaint histories would now be included with the material to be considered by him in s181D matters.

The Commissioner has accepted the need for a meeting of key players to discuss streamlining the s181D process to overcome concerns that the process had become unnecessarily complex and legalistic, and not reflective of the intentions of the Royal Commission.

We had also recommended that the Commissioner review his decision in the particular case not to remove the officer involved. The Commissioner advised us that his legal advice was that it would be unreasonable of him to revisit his original decision on the basis of material which should have been known to him at the time. However, the Commissioner has agreed to implement our recommendation to take additional action aimed at minimising any risks posed by the officer to the Service and the public.

***Norford Report***

Our investigation led the Police Service to review its procedures and police training in the area of DNA testing. Samples needed for such testing are now provided to the laboratory within three days. The Service also recognised the need to develop a training program to enhance police understanding of DNA testing, particularly in view of recent initiatives in the area of forensic evidence.

We recommended the Police Service should provide an apology to the young man and his family for the deficiencies in the criminal investigation and the Service's initial failure to recognise those deficiencies. The Service agreed to provide an apology.

We also recommended the prompt payment of compensation, emphasising the unnecessary length of the young man's 83 days in custody, and the grave impact of the matter on both him and his family. Our special report stressed that unreasonable delay in the payment of compensation would compound the injustice.

Negotiations between the Police Service and Mr Norford's solicitor concerning an appropriate settlement are still underway.

# 4. GENERAL AREA

## PROTECTED DISCLOSURES

### 4.1 a) What is the Ombudsman's view on the current operation of the *Protected Disclosures Act 1994* and are there any specific issues which should be drawn to the attention of the Committee prior to the review of the Act?

There are a number of issues impacting on the current operation of the *Protected Disclosures Act* which are recommended for consideration in the forthcoming review of the Act:

1. The extent to which the recommendations and finding in the 1996 review have been implemented, in particular the non-implementation of recommendations 1, 2, 7, 8, 10-13, 15-18 [possibly 20&21], and 24.

2. Reconsideration of various issues raised by the NSW Ombudsman during the first review of the Act and in particular the following issues (listed in Annexure 2 to the 1996 report):

   a) **Recommendation 7:** that the Act should be amended to clarify what is meant by the reference in section 17 of the Act to the "*merits of government policy*";

   b) **Recommendation 8:** that the reference in section 17 of the Act to the merits of government policy should be clarified to specifically provide that it does not include or extend to the merits of local government policy;

   c) **Recommendation 10:** that the protections of the Act in relation to public officials should be limited to public officials who make disclosures in their capacity as public officials or who make disclosures of information or material of which they became aware or have obtained by virtue of the fact that they are public officials and in that capacity;

   d) **Recommendation 19:** that the Act be amended to expand the exceptions to the confidentiality requirement in section 22 of the Act to specifically refer to:

      (1) disclosures made in accordance with an internal procedure (per section 14(2)) or code of conduct (per section 9(3));
      (2) disclosures to persons assigned to investigate or responsible for the investigation of the matter(s) the subject of the protected disclosure; and
      (3) disclosures made in compliance with a statutory obligation.

   e) **Recommendation 25:** that consideration should be given to an appropriate amendment to the *Freedom of Information Act* to give agencies alternative options for exempting documents containing matter relating to a protected disclosure from release without the need to indicate that the documents relate to a protected disclosure. We put forward the following options for the purpose of fostering debate on this issue:

i) making an appropriate amendment to expand the confidentiality exemption in clause 13 of Schedule 1 to the *FOI Act*; or

ii) incorporating a provision in the *FOI Act* similar to section 31 of the Western Australia *FOI Act 1992* which allows agencies, in appropriate circumstances, to determine an application on the basis that it neither confirms nor denies the existence of such a document but that, assuming the existence of such a document, it would be an exempt document.

3. Reconsideration of recommendation 15 in the report on the 1996 review which provided, relevantly, that the definition of "public official" "*... should be amended to provide explicitly that the protections of the Act* ***do not*** *apply to members of the Parliament and Local Government Councillors,...*" [emphasis added], a proposal that would deny politicians protection under the Act.

4. Amendment of the *Protected Disclosures Act* to make it mandatory that agencies adopt an internal reporting policy. Our audit of internal reporting policies adopted by agencies shows a continuing failure by a number of agencies to either adopt a policy, or adopt an adequate policy.

5. Standardisation of the test for a disclosure to be a protected disclosure (ie. that the disclosure "*shows or tends to show*" one of the three categories of conduct covered in the *Protected Disclosures Act*) and the test for the obligation to report corrupt conduct under the *ICAC Act* (ie. that a person "*suspects on reasonable grounds*" that any matter concerns or may concern corrupt conduct).

6. Consideration of the need to retain section 19(5) of the *Protected Disclosures Act*. This subsection requires that for a disclosure to a Member of Parliament or a journalists to be protected by the Act, amongst other things, *"the disclosure must be substantially true*" - a difficult matter to prove when the circumstances listed in section 19(3) apply.

7. Amendment of the *Protected Disclosures Act* to extend the statute of limitations for the commencement of proceedings under section 20 from 6 months to 12 months.

**At the last General Meeting the Ombudsman provided a report on the Office's audit of internal reporting systems adopted by public sector agencies.**

**b) What developments have occurred in relation to the implementation of internal reporting systems within the public sector?**

In the original audit conducted by this Office, the internal reporting procedures from over 133 agencies were assessed. Where deficiencies were identified, the Deputy Ombudsman wrote to over 90 agencies drawing their attention to those problems.

Responses from those agencies were then assessed and further communications sent to agencies where necessary.

To complete the review, and to develop a database of up-to-date internal reporting policies, in April 1999 letters were sent to a total of 69 agencies requesting that they forward to this Office a copy of their current adopted internal reporting policy.

Responses have been received from 36 agencies. An assessment of the responses, or lack thereof, from the 69 agencies found that (as at the time of writing):

- 33 agencies (ie. 48%) had failed to respond;
- 10 agencies that responded had not addressed the problems previously brought to their attention by the Deputy Ombudsman;
- 7 had made changes to their procedures/policies, but the documentation was still inadequate;
- 7 improved their documentation to an adequate standard; and
- 5 based their revised procedures on the model policy (Annexure A to the Ombudsman's Protected Disclosures Guidelines).

The results of our audit of the standard of internal reporting procedures are summarised in the Table below:

| | Very good | Adequate | Inadequate |
|---|---|---|---|
| **1997/98 review** | 37 (28%) | 15 (11%) | 81 (61%) |
| **1998/99 review** | 51 (39%) | 16 (12%) | 65 (49%) |

As can be seen, the percentage of agencies whose documentation was at least adequate has increased from 39% to 51% between 1997/98 and 1998/99.Of the agencies whose documentation was found to be very good or at least adequate by the time of the 1998/99 review, 39 had largely adopted the model policy and 17 had based their policy and/or procedures on the model to a significant degree (not always a complete success).

In the coming year we intend to follow up with the more than 30 agencies that have not as yet responded to our April letters, as well as the agencies that did respond whose documentation is still inadequate.

## CONTROLLED OPERATIONS

### 4.2 a) Has the Ombudsman been able to exercise her role fully under the controlled operations legislation and what ongoing impact have the special audits had upon the resources and management of the Office?

The Office has been able to fully exercise the Ombudsman's role under the *Law Enforcement (Controlled Operations) Act.* All Law Enforcement agencies have been co-

operative with the Office in terms of our inspections and their reporting requirements to the Ombudsman.

The role has had some impact on the resources of the Secure Monitoring Unit. That unit also handles the telecommunications interception inspection role of the Ombudsman and the complaint and appeal function under the *Witness Protection Act.*

In general terms, the work of the Secure Monitoring Unit in relation to Controlled Operations involves approximately 20% of its workload. The proposed introduction of three Commonwealth agencies into the scheme will also impact on the Office. The extent of that impact at this stage is not clear

In respect to certain records, the Ombudsman is only able to delegate her powers to an Assistant Ombudsman. As a result the Assistant Ombudsman (General) who has responsibility for the Secure Monitoring Group has participated in all inspections carried out to date.

**The report identifies 48 instances where the Chief Executive Officer for controlled operations conducted by the Police Service was not provided with reports on the completion of operations within the required 28 day statutory time limit. In 7 instances the late reports were overdue by a period of over 100 days.**

**b) Does the Office regard this percentage of overdue reports and their lateness to be a significant issue and what internal measures and checks has the Police Service undertaken to improve performance in this area?**

The Police Service in the early stages of discussion indicated that the time limit for the reporting requirements may be onerous for their officers. This Office recognised that there were some difficulties in complying with this time limit. Principal among these was the competing demands upon Principal Law Enforcement Officers after the conclusion of operations, particularly where arrests have been made and charges laid and briefs of evidence must be prepared for subsequent court proceedings.

It was recognised during the recent review of the Act carried out by the Inspector of the PIC, Mr Finlay that 28 days was a short time limit for requiring the furnishing of the report to the Chief Executive Officer. As a result it was recommended that the time limit be increased to 2 months. We supported this recommendation.

As stated in the Ombudsman's recent Annual Report under the *Law Enforcement (Controlled Operations) Act* for the period ending 30 June 1999, there were a number of instances where the delay in supplying a report to the Commissioner appeared excessive.

The Police Service has attempted to address this situation by indicating to those officers who were significantly late in providing reports to the CEO, that they will no longer be able to carry out such operations until such time as the CEO is satisfied that

they are able to comply with the legislative requirements.

I expect that the proposed increase in the time limit, together with the efforts of the Police Service in attempting to eliminates such delays, will have some effect in the next reporting year. This Office will be taking particular notice of the Police Service efforts in reducing such delays during our future inspections.

**In the case of the NSW Crime Commission there were almost as many civilians (10) as law enforcement (11) participants engaged in controlled operations.**

### 4.3 Are there any particular problems which have arisen in relation to civilian participants engaging in controlled operations?

The majority of the controlled operations undertaken by the NSW Crime Commission involve conversations and negotiations concerning the supply of prohibited drugs. The actual controlled activities invariably involve a civilian informer introducing an undercover officer into a drug syndicate, hence the relatively equal number of law enforcement participants and civilians.

There have been no particular problems arising in relation to civilian participants engaging in controlled operations at this stage.

### 4.4 In the case of ICAC No 1 of 1999, what was the basis upon which you formed the opinion "it was obvious the Chief Executive Officer considered the operational plan prior to granting the authority [for the controlled operation]" in light of other shortcomings referred to in paragraph 7.2?

The evidence comprised detailed underlining and notations made in the Commissioner's handwriting upon the operational plan that accompanied the application.

## FREEDOM OF INFORMATION & COMPLAINTS ABOUT CONTRACTED SERVICES

### 4.5 During the seventh General Meeting, the Ombudsman informed the Committee of problems experienced by the Office and the Auditor-General in relation to public sector agencies using contractual arrangements with private contractors to avoid existing accountability, complaint handling and redress mechanisms, especially freedom of information.

### Do you have any further information about this issue?

No further cases of public sector agencies using contractual arrangements to avoid FOI have since been brought to our attention. However, we have received at least two

complaints in which the complainant was denied redress as a consequence of disputes about liability between a public authority and its contractor.

In one case, determination of liability as between the public authority and the contractor was unclear and would have required legal action to resolve, a measure which was not cost effective for the complainant to pursue. While we were not able to assist the individual in this particular case, we are conducting further enquiries with the public authority concerned (the RTA) with a view to seeking greater accountability by its contractors under the terms of its contracts in the future.

In the second case damage was caused to the complainant's car by a council's contractor. The terms of the contract between the council and the contractor ought to have enabled the council to require the contractor to pay the claim but the contract was terminated, and compensation ultimately denied to the complainant, as a result of the contractor going into liquidation.

## TRANSCRIPT OF PROCEEDINGS BEFORE

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

## EIGHTH GENERAL MEETING WITH THE OMBUDSMAN

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**At Sydney on Wednesday 3 November 1999**

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**The Committee met at 10.00 a.m.**

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**PRESENT**

Mr P. G. Lynch (Chairman)

| Legislative Assembly | Legislative Council |
|---|---|
| The Hon Deirdre Grusovin | The Hon P J Breen |
| Mr M J Kerr | The Hon Jennifer Gardiner |
| | The Hon J Hatzistergos |

**IRENE MOSS,** Ombudsman, 3rd Floor, 580 George Street, Sydney,

**CHRISTOPHER CHARLES WHEELER**, Deputy Ombudsman, 580 George Street, Sydney,

**STEPHEN JOHN KINMOND**, Assistant Ombudsman, 580 George Street, Sydney,

**ANNE PATRICIA BARWICK**, Assistant Ombudsman, 580 George Street, Sydney, and

**GREGORY ROBERT ANDREWS**, Assistant Ombudsman, 580 Street, Sydney, affirmed and examined:

**CHAIR:** Have each of you received a summons issued under my hand in relation to attending today?

**Ms MOSS:** Yes.

**Mr WHEELER:** Yes.

**Mr KINMOND:** Yes.

**Ms BARWICK:** Yes.

**Mr ANDREWS:** Yes.

**CHAIR:** Do you wish to table the answers to the questions on notice that you forwarded to the Committee?

**Ms MOSS:** Yes.

**CHAIR:** Will you also table the answers provided to questions on notice addressed to the Commissioner of the Police Integrity Commission?

**Ms MOSS:** Yes, I am happy to table that.

**CHAIR:** I invite the Ombudsman to make an opening statement.

**Ms MOSS:** It is with mixed feelings that I appear before this Committee for the last time. Whilst I naturally look forward to the challenge of my new position, I feel extremely fortunate to have held the Office of Ombudsman at this particular juncture in the evaluation of public administration. Over the five years that I have been Ombudsman I think it is fair to say that awareness, appreciation and demand for public sector accountability has noticeably increased. Standards of conduct expected from public officials have become much more clearly articulated and departures from those standards less likely to be tolerated.

It is no coincidence that the jurisdiction of the Ombudsman's Office has increased in line with rising expectations about the integrity of public administration. Looking back, I am proud to have participated in the considerable expansion in the jurisdiction of this office to include witness protection, controlled operations, other auditing roles such as our review of the

implementation and effects of new police powers and, most recently, our significant new functions in the area of child protection.

In the short period of time that our Child Protection Team has been functioning, we have already received in excess of 330 notifications of allegations of child abuse. At this early stage the majority of notifications have come from the education sector and most notifications involve physical assault of boys. Approximately one in five notifications has contained allegations of sexual abuse of children, ranging from sexual harassment to criminal charges. Fifty allegations of serious sexual abuse of children in substitute care and in schools have been made. These have involved both boys and girls. It is still very early days, however, and we are anticipating changes to these early notification patterns once all organisations covered by the legislation have notification procedures in place and they become operational.

Whilst I feel privileged to have been able to build up these new areas of jurisdiction from scratch, my period of office has also coincided with changes to the way in which the Office's existing functions have been conducted. At the time I took up my appointment as Ombudsman the Royal Commission into the New South Wales Police Service had commenced its massive inquiry into the operations of the service. Through this process our civilian oversight role in relation to police complaints was affirmed and recently we have driven major changes to the system for handling and oversighting police complaints.

As my response to the questions on notice indicate, the impact of these changes is beginning to show. From both the complaints received about police over the last year and our review of the manner in which the Police Service is handling these complaints, we have identified some issues of particular concern in the Police Area. In my responses to the questions on notice I have set out at length our concerns about the quality of some police briefs of evidence, the misuse of capsicum spray by some police, the police response to incidents of domestic violence, police failure to seek out or act on advice from the Director of Public Prosecutions about criminal charges and the failure by some police commanders and investigators to properly investigate complaints about police.

I stated at the outset my belief that expectations about public sector accountability have become greater. One manifestation of this has been a rise in public expectation about the delivery of government services. The interest shown at all levels of government in creating full customer service systems is evidence that this challenge is being addressed across the public sector. During the time that I have been Ombudsman it has also been edifying to observe a dramatic escalation in the demand for our program on complaint handling in the public sector.

In 1998-99 we made customer service a major focus of the Office. Under the auspices of our mystery customer project we initiated a series of customer service audits. These audits are designed to test this standard of frontline customer service provided to members of the public by a range of public authorities selected on the basis of their high volume of public interaction. What we have found so far is that the level of service provided within the authorities has been very uneven. For example, staff at the Department of Fair Trading were courteous and helpful when spoken to but 58 percent of calls we made to them did not actually connect.

Staff at Marrickville Council were similarly helpful and courteous when we visited them in person but when we wrote letters 40 per cent were never replied to. The Department of Industrial Relations performed extremely well, responding to written correspondence and exceeding its own internal standards for turnaround times. By contrast the department achieved only a 40 per cent performance achievement against its own standards for responding to emails and 20 per cent of all emails we sent were not replied to at all.

We are using the results of these audits to provide feedback to the authorities concerned, helping them to identify deficiencies, and as a means of improving standards of service. It is also hoped that the process will assist authorities improve their understanding of the customer's perspective and reinforce standards to their staff. To date the customer service audits we have performed have yielded very positive results. We have been advised by the Director-General of the Department of Fair Trading that more staff have been appointed to its telephone call centre to better cope with the number of calls, and that the telephone system is being upgraded to deal with their difficulties in attending to calls.

Although our mystery customer project is ongoing, we have set out in some detail the results of our first three customer service audits in this year's annual report. I have also used this year's annual report to draw attention to further issues in public administration that have come to our notice through the course of our work. The first relates to freedom of information. This year marks the tenth anniversary of the *Freedom of Information Act* and a review of this important piece of legislation is well overdue. In the 10 years that it has been in operation ad hoc amendments have been made to the Act without any overall review of how they interact, leading to unintended complexities and even direct contradictions.

Developments in information technology, judicial decisions in New South Wales and elsewhere on rights to access government information and public sector reforms, such as the increasingly common practice by public sector agencies to contract out their functions and activities to bodies not subject to the *Freedom of Information Act*, all threaten the ongoing relevance, impact and effectiveness of the Act in its current form. A further compelling reason for a comprehensive review of the *Freedom of Information Act* is the existence now of up to three separate regimes for seeking access to and amending documents in certain circumstances.

In the State sector information can be accessed under the *Freedom of Information Act* and soon under the *Privacy and Personal Information Protection Act*. In local government the radical access to information provisions in the *Local Government Act* established a third mechanism. The existence of these three separate systems has created or is likely to create considerable confusion for both the public and persons responsible for administering the relevant legislation. The other issue that I wish to briefly mention relates to local government administration and concerns the current levels of legal expenditure by local councils, particularly on court costs.

I am taking this opportunity to raise the matter because despite concerns expressed by me and the former Ombudsman, and despite the work of the Public Accounts Committee, councils have shown themselves unable or unwilling to address this significant burden on resources and there has been no appreciable reduction in the level of legal expenditure by local councils in this area. We have been attempting to develop initiatives which would cut down the incidence of councils going to court. Use of costs awards is one measure that we

have proposed. When a council has blatantly abused the decision-making process and refused development applications that are in full accordance with the relevant planning instruments and council's own development control policies, there is a case for costs being awarded to successful appellants, particularly where a council has rejected the advice of its professional staff.

The Land and Environment Court already has the discretion to award costs but the present practice is to only award costs in exceptional circumstances. At this stage our proposal has not been endorsed. The time has now come to give consideration to more radical solutions. One proposal that deserves serious consideration is to refocus the jurisdiction of the Land and Environment Court in particular circumstances on a review of the fairness and appropriateness of the decision of the council rather than a full merits review of the application. This is not a proposal that I am endorsing at this point but it is one that I have advanced in order to stimulate debate around this important issue.

Before concluding, I would like to share with you somewhat final impressive figures. Since the doors of the Ombudsman's Office opened, more than 126,000 formal and 172,000 informal complaints have been brought to this office. In the last year alone over 7,000 written complaints and over 23,000 oral complaints were brought to this office. As I prepare to stand down as Ombudsman I am very pleased to be able to report that not only is the Office providing more services but it is also providing them to a greater diversity of people than ever before. Over the past five years we have made it a strategic priority to improve the accessibility of our services for all members of the community. The establishment of an Aboriginal Complaints Unit, recruitment of a Youth Liaison Officer and an enhanced access awareness program have played an important role in this achievement.

Finally, I would like to formally farewell all Members of the Committee. In so doing, I would like to acknowledge the constructive relationship that has existed between the Committee, the Office and me over the course of the last five years. This Office has at all times welcomed scrutiny and, in accordance with practices we promote among the public sector agencies, we pride ourselves on operating as openly as possible. I have always been committed to working with the Committee to produce a better service for the whole community. While we have not necessarily agreed with everything that has been put to us in that time, we have always taken on board any comments made around the table and have either tried to clarify the issue, explain our position or introduce necessary changes to our policies, procedures or practice in response. From my personal experience, the input from this Committee has helped to keep us focused and has, on occasions, forced us to step back or reconsider aspects of the way in which we exercise our functions and the priorities we give to various activities or projects.

**CHAIR:** Before the Committee asks questions I would like to refer to one of the comments you made in your opening address about local council costs and legal costs involving litigation. Is it a particular geographic area among councils that seems to be the problem, or is it a broad, across-the-whole-State issue?

**Ms MOSS:** The costs were actually analysed by the press at one point, and some councils were identified as being, say, worse than others in regard to court costs. We have also taken on board discussions before the Public Accounts Committee on costs. We have also had many complaints where this has been an issue and have indeed written about it over the last

seven years in terms of court costs generally. We have concluded that, looking at the figures, the level of court costs is unnecessarily high. A number of cases that councils entered into were probably done unnecessarily. We think that that adds to the burden of the community's costs because that has led, on many occasions unnecessarily, to going to court to have matters resolved. We think that there can be better and fairer schemes evolved so that the cost to the community is brought down.

**CHAIR:** Is there any sense that in some of those cases councils are simply off on a frolic of their own, or do they think that they are responding to community pressure to oppose particular proposals in those areas?

**Ms MOSS:** I would say both. The Deputy may wish to make some comments about this.

**Mr WHEELER:** The experience across the State varies. Some councils are better than others in terms of their legal costs. Some councils hardly ever have an appeal. There are others that seem to be in the Land and Environment Court every day on a separate matter. Some councils go to appeal because the matter is not in accordance with their policies or is totally against the views of the whole council. There are others that appear to respond to objections from neighbours, no matter what the merits of the proposal might be. If there is an objection from a neighbour, then the council will go against that application. There are other councils where community pressure might be brought to bear.

There is nothing wrong with that and quite often those decisions are good and proper decisions. But there continue to be numerous examples where councils make decisions which are not in accordance with their policies, where they are not in accordance with their local environmental plans [LEPs] or the advice they have obtained professionally. They take people to court and, as you know, in the Land and Environment Court, as a general rule costs are not awarded and it can cost an applicant considerably when they thought they had done the right thing and when their professional advice would have been that they had done the right thing. But because a neighbour disagreed with what was going on, or perhaps because the council reacts to a neighbour's concerns, or perhaps because a certain group on the council might have a particular agenda which has not been converted into council policy, the council proceeds to appeal.

**Ms MOSS:** In our previous annual reports we have actually highlighted cases where councils have unnecessarily taken matters to court. We have written about the problem of the abrogation of a council's responsibility to make decisions and the tendency to leave the decision making to the courts rather than actually come right down and say, "We will make a definite decision, one way or the other." The Public Accounts Committee has actually put forward some suggestions, such as the better use of mediation and those sorts of techniques. We do not think that they have been taken up in any serious way.

**CHAIR:** One of the reasons I asked whether you thought there was a geographic distribution is that I know that in western Sydney some time ago Liverpool Council adopted an independent area assessment panel structure, and I believe that Fairfield is doing the same thing. Proposals go to the independent panel and then come back to the council. In terms of political reality, it is very hard to overturn a decision of an independent panel. That is perhaps one way of dealing with some of the problems. Is it your perception that that approach is more broadly spread than only western Sydney, and that it occurs generally

across councils?

**Ms MOSS:** We do not get the impression that that is more widespread.

**Mr WHEELER:** Particularly among the inner-suburban councils, which, by and large, are the major source of appeals. It is understandable when you think about it because the closer that people live together, the more chance there is that it will be an issue.

**Mrs GRUSOVIN:** In those cases in which councils are involved in the Land and Environment Court, have you examined the number of cases in which the action has been initiated by an applicant when the matter was not dealt with by council within the 40-day period?

**Mr ANDREWS:** A deemed refusal?

**Mrs GRUSOVIN:** Yes.

**Mr WHEELER:** Particularly in the inner suburbs, most applications are deemed refusals.

**Mrs GRUSOVIN:** Are many of those matters that finish up in the Land and Environment Court activated for that reason, which then results in councils incurring costs when they appear?

**Mr WHEELER:** It is a strategic decision for applicants whether they wait and try to argue it through the council or whether they try to bring pressure on the council by lodging an appeal. Once they lodge an appeal they have to pay the court costs, they have to brief a lawyer, and they have to start getting the experts' opinions, and it is a fairly expensive way to go. If they think that by keeping the pressure on the council by going to meetings, et cetera, they might be able to get approval or at least a decision made in the not too distant future. That is a decision that each applicant has to make. A lot depends on whether they have got the money. A number of people cannot afford to go to court unless they really have to. A significant part of the cost of the work they want to do would involve fighting a court case.

**Mr KERR:** I think you mentioned that your recommendations had not been endorsed. Has a formal submission been presented to somebody in relation to the Land and Environment Court?

**Ms MOSS:** This recommendation was actually put up for debate. I think we did actually present a position paper which suggested that as a recommendation. It was put forward to all stakeholders but it has not been adopted. At this particular point, we would like to put it up as a subject for debate. We think it is one possible solution to the problem.

**Mr KERR:** Would you seek endorsement from the stakeholders?

**Ms MOSS:** We would probably seek their opinions and we are actually thinking of looking further into this issue this coming year. We are hoping to engage other people in debate on it.

**Mr KERR:** The term "endorsement" seems to suggest a recommendation that is being

formulated, and you then seek approval for that formulated recommendation.

**Ms MOSS:** Yes. In fact, my Deputy informs me that in one particular case that we dealt with, and I think the case went to the Supreme Court, we put that up as a recommendation, and it was not taken up.

**Mr KERR:** Was it a recommendation to the Supreme Court?

**Ms MOSS:** It was a recommendation broadly. We had some recommendations for the council concerned, some of which were taken up. This particular one would have been put up to the Land and Environment Court.

**Mr KERR:** My understanding is that the Attorney General is to commence an inquiry into the legislation in the Land and Environment Court. Are you aware of that?

**Ms MOSS:** No.

**CHAIR:** I recall a motion being moved about that, but I do not recall it having gone that far.

**Mr KERR:** I take it that your office would be interested in that sort of mechanism?

**Ms MOSS:** Yes, it is certainly something that we could draw attention to by writing to the Attorney.

**Mr KERR:** The Land and Environment Court is probably being used as a notice of alibi: Councillor A is elected because there is a lot of community opposition to a particular project that nevertheless conforms legally, council then votes it down, and it goes to the Land and Environment Court, which can say, "It is not our fault."

**Ms MOSS:** Yes.

**CHAIR:** But is there not a problem with that, in that the councillor who, in that presentation, is perceived as the force of darkness and evil, has actually been elected on a particular basis when people voted for him? There would seem to be a real problem.

**Ms MOSS:** Yes.

**CHAIR:** Simply legal solutions to that problem will probably not make the problem go away. It is essentially a community political problem that needs to be dealt with somehow, rather than by just finding a legal solution.

**The Hon. J. HATZISTERGOS:** Do you accept that costs incurred by councils in relation to a Land and Environment Court matter are not an adequate test of whether the councils are properly performing their functions in approvals and instruments? You have already said that in some communities applicants may not have the resources to commit themselves to appeal to the Land and Environment Court and therefore may be further disadvantaged by being saddled with being unable to develop the land in the way that they desire. If so, have you looked into that anomaly and incorporated it into your investigations?

**Mr WHEELER:** I am not clear about the question.

**The Hon. J. HATZISTERGOS:** Do you accept that cost itself is not an adequate performance measure of whether a council is adequately adhering to its approvals processes, in the sense that, as you have identified, some people may not have the resources to appeal and therefore are saddled with what might be termed an unfair decision? If so, how have you incorporated that sort of conduct into your investigations, and what do you intend to do about it?

**Mr WHEELER:** The costs incurred by a council are not in any way a performance measure of how they are proceeding. The cost issue really comes down to whether the applicant should be penalised if he or she is forced to go to the court to get a decision which should have been made in the first place. In terms of how you deal with the situation where it is a very expensive process for many applicants that they cannot afford, that is one of the bases for the other option that the Ombudsman has referred to. That option is that if you change the focus of the court from looking at just the application, reviewing the application from scratch, with all the experts' reports that have to be obtained and the total involvement of the various players, to just reviewing whether the original decision of the council was fair and reasonable on the information available to it, you still have a review that is fair, that gives that person a chance to have somebody else look at what was done, but it is far less expensive.

**Ms MOSS:** I guess part of the problem is the fact that if it goes to the Land and Environment Court the whole matter is heard afresh from every aspect; it is a de novo hearing. Perhaps what we should consider is cutting that down, so that if the Land and Environment Court feels that the council has made a fair decision, that on the papers before it the council has done the right thing procedurally, perhaps the applicants do not have to go through that full de novo hearing again, and thereby add to the court costs by having an extraordinarily lengthy full hearing.

**The Hon. J. HATZISTERGOS:** One of the arguments that would be put against you is that when matters go to the Land and Environment Court applicants are much better prepared because they have their experts and other evidence, which is not prepared when they go to the council, and that sways the court in overturning the council's decision. Do you say that under your proposal that should occur at an earlier stage so that all the expert evidence that the applicants prepare for the courts should be provided to the council, as a means of getting a fair decision? If not, you might have a situation in which a matter ought to be overturned, on its merits, but the council has acted fairly. We have to strike a balance in these matters, and it is not easy. I am looking at the matter from both perspectives.

**Mr WHEELER:** If the applicant has put insufficient information before the council, and the council makes a decision based on that information—plus the information from its own sources, from its own staff based on policies and its knowledge of the area—I think that should be the basis on which that application is determined. Any review should be whether the council acted fairly on the basis of that information. Otherwise, what you are considering is who can pay the most amount of money to get the best lawyers, the best experts, and it goes on and on.

It might mean that applicants put in a more considered application in the first instance, so that we do not have the delay and the cost. It is not only the cost to the applicant, it is also

the cost to the council. Councils have to pay out money for experts; for their staff to go along to these appeals, which go for two or three days; for the staff to brief the solicitors or barristers who are appearing for them; and for the matters to be considered by councils again and again. It is to the benefit of both parties if you say it is up to applicants what information they put forward, and the council assesses that information, looks at its own information, and makes a decision based on that.

Again, we are not endorsing this as the answer; we are simply putting it up as an option. Maybe the appeal should be based on whether the council did the right thing. At the moment there is no actual accountability for the council's decision. If there is a right of appeal, we cannot look at council's decision. The court does not look at council's decision; it conducts a de novo appeal. The court does not go back and say, "Did the council do the right thing?" Nobody looks at that.

**The Hon. J. HATZISTERGOS:** Sometimes the court looks at the council papers to see the recommendation of the officers and how the council made its decision.

**Mr WHEELER:** Indeed. But the court does not then say, "Was that the right decision? Should that have been done? Something is wrong here." The court may look at those documents, but—

**The Hon. J. HATZISTERGOS:** One of the things that the Government did in the previous term was to introduce private certifiers, which you have briefly dealt with in the report. I suppose it is too early to indicate whether that measure will be successful in overcoming some of the more minor development applications or building applications that councils deal with.

**Ms MOSS:** It is a little early. However, I think our impression is that it is not moving fast enough to get the number of certifiers on board.

**The Hon. J. HATZISTERGOS:** It may be a little premature to ask this question. Do you see any merit in expanding that sort of process to allow greater jurisdiction, as a means of taking the political aspect away from councils' decisions? Flowing on from that, in the case of councils that are flagrantly abusing their positions as approval or consent authorities, is there merit in taking more punitive action in terms of councils' planning powers?

**Ms MOSS:** I think at this point it is too early to judge how well this process is going. It is something that I think we need a bit more time to think about and explore.

**Mr WHEELER:** With regard to private certifiers, it is still very early days. In terms of expanding the process and taking power away from councils, the elected representatives, it is an extremely big step. With regard to the State imposing its will by taking over the planning power—

**Ms MOSS:** It is taking away each core activity of what councils are there for.

**Mrs GRUSOVIN:** We will have every precinct committee in the State on the rampage.

**Ms MOSS:** That is right.

**The Hon. J. HATZISTERGOS:** I recall that in a recent election legal costs was a big issue of one of the teams that was campaigning on the question of how much money the council had wasted in fighting hopeless cases.

**Mr WHEELER:** But it is not an issue in a number of the 177 councils, given the money that is being spent. Massive amounts of money are being spent by some councils. Maybe some of it is quite valid, but I would imagine that a fair bit of it is not. In terms of the State stepping in and taking over the planning function, that is very problematic. Even in the cases we are talking about, it is not every decision made by the council, it is just some decisions that are either particularly contentious or that involve particular interests. It is not councils' overall planning role, so it is very hard to take away an individual matter. The State's power is basically to put in a planning administrator, which has its own—

**The Hon. J. HATZISTERGOS:** Or call in an application?

**Mr WHEELER:** —or call in an application. But the trigger for calling in an application at the moment, I think, is problematic. It is very tricky to be able to say before the application is determined, "We think they are not dealing with this properly". Of course, afterwards it is too late.

**The Hon. J. HATZISTERGOS:** I think that if there are massive delays in a council actually dealing with an application—deemed refusals, for example—the council is not even turning its mind to it.

**Mrs GRUSOVIN:** That is the way some councils operate; that is policy.

**The Hon. J. HATZISTERGOS:** They simply keep deferring the applications and never make a decision.

**Ms MOSS:** We think it is timely to debate this issue. We think we should debate all the options concerned to see how we can reduce those costs to the community.

**CHAIR:** With regard to the proposals you have suggested and discussed, is part of your proposal that in an unmeritorious appeal costs will be ordered against the applicant if the applicant is unsuccessful?

**Mr WHEELER:** Yes.

**CHAIR:** The other warning that rings in my mind is that there is a legitimate role in the Land and Environment Court for community groups, environmental causes, and so on, to lodge appeals. There was a Court of Appeal decision that resulted in costs being awarded in such cases and there was then legislative change to stop that. I would be concerned if this sort of cost regime were put up in cases which involved public interest appeals against particular developments.

**Ms MOSS:** If you were thinking of legislating, you could make sure that those matters could continue to go on appeal. We are simply saying that at the moment it is problematic, because too many of them are going on to full hearings and a huge amount of costs are being incurred.

**Mr ANDREWS:** The public interest appeals that you are talking about tend to be class four appeals, and we are only talking about class one appeals, which usually involve only the applicant and the council.

**Mrs GRUSOVIN:** When a case has been unsuccessful in the Land and Environment Court and there is an appeal, who determines that appeal in the Land and Environment Court?

**Mr WHEELER:** Whoever is presiding at that appeal. It may be an assessor, a judge, the chief judge, or provision may have been made for a panel. It is one of the presiding officers at the court.

**Mrs GRUSOVIN:** Council officers have raised with me their concerns about the functioning of the Land and Environment Court. They have raised the problem that it is the chief judge of the Land and Environment Court who sits on the appeal, and they therefore feel that the dice are pretty well loaded. I am referring to a councillor who had not been unreasonable in the number of times he went to the court.

There is also the practical problem, for example, of very large developers who are extremely well versed in playing the game between council approvals and the Land and Environment Court going right down the line. To that extent, amendments will be moved this session of Parliament to clarify some matters with regard to the provision of affordable housing, because a legal battle will take place if that clarification is not in place. It is really difficult to balance both sides of these arguments in order to determine who is doing the right thing and who is doing the wrong thing.

**CHAIR:** I will turn to the answers to the questions on notice, and I propose to go through the questions in groups. The first group of questions relates to complaint levels and statistics. At pages 1 to 6 you say that there has been an increase in the rate of conciliation of complaints and a decrease in conciliation failures. Does that stem from a greater preparedness on the part of police commanders to deal with matters?

**Ms MOSS:** The increases and decreases are not huge, but they definitely show an improvement. We think that there has been an improvement amongst commanders to take conciliation more seriously. There has not even been a decrease in the numbers they have sent across. We thought there would be with the removal of the mandatory provision, but there has not. The head of police complaints has been heartened by that.

**Mr KINMOND:** Yes, it has been pleasing. One of the concerns we had was that once the requirement for mandatory conciliation was removed there would be a drop in conciliation rates. Many commanders said that they had been forced to conciliate matters that they thought were not profitable to do so. It is interesting that the mandatory requirement is removed, the conciliation rate goes up marginally and the failure rate goes down. That suggests there is value in the commanders owning the decision. When they own the decision there is a greater likelihood of success.

**CHAIR:** Has there been a change in the attitude of the commanders or a change in the personnel of commanders?

**Ms MOSS:** Our impression has been that commanders are taking it reasonably seriously.

**Mr KINMOND:** There has been a change in the personnel as well, with a fairly large turnover of local area commanders. The improvement probably ties in with the attitude of ownership. If they decide a matter is worth conciliating, it stands to reason they will want a successful outcome.

**The Hon. JENNIFER GARDINER:** The issue of complaints from universities is rather interesting.

**Ms MOSS:** It is interesting. The complaints are mostly about procedural issues, such as students doing their PhD who feel they are not getting a fair review of a decision. We have noticed amongst some universities a lack of understanding of procedural fairness. At one particular university people actually sat on an appeal of their own decisions. There was a lack of understanding of what the appeal process really means.

**The Hon. JENNIFER GARDINER:** That is amazing, in this day and age.

**Ms MOSS:** It has been a very secluded area that has not been open to scrutiny and accountability. I notice that an increasing number of students are prepared to complain to our office about those issues.

**The Hon. JENNIFER GARDINER:** Do you find the universities receptive to your responses or suggestions to them?

**Ms MOSS:** We find that initially their responses are hostile. They do not like the idea of being subjected to accountability. We make it plain and clear that we are not trying to act as a substitute. They are the experts on those particular subjects, we are interested in the process and procedures. We make sure that we do not try to replace them in terms of their expertise in the area. We try to point out that they too are subject to fairness rules. We have had some difficulty in dealing with universities; they do not like other scrutiny.

**Mr ANDREWS:** A large percentage of complaints from universities relate to freedom of information. Universities seem reluctant to give out information.

**The Hon. JENNIFER GARDINER:** On the tenth anniversary of the freedom of information legislation, have you had the opportunity to put a proposition to the Government that there should be a review of the Act, and, if so, has the Government given any indication of what it will do?

**Ms MOSS:** We have done that in the annual report, but we would be more than happy to put that proposal to the Government. We think that there is a problem with the access factor. The public is faced with confusing regimes and is not too sure where to go. Even within those regimes there are contradictory definitions and requirements.

**Mr KERR:** On *Stateline* Quentin Dempster interviewed the new Auditor-General, who made the remark that freedom of information is sometimes described by bureaucrats as freedom from information. Obviously the Auditor-General has concerns about its operation. Should your Office have discussions with the Auditor-General's Office about the way the freedom

of information operation might be made more effective?

**Ms MOSS:** I have had discussions with the previous Auditor-General on these very issues. He referred a few matters to our office, one of which was the issue of contracting out. He was worried about the tendency of some organisations to use the contracting out process so that the agencies would then be able to avoid scrutiny. They would come to an arrangement with private agencies they are dealing with and say, "If we ask that you now take ownership of the documents so that you are now deemed to be the owner, we feel that we then do not need to be subject to the freedom of information requirements."

**Mr KERR:** Basically it takes it out of their jurisdiction?

**Ms MOSS:** Yes.

**Mr KERR:** Did the former Auditor-General express any other concerns to you about the effectiveness of the freedom of information legislation?

**Ms MOSS:** Yes. He has been quite open in his discussions with people about his view of the administration of the freedom of information legislation by some agencies. Our concerns are that where information is of a sensitive nature or might bring an agency into disrepute, we have had a battle with the agency about the release of such information. In the normal scheme of administering freedom of information legislation it is not a huge problem. Most matters are dealt with smoothly and easily. The rate of refusal is acceptable and low when it comes to uncontroversial, day-to-day information.

**Mr KERR:** Although the rate is small where an agency tries to cover up to protect its reputation or for some other reason, a matter could be of critical public importance.

**Ms MOSS:** That is where we have encountered problems. If the information does not put the agency in a terribly good light, then there will be a battle to get the information.

**Mr KERR:** Could you give examples of that?

**Mr WHEELER:** We had one case we can talk about because it was in a special report. One of the board members of the Royal Prince Alfred Hospital sought access to certain documents about a contract let for the building of a private hospital in the grounds several years before, but no hospital had been built. The area health service refused access to that application. We submitted a report to Parliament. The report had numerous blank spaces because we are not allowed to release exempt material.

We recommended that the information be released in the public interest, given that this place had been left as a gravel car park for eight years. Nothing else could be done with it because theoretically a contract had been let to build a hospital. The area health service continued to refuse access to the information because it was embarrassing for it. We are just about to commence another investigation because two years down the track the hospital still has not been built. That is an example of the sorts of issues that come up. They are generally a public issue and sensitive, and the information is withheld.

**CHAIR:** One comment that is made both in your annual report and the answers is that complaints have become increasingly complex and take longer to deal with. Does that have an impact on turnaround times?

**Ms MOSS:** It does a bit, although we are proud to say that we are still resolving as many complaints as previously, if not more. We have noticed that the complexity does impact on how fast matters are finished.

**CHAIR:** Another comment in the answers you have provided suggests that there has been a large increase in local council enforcement and engineering complaints. Is there an obvious reason for that? Has it just happened or is there an explanation?

**Mr ANDREWS:** I think it has probably just happened. There is no discernible reason that we are aware of. In the next few months we will develop general enforcement guidelines. One of the recurring problems in many complaints is inconsistent attitudes by councils to enforcement action, particularly to deal with enforcing conditions of development consents. We think it would be a good idea for all councils to have a basic policy about enforcement action, the investigation of complaints of lack of enforcement, thresholds for prosecution action and so forth. The way to get that going is to develop and promulgate a guideline and to encourage councils to develop their own policies. Some agencies, such as the Environment Protection Authority, already have a very good enforcement guideline, which could be a model for other agencies.

**CHAIR:** One of the comments in your answers and the annual report relates to the conflict in councils between individual councillors. How widespread is that conflict in terms of it having an impact on the way a council operates?

**Ms MOSS:** I do not know that it is hugely widespread, but the matters that have come before us have been extremely disruptive to the point where they have stopped councils from running smoothly. As you are aware, the Bega matter was extremely disruptive and the Minister had to take strong action. Perhaps we should again explore a whole range of options. We have put forward one option that we think might be more feasible, that is, suspension. We have also discussed in our annual report other options that the Government might consider to resolve this issue. There is ministerial intervention, dismissal—which is an absolutely last resort—censure, those sorts of things.

With each of these options it is important that there be proper natural justice, with procedural fairness mechanisms put in place. Rather than, in the worst cases, getting rid of the whole council, perhaps the better way to go is to address the worst offending councillors. When we talk about these matters, we are not talking about healthy debate, or even unhealthy debate, that occurs within councils all the time. We are talking about behaviour which brings a council to a standstill.

**CHAIR:** I suppose it is implicit from what you have said that the mechanism would involve a formal inquiry of some sort and then an opportunity for everyone to put their views?

**Ms MOSS:** Yes, a mechanism to decide that in a fair way. It may not involve the Ombudsman's Office. It might involve another external agency or a vote around the council chambers of the councillors involved, which may or may not be fair.

**CHAIR:** To get councillors to vote on whether one of their number should be excluded strikes me as fundamentally dangerous.

**Ms MOSS:** Yes, and obviously that might not be the way to go.

**The Hon. J. HATZISTERGOS:** They have got the power now to expel a disruptive councillor but the reality is that the moment one goes down that track and the police come in, it creates a media sensation for the individual concerned, so no-one ever tries it. I can recall one occasion when the police said that the Act says "may", and they decided not to exercise the discretion that was given to them.

**CHAIR:** That is, they have got some real work to do and leave them alone?

**The Hon. J. HATZISTERGOS:** They just regard it as a joke, and a real waste of police time.

**Mr WHEELER:** At one council at six or seven successive meetings a councillor has been taken out by the police.

**CHAIR:** The Bega model had an inquiry by an official from the Department of Local Government and then the Minister simply endorsed the recommendation.

**Mr WHEELER:** The same with Maitland and Burwood, where a person conducted an inquiry and the Minister then made the decision.

**The Hon. J. HATZISTERGOS:** It would be feasible to expand the list of recommendations which the person conducting the public inquiry could make to the Minister.

**Ms MOSS:** True, yes.

**The Hon. J. HATZISTERGOS:** That would give more flexibility rather than simply recommending dismissal.

**Ms MOSS:** That is another feasible option actually.

**CHAIR:** I refer to the *Crimes Legislation (Police and Public Safety) Act*. One of the curious things about that Act is that you report back to the Minister rather than to the Parliament. Traditionally the Ombudsman reported to Parliament. Has moving away from reporting to the Parliament to reporting to the Minister posed any problems?

**Ms MOSS:** It has not posed any problems in doing the project, it is just that Parliament does not get the information first. I suppose if it were a statutory assignment of this nature my preference would be to report to Parliament. On occasions in the past Ministers have approached us to look at particular matters and we would report to the Minister concerned. As my Deputy has pointed out, in those cases we have also had the option of going to Parliament.

**CHAIR:** What is the connection between that sort of work and your normal oversight of police conduct?

**Ms MOSS:** They are tied in, but it was quite different in the sense that we looked at it as a fairly major auditing research project. We had to use our expertise, or bring in some expertise and research to look at this issue. As outlined in our answers, we engaged all those wide-ranging techniques. Of course we drew from our complaint handling work as well and we drew in some people from core complaint handling.

**CHAIR:** The observational research work strikes me as potentially quite interesting. Given the relationship between your Office and the police, how did it work?

**Ms MOSS:** It was interesting. As you can see, one method was to go out and observe how it was done. We knew that our very presence would have an effect so, as we said, we factored that in. It was very helpful to draw heavily on other experts such as the Bureau of Crime Statistics and Research. We approached the Family Court, which had something to tell us about people who came through its doors. We were quite interested that quite a number of people who were monitored through its doors actually carried knives.

**Mr KINMOND:** In relation to the observational research we were worried about a tainting of the evidence by virtue of the fact that they knew we were on the Ombudsman's staff. Our observational research was well in excess of 100 hours. It was interesting because we deliberately chose ex-police officers. They were not from New South Wales, but they were ex-coppers. When they went out one of the first things they mentioned was that they were ex-police officers and that did not seem to create a problem. "That's not a problem" was quite often the response. As a result the walls went down very quickly. It was similar to "Cop it sweet" when the media followed the police around. We found that they were a lot more frank and open in the way in which they conducted themselves.

**CHAIR:** Did you have a video?

**Mr KINMOND:** No, we did not have a video, and it worked quite well.

**Ms MOSS:** We were able to get videos, say, from Sydney City Council of their observation of that particular area of the city, and we received a lot of help from them. We looked at the computer operated police system and that was interesting to draw conclusions as to how well they were recording those incidents, and that is a bit patchy.

**CHAIR:** I refer to the child protection community services area. Is there any duplication between what you were doing and what other agencies were doing?

**Ms MOSS:** That is something we worked really hard at not doing. As a matter of fact we came to various agreements to ensure that that does not occur. We had a class in kind agreement with the Commissioner for Community Services and we will observe to see how that goes before we finalise it. We are chairing this interagency forum to ensure that best practice is carried out but also no duplication. We are very conscious that many agencies are involved and we are working hard to ensure that there is no duplication. We also try to make sure that there is appropriate information sharing. A lot of work has been done by Anne Barwick, who is new to our statutory officers team.

**Ms BARWICK:** We are also involved with the Child Protection, Senior Officers Group which is currently viewing interagency guidelines. Again we are teasing out roles and making sure

that our particular responsibility is reflected in the guidelines. The Department of Community Services has a potential overlap. We are negotiating a protocol with that department. We are also moving into the function of scrutinising systems to see what they have in place for preventing child abuse.

We have had some preliminary discussions with the Ageing and Disability Department. It has quite an effective tool to monitor agencies and it works very closely with home and community care funded services as well. There is an agreement between those two arms that there is only one audit of the services and they try to incorporate all the necessary questions. That auditing process would be a good model for us to piggy-back on, and inject a few questions that we might need so that it covers a vast range of services that need to be scrutinised. It can be done in an effective way by piggy-backing either tools. They are only preliminary discussions but it makes sense, given that there are some 7,000 agencies that fall within our jurisdiction, to look at the existing auditing tools and processes with which we can work.

**Ms MOSS:** The big area of controversy will be the definition of psychological abuse. Already we have met with unions that are concerned about how we approach this issue. In the ensuing months we will try to engender a debate on what people feel that actually means. Unions are concerned because they feel that our Office would give it such an incredibly broad meaning that everything of concern would end up being notified. They are concerned about how that will impact on their members.

**CHAIR:** Your answers did not say a lot about what has happened in your discussions with the Commissioner for Children and Young People. Will there be any formal information-sharing arrangements?

**Ms BARWICK:** Yes, initial discussions have revolved around it being early days for both to identify what information should be shared. In a sense we are looking at what comes through and we will ultimately reflect some decisions in a protocol. At the very least we would be exchanging information about substantiated matters of child abuse. One would have to question the value of passing on information about vexatious complaints or unsubstantiated matters. It is early days yet to categorically state what should be in, and what should or should not be transferred but we will be moving towards some finalisation of that in the next few months. The area of concern for a whole lot of agencies—unions, et cetera—is the capacity to exchange information in relation to privacy and the point in exchanging some levels of information.

**CHAIR:** Is there any difference in the level of reporting between public and private sector agencies?

**Ms BARWICK:** At the moment, because public sector agencies were better prepared for the legislation, we are receiving more complaints or notifications from the Department of Education and Training. In fact, most of our work is coming from that department at this stage. Some of the smaller agencies are still to develop their procedures so they are a little slow in notifying. The pattern will continue obviously because there are large numbers in the Department of Education and Training. We are getting appropriate numbers, the projected estimates, of notifications from non-government schools so there is a consistency in the notifying rate between, say, the Department of Education and Training and non-government

schools.

**The Hon. JENNIFER GARDINER:** In relation to smaller agencies and the fact that they have not got all their notification procedures and training in place, do you have a timetable for when they should all be up to scratch?

**Ms BARWICK:** Yes. We have been saying that basically the first 12 months is a transitional period during which we will work very closely with those agencies. We have developed some generic policies for them to use if they wish, or tinker around the edges to suit their particular needs. We would hope that within the first 12 months people would be online and have their procedures in place.

**Mr KERR:** Do you deal with cases of psychological abuse at the moment?

**Ms MOSS:** We have had cases of that nature. It is a question of judging how serious the abuse is and whether it has caused harm to the child. As we have had more cases we have had to review our own definitions. We have had to make sure. In some cases, albeit bad and obviously something ought to be done with respect to the person concerned, it was not a matter that was notifiable as such, so we had to use our judgment.

**Mr KERR:** What were your existing definitions? Have there been any refinements to your existing definitions?

**Ms MOSS:** Yes, there have been refinements.

**Ms BARWICK:** We look at two components; the particular behaviour and the associated harm from that behaviour. We look at something more than rudeness or a one-off situation. We look at more persistent, targeted behaviour—scapegoat, humiliation, put-down, et cetera— and then the harm would be behavioural problems, bullying that did not exist before, or somatic problems. We have been talking about vomiting, bed-wetting or asthma attacks. Obviously, if a child is an asthmatic, or he or she has some medical problems, we would have to look at that. We are looking at that sort of persistent, ongoing, berating humiliation and the significant harm that follows. We have had two matters so far out of the 315 that have been reported, so the fears of unions and employees have not been fulfilled. In fact, the two cases that we have received have been quite serious illustrations of that type of child abuse.

**Mr KERR:** Most parents would have been critics of their children at some point in time as their children were growing up. Sometimes that criticism is justified and sometimes it is not and, even when it is unjustified, it is probably well-intentioned. However, a sensitive child might react with an asthma attack or vomiting. How do you distinguish between one who is guilty of psychological abuse and someone who is simply an inept but loving parent?

**Ms BARWICK:** In the two matters that we have had it has been quite clear that the behaviour that the children have been exposed to has been different from the behaviour that other children in a particular class or agency have been exposed to. There has been something quite particular and, therefore, an allegation has been made. The second thing we do is to then substantiate the allegation. That is where we take into consideration the sorts of things that you are talking about.

**Ms MOSS:** With respect to, say, a parent and child, that would be outside our jurisdiction anyway. We are conscious of the fact that we are looking at the more serious side of these issues. That is what the unions have been concerned about. We have had quite a number of discussions with them and we are intending to have further discussions with them to try to better refine the definition of what that means.

**Ms BARWICK:** Once we have finalised that and we are in a better position to talk about it we will need to look at expert advice on the psychological abuse side of it. There is considerable expertise in that area. We will draw on that to help us come to a clearer position.

**Mrs GRUSOVIN:** You referred earlier to 15 children being placed in substitute care. We have been looking at the question of the possible abuse of children placed in a great variety of substitute care. Are you assessing the question of the adequacy of the placements that are being provided? There is a great deal of concern at present about finding suitable substitute carers—something about which we need to be thinking. How do we get those sorts of people? What happens to kids when frequently there is no place for them, or they are shuffled around between two, three, four, five or six different places? Has that been taken into account?

**Ms BARWICK:** The cases which we have looked at highlight problems with monitoring placement at the very least. Last time we met I think I flagged that we might be looking more closely at the systems problem. At the same time the Community Services Commission has been given enhancement funding and it is commencing a fairly major investigation into many aspects of substitute care, including recruitment carers, et cetera, and the shortages in the system. I have had some discussions with that body because we do not want to duplicate services. We will work with the Commission, as it progresses through that inquiry, on the concerns that we have.

But our concerns at this stage relate only to the monitoring. It is interesting to note that, in some of the longer term placements, there have been allegations of abuse. There seems to be a lack of recognition that children's needs change. There are developmental stages. For children who are not living with their natural parents a whole lot of identity issues around adolescence just seem to be overlooked. That is the time when the disruptive behaviour occurs. There does not seem to be support for those carers around those critical times. We will look that aspect in particular and at the support that is available in those placements.

**Mrs GRUSOVIN:** Have you been concerned about what monitoring is occurring in relation to placements?

**Ms BARWICK:** It is early days and there are only small numbers. That is a common feature that is emerging. If a child is lucky enough to find a good placement, the level of monitoring is fairly minimal. There is an assumption in some agencies that once a child is there he or she will be okay. Yet we know, from history, that there could be six, seven or eight placements following breakdowns. I have concerns about that element of the process.

**Mrs GRUSOVIN:** Because of the workload being carried by district offices how reasonable is it for one to demand a standard which they cannot reach because it is physically impossible?

**Ms BARWICK:** Absolutely. They have their priorities. They have to respond to allegations of abuse and they have to make decisions about how much of their time is allocated to such a task. If a placement looks like it is working well they will certainly not be giving it high priority. We know that, if that work is not done, abuse occurs, placement breaks down and a cycle develops. But it is very much related to resources. Some of the non-government agencies that run what I deem to be effective foster care programs have a high staff input. They may even have different workers for the natural parents, the foster carers and the child. So we have some broad examples of best practice, but it is very much a resource-intensive exercise.

**Mrs GRUSOVIN:** At our last meeting we talked about the question of non-government organisations—churches, for example—and the way in which they are responding with their protocols. Have there been any further discussions in this area? Are any of those organisations looking at reviewing or refining protocols which were put in place, at times, somewhat hurriedly? I am aware that there are many flaws in some programs, such as the protocol of the Catholic Church. Is there a move to bring about some improvements?

**Ms BARWICK:** We are working closely with those groups, particularly in relation to adopting protocols that pick up responsibilities in the legislation. I have also had discussions with the Uniting Church which were pretty much along the same lines. It is slowly sinking in that the legislation has pretty broad ramifications for a range of their services and they must review their policies. The arrangement is that, as they develop, they will either use our expertise and/or run them past us when they are in draft form so that we can see whether they meet the requirements. They have been co-operative.

**Mrs GRUSOVIN:** I am not sure how they are following through with their protocols.

**Ms BARWICK:** They are taking steps, which indicates to me that they are at least open to review and that they will change their policies. The next step obviously is implementation. That is where our scrutinising role is important so that we can see how those policies are working.

**Mrs GRUSOVIN:** It is the person-to-person handling of individual cases that sometimes gives cause for concern.

**Ms BARWICK:** Yes.

**Mr KERR:** You referred in your opening statement to the sexual abuse of children and to the Ombudsman's involvement in investigations of such abuse. Does physical abuse come within the jurisdiction of your Office?

**Ms MOSS:** It does.

**Mr KERR:** There have been some spectacular examples of injustice—inexplicable injuries caused either by assault or accident. In Britain people have been dragged before the courts even if there is a reasonable doubt that they are innocent. Is that a problem that you have encountered in Australia?

**Ms MOSS:** Parents do not come within our jurisdiction as such.

**Ms BARWICK:** That has not been a problem with employees. In fact, in most of the situations that we have looked at, an employee has admitted that he or she has struck a particular child. We have not yet had serious matters of the type that you are talking about.

**Mr KERR:** What happens if a parent feels that he or she has been unjustly accused by the department? Where does he or she go?

**Ms BARWICK:** We would ask parents to use the grievance procedure within that department. If they feel that they are not being heard or that their matter has not been dealt with adequately, they can complain to us and we would then review the way in which the matter was dealt with. We have already received about 60 complaints from either employees or parents about the conduct of a particular investigation. With respect to employees, the common complaint has been that they have not had the allegation put to them and, therefore, they have not had an opportunity to put their case forward. The other complaint would be that there has been an untimely delay and their lives have basically been on hold. It could well be that the matter was unsubstantiated at the end of that time. We have been looking closely at those complaints.

**CHAIR:** You indicated that the Office has responded to 89 per cent of the notifications that it has received in this area by oversighting investigations by other agencies. Have you been generally satisfied with those that you have oversighted? What have you done with those about which you were not satisfied?

**Ms BARWICK:** With oversighting the general approach is that the notification is assessed and, if we consider that the action with respect to the child and the employee is appropriate, nothing happens in our Office until the final reports come in. Then we assess at the final stage. Mostly with that group the appropriate action has been taken in that initial instance. We do not yet have many final reports, so it is hard to say at the end of the day whether the matter was dealt with properly. At this stage, with those that we have received and that we have categorised as oversighting, all things being equal, they are reasonable responses. With those that we have monitored there have been some flaws in the way that agencies have responded.

Sometimes they have not made the necessary notification to the Department of Community Services, so straightaway we get on the phone and ask them to do that. Another problem is that sometimes they act too hastily and they might dismiss a staff member without undertaking a proper investigation. So we have had to advise them of procedural fairness and we inform them that they might have to review what they have done. The other side of it is that, in some cases, there might be evidence that a staff member should have been dismissed and he or she has not been dismissed. So we get two extreme approaches: a knee-jerk reaction to either sack a person straightaway or keep a person in the system and not really take into consideration the risk to children. There have not been too many cases but that is the pattern that has developed.

**CHAIR:** The suggestion is that there are about 70 or 80 new notifications each month. Will you be able to absorb that with your current resources, or will you need additional resources?

**Ms MOSS:** We do not know at this stage. It all depends on how complex each matter is. Some do not take a lot of time and others do. At the moment staff are working quite hard at it and there is very little down time as such. We will know a bit more as the year develops. We have to report back to Treasury. Treasury will review the adequacy of our funding in this area.

**CHAIR:** The other funding issue would be whether or not you have a range of smaller agencies that do not have a lot of resources to carry out these tasks.

**Ms MOSS:** That would be where the problem would be. Quite obviously they do not have the expertise or the money to do it and we will probably have to do it for them. It is early days yet. We will see how it goes.

**CHAIR:** Following your audit there is a reference in your answers to the recording and notification of deficiencies in 403 non-notifiable matters. Do you have an explanation from the Police Service about that?

**Ms MOSS:** I guess that is a fairly high number.

**Mr KINMOND:** Essentially, it arises out of the agreement we reached on 8 March that the Police Service need not notify us of certain matters. What we have done at this stage is point out to the Service that these are police internal matters. Many cases were harassment-type cases and in some cases there were allegations of criminal conduct. They were not notified but they should have been. We have made it clear to the Service. We have provided an annexure of all the cases. We gave the service a brief description of what they were all about.

We pointed out to the Service that it needed to get its act together in this area. We also indicated that we would be back; Within the next 12 months we will do a further audit. If things do not improve, it would then be appropriate to table in Parliament not only the fact of the audit but also the specific details of the types of cases. The service has acknowledged the seriousness of the issue, and in some cases it just thinks that it was a lack of understanding by local area commanders of their obligations.

**Mr KERR:** You mentioned an agreement with the police. Are there any other protocols that exist in relation to investigations of police?

**Mr KINMOND:** We have a range of protocols relating to notification of matters, protocols that exist for cases in which we identified deficient investigations and for when we make adverse finding reports, who we send that to in order to ensure that we get a quality response.

**Mr KERR:** Is there any problem about putting those protocols on the record?

**Mr KINMOND:** No, although most of the protocols are by convention, rather than written agreements. To the extent to which the Committee needs to know operational issues, procedural issues of that nature, we have no problem with outlining them.

**Ms MOSS:** Does the Committee want them?

**CHAIR:** We would like to look at them if we can, unless there is some objection around the table. Perhaps if they could be sent to us, we will circulate them to Committee members.

**Mr KERR:** Are there protocols for the Inspector?

**Mr KINMOND:** The Police Integrity Commission?

**Mr KERR:** Yes.

**Mr KINMOND:** Yes, we enter into agreements with the Police Integrity Commission concerning, for example, category one matters. That is something which we regularly review. I meet with the Assistant Commissioner on a quarterly basis, so practical issues that arise from time to time get dealt with in that way. In fact, I am meeting with the Assistant Police Integrity Commissioner tomorrow.

**Mr KERR:** Perhaps the Committee could be informed and updated on that.

**CHAIR:** Yes.

**The Hon. J. HATZISTERGOS:** I should like to ask a question about the use of capsicum spray. In your report you indicated that the police misused capsicum spray and you identified one particular occasion when it was used more as a means of punishing people, precipitant punishment, rather than for the purposes of protecting human life or body. You indicated you had serious concerns about the officer's account, the adequacy of the managerial action taken and the quality of the Service's investigations. Where is this matter currently at?

**Ms MOSS:** The reason we were concerned was probably because of a study of the Police Service that showed that police had used capsicum spray on about 25 per cent of the people in custody. It was more that rather than the three complaints that the Commissioner raised in some press report.

**CHAIR:** You would have thought capsicum spray might be used to get people into custody; it would not be used on them after they were in custody.

**Ms MOSS:** That is what we were concerned about.

**Mr KINMOND:** As we received a reasonably large number of complaints of this kind we decided that we needed to look at the matter thoroughly. We are going through the relevant COPS records—COPS is the police information system—to see what they tell us about the use of capsicum spray, particularly the broad understanding we have at the moment that it tends to be used a lot in custody situations. However, in fairness to the Service, one must say that custody may in fact include the actual act of arrest. It may be a problem with the misleading nature of the term "custody". It is early days in terms of knowing what we will be recommending in that area.

If you introduce a practice of this type it makes sense to know how it is being implemented on the ground. You would want to spell out to members what is best practice in the area—those circumstances where the spray has been used when it should not be used. Officers on the ground need to have a good understanding of the best practice because the

capsicum spray serves to protect not only the community but also the officers against potential assault charges.

**The Hon. J. HATZISTERGOS:** I am interested in this case because I am not quite sure of the circumstances in which the capsicum spray was used. Two drug users were injecting themselves and the capsicum spray was used to stop them from injecting drugs or something, was it?

**Mr KINMOND:** I did a site inspection; there was a distance of several metres between the alleged offenders and the officer and there was a wire fence separating them. Having done the inspection it seemed to me that all the officers needed to do was take a step back and the risk of being hit with anything from the syringe would have been zero. The difficulty in these circumstances is that it is hard to decide whether it is simply a lack of commonsense or whether it is a complete fabrication of the situation. The witness indicated that there was no real risk to the officers at all.

I attended the particular local area command. I told the local area commander that he may need to look at these officers a little more carefully, and he has taken steps to do so. He has indicated to me that there will be monitoring of these officers and also closer monitoring of the local area command. In some of these cases it is hard to know whether you are dealing with stupidity or whether somebody is fabricating evidence of what actually occurred.

**CHAIR:** Are any recommendations being considered to provide better accountability for the use of capsicum spray?

**Mr KINMOND:** That is one of the things we will be looking at in terms of our recommendation. For example, the Service says that local area commanders—and it is true—are required to report the use of the spray. The argument is that the spray is fairly good protection. Failure to report use of the spray is the fact that the spray leaves a mark on anyone who has been hit with it. The Service has also indicated that the Deputy Commissioner keeps a watching brief on the use of the spray as a result of advice that comes through to him. The only question as far as we are concerned is whether the Service has properly evaluated on a statewide level how the spray is being used from the best practice perspective.

**CHAIR:** How widespread do you think the problems you have identified are in relation to the Police Service seeking advice from the Director of Public Prosecutions [DPP] before laying charges?

**Ms MOSS:** The Police Service has finally worked out some protocols with the DPP, and we are happy that the service has done that. That was pursuant to one case that we were very unhappy about. It is a public case; it was a matter of a District Court judge. In the past we have found that when a matter involves one of its own, albeit with a tragic result, the Service has had a tendency not necessarily to refer the matter to the DPP. When there is a possibility of conflict we think it is probably better that the Service refer the matter to the DPP. The guidelines were not clear before.

It was not clear in the minds of the police as to what they should refer to the DPP and what they should not refer. We know that they have the discretion not to refer matters. At the end

of the day they are the people prosecuting most of the cases. What we are saying is that when cases are obviously complex or serious, or involve a conflict of interest, it is much better that the Service consult the DPP early on and seek its advice. At the end of the day with those sorts of serious matters they will probably end up being carried through by the DPP anyway.

**CHAIR:** What is the extent of the problem with the preparation of police statements, and has that resulted in any miscarriages of justice that you are aware of?

**Mr KINMOND:** Often in these cases you know that there is inaccurate information in the police statement. For example, we know that we have had identical statements from two different witnesses or identical statements from police officers. The difficulty that the courts face—and, indeed, the difficulty that the police and everyone in this situation face—is knowing whether there has been a substantial miscarriage of justice, so it is in everyone's interests for the Police Service to be thorough in terms of preparing statements.

It is important to recognise that the Commissioner has acknowledged this, and there is a current broad review of brief handling generally within the Service. In many of these cases it may simply be sloppiness; there may be no attempt to bring about a miscarriage of justice. However, in some cases if a police statement is not prepared properly a person who may well be guilty may be acquitted because the police have prejudiced their own case by the failure to properly present their statements. The difficulty for all of us in this situation is not knowing at the end of the day whether it is a question of incompetence or a question of impropriety. That is a difficulty that the courts face when problems with statements come to light.

**Ms MOSS:** Many of the cases we have dealt with are clear impropriety, when an officer has forged signatures, or collusion is obvious from the wording of the various police statements involved.

**Mr KINMOND:** In those circumstances if they rely on one another's statements to assist them in relation to preparation of statements, the courts have accepted that in certain circumstances that does not present a problem. However, if that has occurred they need to be upfront about that process because if they are not upfront that can not only prejudice the trial but also have significant implications in terms of their own integrity.

**CHAIR:** Is the Police Service doing anything about improving the standard of the preparation of briefs?

**Mr KINMOND:** I imagine that from the brief handling review there will be specific recommendations from the service on that issue.

**The Hon. JENNIFER GARDINER:** Does the need to present a special report to the Parliament on the policing of domestic violence mean that there were a fair number of serious complaints in relation to domestic violence?

**Mr KINMOND:** Each year we receive scores of complaints of this nature. Because we have received them year after year we decided that it was important for us to have a very good look at the area. Essentially, we are looking at the issue of the large amount of police

resources required for the policing of domestic violence. It is a question of whether the Service is well equipped to use those resources efficiently and well equipped to track performance across the State in the domestic violence area.

**Mrs GRUSOVIN:** I have a question about officers under stress and the level of support provided. It seems to me that it has taken a long time and there is a fair bit of toing-and-froing going on. One can read between the lines, and we are now at the end of 1999. Do you see it taking a lot longer before we get clarification? A formal recommendation has been made to the Commissioner. Is there a will to understand the importance of providing proper support to officers?

**Ms MOSS:** I think we have seen inroads in the area. What is of particular concern to us is whether the Service will still grapple with managers being able to get information about officers who need help and then have the ability to send those officers for help. Confidentiality has been the subject of debate within the Service and with the unions, and whether managers should have that power.

**Mrs GRUSOVIN:** Are we talking about whether it is compulsory for an officer see a councillor?

**Ms MOSS:** That, and getting information about an officer who is developing problems. There should be a system in place so that managers receive information. That is a problem that has not been addressed. The Service has moved on this issue since we have been involved. To give it credit, it has made some inroads in that regard by informing officers that there are welfare units to help them, by providing stress debriefing and notifying commanders. A lot of those things are being taken more seriously but the question of whether information about an officer who needs help will be compulsorily relayed back to the relevant managers may still be a problem.

**Mrs GRUSOVIN:** I am surprised that 60 per cent were offered support after a critical incident. That means 40 per cent were not. It is of concern that initially something was done but 72 per cent were not offered further assistance after some initial intervention. Initial intervention means just that. It normally requires a long process to get to the source of the problem and it surprised me that one-third of those surveyed were unaware of the Service's psychology and welfare units.

**Ms MOSS:** Yes, the Service is trying to do something about that. It is of concern that 18 per cent of those interviewed indicated a clinically significant reaction to the incident and only half received assistance. The logical conclusion from that is that many are not receiving the help that they should, which can mean big problems for the community, particularly if they are carrying guns.

**Mrs GRUSOVIN:** It is also a problem of resources, because police officers are resources, and if they are not looked after all that training is for nought. It is madness, in terms of proper management processes, to ignore this problem because those officers are valuable resources.

**Ms MOSS:** We certainly will be monitoring the response and I think the service is going to deal with the matter in the new year.

**Mr KINMOND:** Many measures were needed to take up the way it responds to critical incidents and to make sure these officers are followed up. The real sticking point relates to the question of a police manager saying to an officer, "I need to have you assessed." In those circumstances, if the police manager takes the initiative, the Service is then the client and the police manager is its representative and as a result they are entitled to know the results of the assessment. In those circumstances it is slightly more contentious, as opposed to a situation in which a manager says to an officer, "You may wish to get counselling." If the officer then takes that up, the officer is the client and the manager is not entitled to any information that might be of relevance to the officer's policing duties.

We are saying to the Service that in certain circumstances its managers will have to be the client because they are going to have to know, at least from an assessment point of view, certain information to enable them to make an assessment as to what kind of support will be needed for the officer to perform his or her job. They will need to know specific information as to the impact of a critical incident on officers as it relates to their policing duties. That is the sticking point with the association. There is goodwill but the association is worried about this being used as a weapon rather than a support. It is a delicate issue.

**Mr KERR:** Will something happen in the future about the monitoring process, and is there a time frame for it?

**Ms MOSS:** The Commissioner has indicated that he will get together with all the key stakeholders to look at this issue and he has undertaken to consider these recommendations seriously.

**Mr KERR:** When will that be done?

**Mr KINMOND:** In these circumstances we do not want to push something without hopefully having the support of the employees themselves. We will monitor this critical issue but unless it has the support of employees it can be self-defeating. It is important to have goodwill on the part of all the parties to reach an agreement.

**Mr KERR:** Have you dealt with the Police Association on the matter?

**Mr KINMOND:** Yes.

**Mr KERR:** What is the attitude of the Association?

**Mr KINMOND:** It has identified the issue and is supportive of our report but, on the other hand, it wants to make sure that these new procedures are not used as a weapon.

**Mrs GRUSOVIN:** That is a very valid concern in terms of past history.

**Ms MOSS:** The main concern is that it not be used against officers unnecessarily and inappropriately. It is a valid concern.

**Mrs GRUSOVIN:** How does one make officers understand that this is a support to help them? The difficulty is that the culture was so different in the past.

**Ms MOSS:** Yes, and there have been cases where quite clearly a person is not fit for duty and has to be pensioned out. One must be careful that the system is not abused by allowing someone to get rid of an officer for other reasons. We have to find the right mechanisms to ensure that does not happen. It will not be easy because the Commissioner must deal with the unions, which are particularly concerned about this.

**CHAIR:** I take it that the Commissioner has not accepted the recommendations of the Police Service committee yet?

**Ms MOSS:** I do not know for certain at this point but I would say not yet.

**CHAIR:** In relation to the loss of Commissioner's confidence, a meeting of key stakeholders early in 2000 was recommended. Is that likely to happen? Is it progressing?

**Mr KINMOND:** We understand that it is likely to happen. We understand that the project team set up to review the process is finalising its report and the Service will then be in a position to see the appropriateness of having the relevant stakeholders look at the practical issues.

**CHAIR:** Controlled operations are fairly important because they would otherwise be criminal actions if they had not been approved. The annual report shows that there were 181 applications to chief executive officers of various entities to go forward with controlled operations. No applications were rejected by chief executive officers and one application was resubmitted. That suggests little scrutiny by chief executive officers because statistically the chances of no applications being rejected are infinitesimal. Is that an uncharitable view of what has happened?

**Ms MOSS:** It is hard to gauge that because this legislation at best is an attempt at controlling this very important activity. The legislation could not stop a nefarious operation involving dishonest police officers. It may not be picked up if officers were totally dishonest and the chief executive officer was intent on going along with it. Having said that, on the assumption that basically that does not happen and that an honest chief executive officer is in place, the system attempts to monitor these activities in this manner. It is hard to see whether the chief executive officer has considered all of the necessary factors before ticking off an operation. Indeed, the legislation sets out every single factor that should be considered but it is difficult to judge whether those superficial notations indicate a greater degree of scrutiny.

**Mr ANDREWS:** It really is more the large amount of paperwork associated with getting a controlled operation going, and a lot of operations probably get scotched at a much lower level before they even get to the chief executive officer, so that the ones that actually get to the chief executive officers for approval are usually very solid. Certainly the ones I have looked at have involved substantial grounds for authorising the activity. I have not come across one that I thought was inappropriate.

**The Hon. J. HATZISTERGOS:** The Inspector of the Police Integrity Commission commented that there were significantly fewer controlled operations than initially anticipated. He raised the very matters you have just identified, such as the amount of paperwork and lack of flexibility.

**Ms MOSS:** Yes, that is the main criticism. It slows a lot of things down. The Police Service said it would normally want to carry out about 700 a year, and it is nowhere near that statistic.

**The Hon. J. HATZISTERGOS:** What do you say of the proposal that has been outlined in the Inspector's report that persons other than chief executive officers should be granted authority to approve controlled operations?

**Ms MOSS:** In the case of the Police Service that is sensible because it would be planning quite a number.

**The Hon. J. HATZISTERGOS:** It is interesting that the Commissioner of the Independent Commission Against Corruption has only had two controlled operations to approve yet he wants someone to handle them because he has too much work.

**Ms MOSS:** Yes, compared to the other agencies it is not a large number, but in the case of the Police Service it is sensible.

**The Hon. J. HATZISTERGOS:** Yes, I agree with the Police Service.

**Ms MOSS:** With respect to the others, it is probably not necessary for it to be done by anybody other than the chief executive officer.

**Mr ANDREWS:** I offer a slightly different view on that. I think the problem arises more often where one needs a variation in authority or where urgent circumstances arise. If only one person is nominated, that person may not be available. The Deputy Commissioner, Mr Jarratt, has approved 99 per cent of controlled operations of the Police Service, which invariably have involved him doing some at his home on most weekends, and they have tracked him down interstate. It has been quite an effort. One should also realise that some of these operations are quite difficult to run and all sorts of things can go wrong. In fact, a high percentage of them do not even eventuate because the opportunities do not arise. A fall-back position is needed in terms of accessibility and having someone to make those decisions. It is not as big a problem for the smaller agencies such as the Independent Commission Against Corruption, but there certainly would be circumstances in which it would be necessary to contact someone urgently.

**CHAIR:** If my cynicism about the high rate of approvals is well founded—and I have heard what Mr Andrews has said—would that not be a factor mitigating against going lower down the chain of command to get approvals because the further down the chain the less seriously a matter is taken?

**Mr ANDREWS:** Yes. The approving officers from all agencies have been extremely rigorous in the way they have approached this, from my observations.

**CHAIR:** Do you think there is any substance in the complaint that there is too much paperwork and that is a deterrent to people coming forward to make applications?

**Ms MOSS:** If Greg is right, I think maybe that paperwork is essential. If every single question needs to be considered seriously and if we are looking at the seriousness of these sorts of operations, perhaps it is necessary that these questions be asked and answered, despite

the fact that that might slow them down and irritate them because of the paperwork.

**CHAIR:** I think you have copies of the answers that the Commissioner and the Police Integrity Commission [PIC] gave to our questions on notice.

**Ms MOSS:** Yes.

**CHAIR:** Would you like to deal with some of the issues he raised in response to your report?

**Ms MOSS:** In the scheme of things, that is actually a minor matter. Since then we have communicated to Justice Urquhart that we understood what he was trying to say. It arose out of a confluence of misunderstandings. At the time, we were not notified of that particular matter and we had an interpretation with which he has since agreed, and that has now been basically sorted out. But at the time we were not notified. We were of the view that that had to be finalised and signed off as finalised and notified to us. That has been done. I suppose we should have reported in a way that indicated that it was an occurrence at that time. We were not notified at that time, but we have since sorted that out. We certainly said that we would clarify that in our next annual report. But as I said, in the scheme of things, we felt it was a minor technical breach.

**The Hon. J. HATZISTERGOS:** You have made a number of recommendations for changes in relation to protected disclosures. I am particularly interested in the change to section 19 (5), which is referred to on page 19. Can you elaborate on what you are trying to achieve?

**Mr WHEELER:** The current requirements for disclosure to an MP or to a journalist require that a person must have made substantially the same disclosure to a public authority and, in effect, it did not do anything or, if it did something, the person was not too keen on what it did. By and large, the circumstances in which a person can then go to an MP or a journalist are that nothing has been done within six months. To then get the protection of the Act, what a person has to be able to prove, if the matter ever went to a court and the person ever wanted to defend himself or herself, would be, first, that the person had reasonable grounds for believing that the disclosure is substantially true—which I think is quite reasonable—but the second one is that the disclosure must be substantially true. In essence, without any investigation by anybody who is capable of carrying out the investigation, the whistleblower has to be able to prove to the satisfaction of the court that the disclosure is true. It is not practical in most cases for a person to be able to do that when there has been no investigation by a competent body that can get access to the information in question.

**Ms MOSS:** It is too high a threshold.

**Mr WHEELER:** It is too high a threshold and that cuts down the possibility of making a disclosure to an MP or a journalist to almost nil if the person wants to be protected under the Act, unless they have photos in four different directions of somebody's hand in the till and a statutory declaration admitting that person did it, to take it to extremes.

**The Hon. J. HATZISTERGOS:** My second question relates to an investigation you carried out, which is referred to on page 137-138 of the report. I presume you received an anonymous complaint by a member of staff of the Independent Commission Against Corruption [ICAC] under a protected disclosure?

**Mr WHEELER:** Yes.

**The Hon. J. HATZISTERGOS:** It was a protected disclosure that, amongst other things, the person who was involved in the investigation of a matter before ICAC had developed a sexual relationship with the solicitor who was representing a potential target of an ICAC investigation. Your office became involved, and on page 138 this comment appears:

> We had serious concerns that at the time no formal written account of the incident, or action was taken, made or recorded in the official files. Notes were taken by the Commission's solicitor, but in our view this was wholly inadequate. The Commissioner had instructed a formal minute to be drawn up but due to operational pressures this had not been done.

I take it that that was the situation at the time you entered into your investigation of the matter?

**Ms MOSS:** Yes.

**The Hon. J. HATZISTERGOS:** At that stage there had been no notation made on the file of the officer's involvement and the potential threat that it posed to ICAC?

**Ms MOSS:** Correct.

**The Hon. J. HATZISTERGOS:** Over the page you voice criticism of the Commissioner's disciplinary action and state:

> We, however, found it very difficult to accept in any objective measure that it was adequate given the seriousness of the breach. The Commission must necessarily expect high standards of its staff in order to uphold its reputation and credibility.

Has that criticism being drawn to the attention of the Commission? If so, what mechanisms have been put in place by ICAC to ensure that the security of its operations is not jeopardised by similar instances in in future, and that adequate disciplinary action is taken?

**Ms MOSS:** We drew it to the Commissioner's attention and he made notations on the person's file and took action by speaking to the person and addressing the staff about the issue. As for particular actions that he would take to ensure that this would not breach security measures in the future, I am not too sure that that was made clear to us in the letter, from my recollection. I am not too sure what has been put in place since then.

**The Hon. J. HATZISTERGOS:** Are you satisfied that he accepts the seriousness of the situation now?

**Ms MOSS:** At the time we raised the issue with him, he did take it seriously and responded to our recommendations.

**Mr KERR:** You say he did take it seriously, and your criticism was that he did not take appropriate disciplinary action against the officer. Was disciplinary action taken against that officer?

**Ms MOSS:** The problem was that the matter was brought to our attention some time later and disciplinary action to our satisfaction was not taken at a much earlier date. We felt that

it would be unfair then to revisit the matter at such a later date when in fact at an earlier time he had been dealt with. After that, we felt that the best approach was that it should be noted in his file so that there would at least be a record of displeasure with respect to his actions on his file. But disciplinary action in a more serious form, such as dismissal or downgrading, would probably be unfair at that much later date. I understand that he had, after our intervention, been further counselled.

**Mr KERR:** Did the Commissioner fully accept criticism of him, or did he take issue with some elements of the criticism or put forward matters in mitigation?

**The Hon. J. HATZISTERGOS:** In fairness, the report stated that you felt that the Commissioner acted in good faith, taking into account the personal circumstances of the officer to be considered relevant in mitigating the conduct. I am not sure that that necessarily revokes the criticism that you voiced to him in the circumstances of the breach; but, nevertheless, that is what he thought was appropriate.

**Mr ANDREWS:** I think it is fair to say that the Commissioner, on the grounds that he put forward at that time as mitigating circumstances, thought he had made the right decision. When the Ombudsman did the investigation and expressed a very strong view that she believed it was inadequate, he then took some further action.

**CHAIR:** In your answers, you refer to the 90 agencies in which deficiencies were detected arising out of the audit of the internal reporting systems. You wrote to them again and 48 per cent failed to respond. What are you going to do to them?

**Ms MOSS:** We have actually taken on board your comments at our last meeting. We are warning them that we are going to name them next time.

**CHAIR:** Has that led to a more prompt response?

**Mr WHEELER:** We have not had a chance to contact each of them since. Some responses have dribbled in over time, but basically I think we need to have a concerted approach to a number of agencies, particularly, again, universities. If you want to take a bunch of organisations that have something in common and say they stand out, it is universities. Out of 10, there would be eight that would have an inadequate policy; two are quite adequate. Of the eight that are inadequate, two did not even reply. I have rung them, I have written to them, I have done everything, so we will certainly be focusing on universities in the coming year.

The problem is that they are to a large extent somewhat confused about their status. They do not really see themselves as State agencies. Because they are funded by the Commonwealth, they get a bit confused about just what is their status. When it is pointed out to them that they are in fact State agencies and they each have an MP on the board, as it were, it does not seem to sink in too well. In terms of protected disclosures in particular, we will be giving a fair bit of attention to trying to bring this home to them.

**Mrs GRUSOVIN:** Some of them are slow learners.

**CHAIR:** In terms of the policy for internal reporting, a lot of agencies seem to have adopted

a model policy rather than develop their own. One would have thought that it would be better if they developed one of their own and had ownership of it. Do they give any reasons for simply adopting the model policy?

**Mr WHEELER:** Very few initially adopted the model policy. A number made some attempt. We went back and pointed out some of the inadequacies of that attempt. After some consideration, in most cases they then adopted the model policy with modifications. Very few of them have adopted it with spelling mistakes and all. Most have actually gone through and read it and have made some changes to suit their own particular needs. A lot of them have modified it significantly to suit their particular demands and have built in all sorts of other things as well.

**The Hon. J. HATZISTERGOS:** Is the ICAC officer who was the subject of that investigation still working with ICAC so far as you are aware?

**Ms MOSS:** Yes, on my understanding, to my knowledge.

**Mr KERR:** You referred to the mystery customer. It strikes me that there may be an unfairness, simply in arbitrary comparison, in that some departments may be better resourced than others. A mystery customer may ring up, a large number of people may be away, some departments may not give email trading, and so forth. In such circumstances, do you give departments an opportunity to explain the situation that has occurred?

**Ms MOSS:** Yes, we do, after the report is prepared.

**Mr ANDREWS:** In each case, after we have done the audit we have provided a report to the agency asking them for feedback about it. I think one of the most important things that needs to be noted is that, as far as possible, we test the department's or agency's standards. We actually look for their statement saying, "We hope to be able to return correspondence within a certain period," and we then test against that. Where those standards do not exist, we use the general rule of thumb and simply report the findings.

In some cases, such as with the Department of Fair Trading where there was a significant problem with getting through to the department, when officers of the department gave us feedback they described some technical problems they were having with their system and so forth, so we certainly take those things into account. The whole purpose is basically to give feedback to the department saying that, "As far as possible, we are trying to be like your average citizen, and this is how the average citizen probably sees your service. What do you think about that? If it is not up to scratch, then hopefully you will do something about it." We have had a very positive response from the heads of each of the agencies we have done so far, because they see the value in getting that sort of feedback. Some of the agencies are now in fact adopting the practice themselves.

**Mr KERR:** Apart from the mystery customer, are there any other audit techniques? I understand that Germany has a fairly efficient public administration. One of the reasons for that is that they can take a file randomly, have a look at it, and see whether the case has been efficiently handled. Are there other management quarters you are looking at in terms of public administration?

**Ms MOSS:** We would not be looking at that technique for these projects, although we have used the technique in looking at agencies' compliance with freedom of information provisions; we have actually gone in and looked at the files. Indeed, the Auditor-General would use the technique on various projects. We have not used it on this project. It is more a matter of making out that you are a member of the public and looking at certain customer service issues that are not terribly in-depth. With regard to those other projects, we look at them with respect to freedom of information compliance.

**CHAIR:** The comment was made a moment ago that most of the agencies have responded well to the mystery customer exercise. I noticed a few days ago a fairly terse press release from the Department of Fair Trading. I gained the impression that the department was not particularly happy.

**Mr ANDREWS:** I have not seen that press release. However, certainly the formal letter that the chief executive officer sent to the Ombudsman afterwards was a useful exercise.

**Ms MOSS:** With fairness to Fair Trading, I think the press played up an aberration—which was probably a little unfair—which was that we had one call and it went on for about eight hours. Again, I suspect strongly that that was an aberration, and I think the press unfairly played it up.

**The Hon. JENNIFER GARDINER:** Is the report on the Kariong inquiry imminent?

**Ms MOSS:** It is imminent. We have to give procedural fairness to the particular people who have been investigated and named adversely in those reports. We are awaiting those responses, and the report will then be prepared.

**(The witnesses withdrew)**

**(Luncheon adjournment)**

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# APPENDIX

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

# MINUTES

**Meeting held 10.00am, Wednesday 3 November 1999,**
**National Party Room, Level 12, Parliament House**

MEMBERS PRESENT

| Legislative Assembly | Legislative Council |
|---|---|
| Mrs Grusovin (Vice-Chairperson) | Mr Breen |
| Mr Kerr | Ms Gardiner |
| Mr Lynch (Chairperson) | Mr Hatzistergos |

Apologies: Mr Smith

Also in attendance: Ms Helen Minnican, Ms Tanya Bosch, Ms Hilary Parker, Ms Julie King.

Ms Irene Moss, Ombudsman; Mr Christopher Charles Wheeler, Deputy Ombudsman; Mr Stephen John Kinmond, Assistant Ombudsman; Ms Anne Patricia Barwick, Assistant Ombudsman; Mr Gregory Robert Andrews, Assistant Ombudsman, affirmed and acknowledged receipt of summonses.

The Ombudsman tabled her answers to the questions on notice.

The Committee tabled the answers to the questions on notice provided by the Police Integrity Commission.

The Ombudsman gave an opening address to the Committee.

The Chairman commenced questioning of witnesses, followed by other members of the Committee.

The Chairman thanked the witnesses for attending and the witnesses withdrew. The public hearing concluded at 12.20pm and the Committee adjourned to reconvene for the public hearing with the Inspector at 1.00pm.

Parliament House, Macquarie Street, Sydney 2000
Telephone: (02) 9230 2737 Facsimile: (02) 9230 3309

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

# MINUTES

**Meeting held 11.00am, Thursday 25 November 1999,**
**Room 1043, Parliament House**

MEMBERS PRESENT

| Legislative Assembly | Legislative Council |
|---|---|
| Mrs Grusovin (Vice-Chairperson) | Ms Gardiner |
| Mr Kerr | Mr Hatzistergos |
| Mr Lynch (Chairperson) | |
| Mr Smith | |

Apologies: Mr Breen

Also in attendance: Ms Helen Minnican, Ms Tanya Bosch, Ms Hilary Parker.

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5. *Draft General Meeting Reports*

The Committee considered the Draft Reports on the General Meetings with the Ombudsman, PIC Commissioner and PIC Inspector. It was confirmed that the Inspector's letter of 4 November 1999 concerning Question on Notice 5.3 to the PIC would be included in relevant sections of the PIC 4th General Meeting Report.

The Committee discussed the Inspector's continued lack of access to TI material and agreed to include a comment expressing concern on this issue in the PIC Inspector 3rd General Meeting Report.

Resolved on the motion of Mrs Grusovin, seconded Mr Smith that:

a. the Chairman, Director and Committee Clerk be permitted to correct stylistic, typographical and grammatical errors.

b. the draft reports be the reports of the Committee and that they be signed by the Chairman and presented to the House, together with the minutes of evidence.