INQUIRY UPON THE ROLE OF THE OFFICE OF THE OMBUDSMAN IN INVESTIGATING COMPLAINTS AGAINST POLICE

Parliament of New South Wales

Report of the Joint Committee on the Office of the Ombudsman

April 1992

PARLIAMENT OF NEW SOUTH WALES

REPORT OF THE JOINT COMMITTEE
ON THE
OFFICE OF THE OMBUDSMAN

INQUIRY UPON THE ROLE OF THE OFFICE OF THE OMBUDSMAN IN INVESTIGATING COMPLAINTS AGAINST POLICE

TOGETHER WITH MINUTES OF PROCEEDINGS

APRIL 1992

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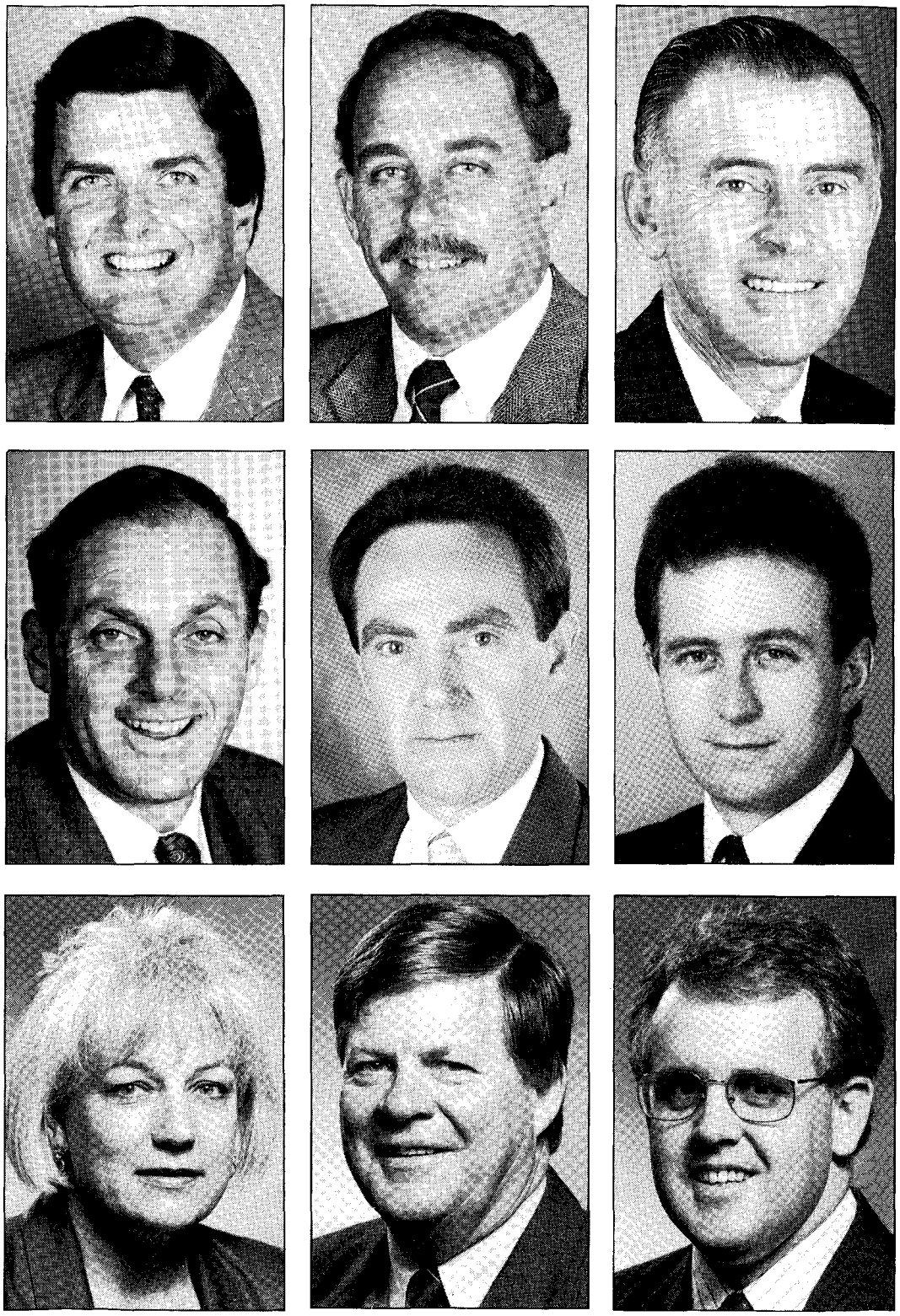

Committee on the Office of the Ombudsman (Left to Right)
Andrew Tink M.P. (Chairman), John Turner M.P. (Vice-Chairman), John Hatton M.P., Malcolm Kerr M.P., Kevin Moss M.P., Carl Scully M.P., The Hon. Dr. Meredith Burgmann M.L.C., The Hon. Lloyd Coleman M.L.C., The Hon. Stephen Mutch M.L.C.

THE PARLIAMENTARY JOINT COMMITTEE

Following a request by the Ombudsman in his Annual Report to Parliament for the year ended 30th June, 1990, the Committee was established in 1991 by Act of Parliament and subsequent resolutions of each House.

MEMBERS OF THE COMMITTEE

LEGISLATIVE ASSEMBLY

Mr A.A Tink MP	(Chairman)
Mr J.H Turner MP	(Vice-Chairman)
Mr J.E Hatton MP	
Mr M.J Kerr MP	
Mr K.J Moss MP	
Mr P.C Scully MP	

LEGISLATIVE COUNCIL

The Hon Dr M.A Burgmann MLC
The Hon L. Coleman MLC
The Hon S. Mutch MLC

SECRETARIAT

Ms H. Minnican BA (Hons)	Project Officer
Ms P. Burgess	Assistant Committee Officer
Ms R. Miller	Clerk to the Committee

FUNCTIONS AND POWERS

The Committee on the Office of the Ombudsman is constituted under Part 4A of the Ombudsman Act 1974. The functions of the Committee, which are set out in section 31B (1), are 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.

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.

TERMS OF REFERENCE

"To review and report to Parliament upon the role of the Office of the Ombudsman in investigating complaints against Police."

"The object of any system concerning police complaints must be to provide oversight and thereby to maintain public confidence in satisfactory determination of complaints. However, it must also be fair to ensure that the morale of a competent Police Service is not adversely affected. A public complaints procedure that favours the interest of a complainant at the expense of a member of the force is no more likely to provide satisfaction than a procedure that does the reverse. The interests of the general public and the service are involved, and they must be accorded due consideration. It is with an awareness of the need to balance the interests in an equitable manner that the complaint authority should undertake its investigation and formulate its recommendations." **(Mr David Landa, NSW Ombudsman, 4th November, 1991.)**

"The police are in the vanguard of the administration of justice in our society. The honour and discipline of the force are integral to its effectiveness and must be maintained. Complaints do occur and are likely to increase with growing knowledge of and sensitivity to rights. Some will be vexatious. Others will be unjust. Still others will be justified and will require action. The machinery for action must be fair and just to the police and public alike. For the appearance of justice and for the protection of the standing of the police the procedure cannot be left wholly to the police themselves. As much as possible should be." **(Law Reform Commission - Report No. 9, Complaints Against Police - Supplementary Report, Canberra 1978.)**

CHAIRMAN'S FOREWORD

Striking the right public interest balance between Police Officers and complainants is always a very difficult exercise, especially in New South Wales where a Police Service of 13,203, one of the largest in the world, serves a population of 5.9 million.[1] This is because their relationship is not only frequently controversial but also dynamic. Hence, the balance, wherever set, will always shift further.

This Report is an attempt to strike the right balance in New South Wales where everyone agrees that the present procedures are cumbersome, time consuming and wasteful of resources notwithstanding the best efforts of the Ombudsman and the Police Commissioner to make the procedures work.

There is broad agreement that significant amendments are required to the Police Regulation (Allegations of Misconduct) Act to create the right statutory framework for appropriate procedures to operate in.

There is also broad agreement that, subject to appropriate safeguards, there should be a greater emphasis on conciliation of minor matters. As a check and balance, it is proposed that the Ombudsman's powers be strengthened in a number of important areas.

It is anticipated that this "rejigging" of the system will allow more resources to be focussed on the special needs of minority group complainants and that the proposed changes will assist to break down the negative aspects of entrenched Police Culture.

Following the formal hearings, my draft report was circulated to the Police Commissioner and the Ombudsman for comment. An "in camera" Round Table Conference was then organised to try to reach agreement on the remaining issues in dispute.

I wish to acknowledge the involvement of the Ombudsman, Mr David Landa, the Assistant Ombudsman (Police Complaints), Mr Kieran Pehm, the Police Commissioner, Mr Tony Lauer, and the Assistant Commissioner (Professional Responsibility), Mr Col Cole, in the Round Table Conference which I understand is a first for a Parliamentary Committee in New South Wales.

I particularly appreciate the very constructive cooperation of all involved in the Round Table Conference and their willingness to seek mutually acceptable solutions to many very difficult problems in this area. I would like to thank witnesses who appeared at the formal hearings and all those who took the trouble to make written submissions to the Inquiry.

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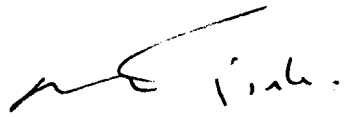
1 These statistics were valid as at 30/6/91.

I also wish to thank my Committee members who approached a difficult task on a bi-partisan basis with great energy and dedication. It is a credit to all concerned that, on such a difficult issue, the Committee Report is unanimous.

Last but by no means least, I would like to thank the Committee Project Officer, Ms Helen Minnican, Assistant Committee Officer, Ms Peita Burgess, Committee Clerk, Ms Ronda Miller and Hansard staff for their very professional assistance and patience.



A.A. Tink, MP
Chairman

EXECUTIVE SUMMARY

This Report contains proposals for the refinement and adjustment of the New South Wales police complaints system and is based on evidence given to the Committee during five days of hearings. It draws heavily on the views of the Office of the Ombudsman (the Ombudsman) and the Police Service. These organisations share the major responsibility for administering the Police Regulation (Allegations of Misconduct) Act 1978 (PRAM Act) and the Report includes many proposals agreed upon by both parties. The Report also incorporates opinions expressed by other interested parties including academics, representatives of civil rights interest groups, minority groups and individuals with direct experience of the police complaints process.

This is the Committee's first Report and the Ombudsman's role in investigating complaints against police was chosen in response to the Ombudsman's repeated concerns that the police complaints system is cumbersome, time consuming and wasteful of resources. Given that 55% of the Ombudsman's workload involves police complaints, the Committee believes that improvements in this area will result in significant improvements in the use of administrative and investigative resources in the Ombudsman's Office and the Police Service.

The Report aims to consolidate improvements already achieved through the efforts of both organisations in streamlining their internal processing of complaints. These improvements derive from both joint and separate management and educational initiatives undertaken by the police and the Ombudsman, such as the computerised reporting of complaints and regular working parties on specific and general issues.

The Committee was particularly concerned that the rate of conciliation of complaints has not increased since the Report of the Select Committee on the PRAM Amendment Bill 1988/89 (the Bignold Report), which noted that the conciliation provisions of the Act were underutilised. The level of conciliation in New South Wales has generally remained static at 6% since then although there is some very recent evidence of a rise to 10% since the commencement of this Inquiry. In contrast, other jurisdictions indicate that a level of 25% is achievable and should be attempted.

The Bignold Committee recommended that education and management measures should be taken to improve the conciliation rate. Three years later, it is apparent to the present Committee that a great deal of scope still exists for the introduction of such measures. To date, the Police Service's main initiative has been to issue a directive on the 26 August, 1991 in the Police Service Weekly advising members of the service that conciliation should be attempted in the case of complaints of a minor nature. Both the Ombudsman's Office and the Police Service now agree that the Ombudsman has a constructive role to play in the provision of further education and training in conciliation.

In evidence, the Ombudsman said that the existing system was becoming unworkable and that his office could not see through the paper to deal with the complaints, especially the

more serious ones. In these circumstances, it was generally agreed that increased conciliation of minor complaints was an appropriate way of freeing up scarce resources to more effectively deal with serious complaints. However, a system making greater use of conciliation has to incorporate appropriate checks and balances to ensure it will work in the public interest.

The Committee's first task was to examine existing legislation and procedures which are dealt with in chapter 2.

Subsequent chapters particularise evidence obtained on the deficiencies in the present system, proposals for increasing the use of informal conciliation of complaints and the benefits to be gained from the proposals. The Ombudsman's Office, the Police Service and most other witnesses believe that the most practical course is to delegate responsibility for conciliating minor complaints to the police, whilst ensuring that the Ombudsman's capacity to independently monitor and review this process is strengthened. Although the PRAM Act currently provides for conciliation, the provisions are plainly not working and require attention and amendment.

The Ombudsman's monitoring role is centred on a proposed power to audit and spot check matters conciliated by the police. As a further check and balance, the Ombudsman's powers to conduct his own investigations and seek information are proposed to be significantly strengthened.

As an additional safeguard, it is proposed that conciliation be limited to those classes and kinds of matters which the Ombudsman and Police Commissioner agree from time to time should be conciliated, thus allowing controls on and incentives for conciliation.

It is anticipated that this package of proposals will allow for the speedy and effective resolution of many more complaints. This will, in turn, free-up the Ombudsman's scarce resources to provide greater and more focused assistance to those complainants who most need it.

Finally, the system should ensure that those who do not wish to have their matters conciliated are able to approach the Ombudsman directly from the outset.

The recommendations made by the Committee consist of a series of "checks and balances" and accordingly, should be considered in their entirety. By balancing the delegation of conciliating certain matters to the Police Service with a corresponding increase in the Ombudsman's ability to monitor police complaints and conduct his own investigations in the public interest, the Committee believes that it has formulated a set of checks and balances which may result in a more cost effective and efficient complaints system.

The report highlights those measures agreed to by the Commissioner and the Ombudsman as essential safeguards in any amended scheme. Most of the legislative amendments and administrative measures recommended in the following pages were accepted by the major parties involved in the Inquiry as reasonable measures to accomplish these goals. The

proposals for enhancing the Ombudsman's powers would confer upon him powers comparable to the Ombudsmen and police complaints authorities in other Australian and overseas jurisdictions, including New Zealand.

The recommendations on the following pages, whilst quite detailed, are not designed or intended to be precisely followed by Parliamentary Counsel in drawing up legislation. They are designed rather to provide the broad thrust of desirable amendments to the PRAM Act the precise particulars of which would be worked out by representatives of the Ombudsman's Office and Police Service assuming the broad thrust of this Report is acceptable.

With respect to this Inquiry generally, constructive cooperation between the Ombudsman's Office and the Police Service has been a highlight of this Inquiry and a credit to all concerned.

RECOMMENDATIONS

The Committee recommends that:

1. The conciliation of complaints against police be encouraged to ensure the most effective use of scarce resources in the areas of greatest need.

2. The Police Regulation (Allegations of Misconduct) Act (PRAM Act) be amended to ensure that conciliation is considered as an integral step in the processing of every complaint pursuant to the procedures set out in Part 2 of the Act.

3. The definition of matters which are capable of being conciliated remain as defined in Part 3 of the PRAM Act.

4. Within the Part 3 definition, a flexible class and kind mechanism of the type now found in Section 19 of the PRAM Act, providing for agreement from time to time between the Ombudsman and the Police Commissioner about classes of matters which can be conciliated, be added with a view to allowing the conciliation of all matters so agreed between a civilian complainant and police.

5. Such conciliations be effected with the assistance of an independent police conciliator who would be a Senior NCO or a Patrol Commander within the Patrol.

6. At the time of attempting any such conciliation the police officer conciliating be required to notify the complainant that the complainant is not obliged to submit to the conciliation process and can elect to have his matter referred direct to the Ombudsman.

7(a). In relation to any matters proposed to be conciliated under the proposed scheme the Ombudsman should be notified of each such complaint at the outset.

(b). Full records of all conciliations be kept in the police station for three years for auditing purposes.

(c). There should be severe penalties imposed on anyone who deliberately tampers with or alters audit records especially in anticipation of or in conjunction with an audit.

(d). Evidence of a statement made by a police officer or an answer given by a police officer to a question asked of the police officer in the course of an attempt to resolve a complaint by conciliation should not be admissible against the police officer except in disciplinary proceedings forming part of the proposed conciliation package in a particular case.

8. The Ombudsman have power to conduct random audits of conciliation records by attending by himself or by his officers at police stations to examine records and by otherwise calling up and making contact with any parties to conciliation or third party witnesses to satisfy himself that procedures are being properly carried out and proper records are being kept.

9(a). In framing the Ombudsman's audit powers due regard be had to the auditing powers of the Australian Tax Office currently in force pursuant to the provisions of the Income Tax Assessment Act.

(b). In relation to complaints which are referred for conciliation within the Police Service, the Ombudsman have the power to interview people other than complainants as part of his auditing function.

10. A substantial education program be introduced for those police officers who are nominated as conciliators involving not only the issuing of written guidelines but also lectures, practical training and guidance in the use of the guidelines by reference to the Ombudsman's Office and incorporating such training at the Police Academy.

11. Recognising the merit of secondment to the Ombudsman's Office, the Committee requests the Police Board to advise how that merit could be recognised within the police promotion system.

12. The conciliation option currently available under Part 3 be maintained in the event that the Ombudsman decides that a matter which a complainant does not wish to have conciliated should be conciliated through the offices of an independent conciliator from the Ombudsman's Office or elsewhere and where, in the first instance, some compulsion is required to bring the parties together.

13(a). Section 35(A) of the PRAM Act be amended to include only records of those police complaints which are found to be sustained or which are unfinalised as at the time of preparation of a promotion report.

(b). Other records be kept for statistical and management purposes but not included on promotion records.

14(a). Records of complaints should contain sufficient particulars to enable the Ombudsman to conduct an effective audit, including copies of the complaint document, details of the conciliation and the report by the police officer responsible for dealing with the complaint.

(b). The Office of the Ombudsman and the Police Service should consult on the most appropriate records system for producing informative data on conciliations and complaints, for example, statistics on the numbers and types of complaints received, percentage of conciliations successfully resolved in each district and trends

in complaints within each district.

(c). The Commissioner present to Parliament such figures and statistics on conciliation as part of his annual report to Parliament.

15. A new disciplinary procedure of admonishment be introduced to provide more flexibility in the options available for disciplining police officers.

16. The PRAM Act be amended to allow the Ombudsman a discretion, having regard to the public interest to conduct direct investigations into complaints.

17. The Committee notes that Section 35B of the Ombudsman Act would give the Commissioner power to apply to the Supreme Court if he feels the Ombudsman is acting outside his jurisdiction.

18. Section 20 of the PRAM Act be amended to permit the Ombudsman to discontinue investigations when he considers it desirable to do so in the public interest.

19. The PRAM Act be amended to permit the Ombudsman when he agrees with a sustained determination and consequent action by police to take no further action other than to advise the interested parties of his decision.

20(a). Section 52 of the PRAM Act be amended to require the production by the police of wider information including documents and records of interview for the purpose of determining whether a complaint should be formally investigated.

(b). Section 26(1) of the PRAM Act operate in relation to the production of any such documents or records.

21(a). Section 52 of the PRAM Act be amended to empower the Ombudsman to telephone individual police officers in simple matters in order to obtain brief background information which would assist in determining whether a complaint should be formally investigated.

(b). Simple matters would be defined as any complaints which on the face of them were unlikely to be investigated where a brief explanation of the Police conduct would decide the matter.

22. In relation to matters where the Ombudsman is using his powers to investigate matters directly in the public interest, his Office must be able to obtain information from civilians other than the complainant.

23(a). In order for the Ombudsman to determine pursuant to Section 51 of the PRAM Act whether or not a complaint should be formally investigated the Ombudsman should have the power to talk to people other than the complainant (with the concurrence of the Police Commissioner).

(b). Statements made to and information gathered by the Ombudsman under this provision should not form part of the evidence in any subsequent formal investigation.

24. Section 24 of the PRAM Act be amended to alter the existing time limit for the completion of investigations of complaints dealt with at patrol command level from 180 days to 90 days.

25. The Ombudsman should be able on a discretionary basis, for appropriate cases in the public interest, to monitor the progress of police internal investigations by being empowered to:

i) be present as an observer during selected internal investigations; and

ii) consult with police investigators during the course of an investigation.

26(a). Sexual harassment matters should not in all cases continue to be categorised as being of a class or kind that should be dealt with solely by Internal Affairs.

(b). Where appropriate an attempt should be made to conciliate such complaints in the first instance and, if necessary, disciplinary proceedings should follow.

(c). If the behaviour subject to complaint is indicative of a more systemic mode of conduct within the Police Service measures should be taken, with the advice or assistance of an appropriate independent body such as the Anti-Discrimination Board, to remedy such behaviour.

27(a). The Coroner is the appropriate person to investigate and make findings into the cause of death of any person including persons who die in police custody.

(b). The Ombudsman is the appropriate person to investigate allegations of misconduct against police arising incidentally such as, for example, allegations of misconduct about the way in which police seconded to the Coroner's office have carried out an investigation.

(c). The PRAM Act, Ombudsman Act and the Coroner's Act as presently drafted require no amendments to clarify the respective powers of the Ombudsman and the Coroner.

28. Complaints regarding off duty conduct of police officers should continue to be notified to the Ombudsman and dealt with in the same manner as any other allegation of misconduct provided that the Ombudsman shall take no action where the off duty conduct bears no relationship to an Officer's status as a member of the Police Service.

29. The Ombudsman and the Commissioner arrive at a "class or kind" agreement in relation to those internal complaints that they agree should be treated as management issues and, therefore, a Police responsibility and those types of complaints which should be notified to the Ombudsman and investigated.

30. On the available evidence, no change is recommended to the wording of Section 26(1) of the PRAM Act.

31. A review by the Committee of the impact of any changes to the existing police complaints system should be undertaken after an appropriate period of time, estimated at twelve months.

FINDINGS:

1. That the significant increase in the level of police complaints in recent years is due to a number of factors, chief amongst which are the increase in public awareness of the police complaints system arising from a couple of recent highly publicised incidents in the police complaints area and the delayed flow on effect of Mr Justice Lee's decision requiring all internal police complaints to be notified.

2. Police Officers should not gain any private advantage by virtue of their job in off duty situations; nor should they be at any disadvantage.

INTRODUCTION

1.1 CURRENT PROCEDURES - "CUMBERSOME AND TIME CONSUMING"

The Committee set the terms of reference for this Inquiry on the basis of the Ombudsman's Report to Parliament entitled "The Effective Functioning of the Office of the Ombudsman" tabled on 2 July 1991 after noting his repeated criticism that the procedures for dealing with police complaints under the Police Regulation (Allegations of Misconduct) Act 1978 (PRAM Act) are both "cumbersome and time consuming".

In his report, the Ombudsman stated that extra resources had to be allocated to handling Police complaints, creating a lack of resources to deal with complaints under the Ombudsman Act. In this context, the Committee gave particular weight to the fact that police complaints accounted for 55% of all the Ombudsman's work and that the number of these complaints had increased by 34.4% during the 1990-91 financial year. Accordingly, it seemed to the Committee that a review of this area should be embarked on forthwith.

The Committee was particularly interested in issues such as the current division of responsibility under the PRAM Act for review and conciliation, existing procedures for dealing with complaints and the level of extra resources required to deal with Police complaints. These issues were reconsidered by the Committee when the Ombudsman presented his "Report on the Role of the Ombudsman in the Management of Complaints about Police", dated 18 July, 1991.

In relation to the procedures under the PRAM Act for dealing with complaints against the police, the Committee was mindful that the Legislative Council Select Committee on the Police Regulation (Allegations of Misconduct) Amendment Bill 1988 (the Bignold Inquiry) had concluded in its final report that the existing conciliation procedures under the Act were not fully utilised. The Bignold Inquiry recommended that all Police should be advised that, where possible, complaints should be conciliated in the first instance and that the Commissioner of Police should consider training patrol commanders in conciliation procedures. It also requested that the Internal Affairs Branch and the Ombudsman improve current procedures for complaint handling to eliminate unnecessary delays and that the Commissioner instruct the Police Administration to encourage secondment of Police Officers to the Ombudsman's Office.

The Ombudsman restated his concern over the lack of progress in developing the use of conciliation when he appeared before the Committee to give evidence. He said:

> "It started three years ago. It was implicit in the Bignold Inquiry. It was not

implicit on the Ombudsman's Office to do anything. It is implicit on the Police Department. We have been pushing the issue and I do not have any doubt that the Commissioner and Mr Cole share my views entirely, but what I am doubting is that the machinery is currently available to put it into practice. . . This is the problem that they confront and if we are talking about a short-term fix, I am concerned that something more than these good intentions and these directions needs to be considered, because I think a mechanism that has not been discussed may be necessary."

The Ombudsman's written submission arguing for changes to the PRAM Act was reinforced by his oral evidence that:

> **MR LANDA:**"It certainly needs more than another recommendation. That is obvious. The Bignold Inquiry recommendation was very strong but did not achieve anything."

Discussing the task before the Committee, Mr Landa remarked:

> **MR LANDA:**"I really think the Committee, whatever it does - if it simply leaves it where Bignold did, which was basically to say that you must conciliate more and leave[s] it there - nothing will change. It might go to 7 per cent or 8 per cent with a rush of enthusiasm post-committee or post-the findings but it really needs more."

The potential for agreement between the Office of the Ombudsman and the Police Service on further improvements to the current system was confirmed by the Commissioner and the Assistant Commissioner in their opening remarks to the Committee. The following discussion with the Committee's Chairman indicated that a significant shift had occurred since the Bignold Inquiry in the Police Service's position on issues such as conciliation:

> **MR TINK:** "Am I right in understanding that that is a substantial change from the proposal that was in the 1988 Bill before the Parliament?
>
> **MR COLE:** Yes, there is a substantial change. The way it was being placed at that stage was that minor matters be returned completely to the Commissioner without any review or oversight. We do not seek that. We believe that the review and oversight should still be there in all complaints.
>
> **MR TINK:** Would you be proposing to ensure continued oversight, first, by allowing the Ombudsman in effect a random audit power in relation to how the less serious matters are being dealt with?
>
> **MR LAUER:** Yes, they would continue to be the subject of notification to him."

The Committee's Report endeavours to maximise this potential for improving the procedures for handling complaints against police and clarify those sections of the Act

which both the Office of the Ombudsman and the Police Service agree warrant amendment or further examination. The level of constructive cooperation between the Ombudsman and the Police Commissioner has been outstanding and is a credit to all concerned.

1.2 ANNOUNCEMENT OF INQUIRY AND CALLING OF SUBMISSIONS

On 16 July, 1991 the Chairman of the Committee, Mr Andrew Tink MP, announced the terms of reference for the Committee's first inquiry to be:

> "To review and report to Parliament upon
> the role of the Office of the Ombudsman
> in investigating complaints against Police."

Advertisements were placed in the major metropolitan newspapers on 17 July providing notification of the inquiry and calling for submissions. In addition, letters were sent to the Office of the Ombudsman, the Police Service and other relevant bodies inviting submissions by 6 September, 1991.

Twenty four submissions were received by the closing date and the Committee resolved to hold public hearings on 4, 8, 10 October and 4 November 1991. The latter date was reserved for Mr Landa to respond to the evidence previously given to the Committee, discuss the difficulties involved in exercising his jurisdiction under the PRAM Act and present his proposals to overcome these problems. Following a request from the Ombudsman, the Committee distributed copies of his relevant reports to Parliament to all persons who had made submissions in relation to the Inquiry.

Selection of Witnesses

The submissions received were circulated to all members of the Committee and examined at Committee meetings. It was noted that several submissions concerned issues outside the terms of reference of the inquiry or outside the Committee's jurisdiction. It was agreed that the persons responsible for these submissions should not be called upon to give evidence before the Committee.

Several submissions dealt with the particulars of specific complaints made by the authors against members of the Police Service. Although the Committee is not authorised to review determinations, findings or decisions by the Ombudsman in relation to any type of complaint, these submissions did contain comments on the handling of complaints against police which, if developed further, would prove useful to the Committee's inquiries. The authors of these submissions were invited to provide a further submission pertaining directly to the terms of reference and detailing ways in which their particular complaints could have been better handled.

In order to promote a comprehensive and instructive discussion of the issues involved the

Committee sought the permission of those persons from whom it intended to take evidence to distribute their submissions on a confidential basis to other witnesses.

1.3 PUBLIC HEARINGS

The Committee subsequently interviewed the following witnesses:

Friday, 4 October, 1991

Mr A Lauer	Commissioner, NSW Police Service
Mr C Cole	Assistant Commissioner, Office of Professional Responsibility, NSW Police Service
Mr T Myers	Director, Office of Professional Responsibility, NSW Police Service
Mr D Wilson	Inspector General, Police Board of NSW
Judge Thorley	Chairman, Police Board of NSW

Tuesday, 8 October, 1991

Mr K Waller	NSW State Coroner
Dr B Perry	Deputy Ombudsman (Police Complaints), Victoria
Mr T Day	President, Police Association of NSW
Mr G Chilvers	Legal Secretary, Police Association of NSW
Mr G Green	Legal Secretary, Police Association of NSW
Mr C Paton	Executive Officer, Aboriginal Legal Service
Mr L Munro	Director, Aboriginal Legal Service

Thursday, 10 October, 1991

Mr W Atkinson	Secretary, Commissioned Police Officers' Association
Mr C Standaloft	Inspector of Police, Jnr. Vice President, Commissioned Police Officers' Association
Mr W Stanton	Inspector of Police, President, Commissioned Police Officers' Association
Mr T Anderson	Research student
Sir M Byers QC	Former Chairman of Police Board of NSW
Mr D Brezniak	Chairman, Criminal Law Committee, Law Society of NSW

Friday, 1 November, 1991

Dr G Tillet	Director, Centre for Conflict Resolution, Macquarie University
Mr T Myers	Director, Office of Professional Responsibility, NSW Police Service
Mr F McGoldrick	Chief Inspector of Police, Police Internal Affairs Branch, NSW Police Service
Mr M Mulhall	Manager, Internal Affairs Branch, NSW Police Service
Mr P Lynch	Journalist
Mr C Cunneen	Lecturer (Criminology) Sydney University Law School
Mr L Ainsworth	Manufacturer
Mr E Azzopardi	Pensioner (interviewed again on 2 December, 1991)

The Ombudsman was kept informed of the evidence given during the public hearings prior to his appearance before the Committee and where possible, responses were sought from witnesses to particular issues which arose during the course of the inquiry. Mr Landa and Mr K. Pehm, Assistant Ombudsman (Police), gave evidence to the Committee on 4 November, 1991.

In addition to the evidence taken at the public hearings, the Committee also considered a number of submissions from the following individuals:

Mr G Reading	
Ms E Cox	NSW Council for Civil Liberties Inc. (Unable to attend)
Mr B Chapman	Human Rights Australia (Unable to attend)
Mr M G Wilson	
Ms J May	
Mr S Pilley	
Ms N Rue	
Mr J Hague	
Mr D Marsden-Ballard	

1.4 PREPARATION OF THE REPORT

After the final hearings in November transcripts of evidence were circulated for comment to allow witnesses to further develop arguments they had made in their submissions and respond to the views expressed by other witnesses. As a result further written submissions were received, the last of which was delivered to the Committee Secretariat in February, 1992.

The exchange of supplementary written submissions between the Police Service and the Ombudsman's Office resulted in a further narrowing of the issues in dispute between the Ombudsman and the Police Commissioner and a growing consensus about what changes to the complaints system were desirable.

A confidential draft report was then prepared by the Committee Chairman and circulated to the Ombudsman and Police Commissioner for comment.

On 18th March, 1992, the Ombudsman, Mr K. Pehm Assistant Ombudsman (Police), the Police Commissioner and Mr C. Cole Assistant Police Commissioner (Professional Responsibility) met the Committee for an "in camera" Round Table Conference at Parliament House to discuss the Chairman's draft Report as a result of which some significant changes were proposed.

Following the Round Table Conference, further responses were circulated resulting in general agreement on the recommendations contained in this Report. The achievement of this balance resulted from considerable "give and take" all round and is a credit to the dedication and commonsense of all involved.

THE CURRENT POLICE COMPLAINTS SYSTEM
LEGISLATION AND PRACTICE

As stated in its explanatory note, the Police Regulation (Allegations of Misconduct) Act 1978 "confer(s) and imposes(s) on the Ombudsman and the Commissioner of Police certain powers, authorities, duties and functions with respect to the investigation of, and adjudication upon, allegations of misconduct made against members of the Police Force and constitutes a Police Tribunal of New South Wales." The following description of the police complaints system draws on statutory provisions and information provided in the Ombudsman's submission to the Committee and in evidence.

2.1 NOTIFICATION

Under the provisions of the Act, a written complaint may be made to either the Police Service or the Office of the Ombudsman. Any police officer who receives a complaint, must notify the Internal Affairs Branch of the particulars and supply the Commissioner with a copy of the complaint document. The Commissioner, in turn, notifies the Ombudsman of the particulars of the complaint (sections 8 & 9). Similarly, the Ombudsman is required to notify the Police Commissioner of the details of a complaint made to his Office. Section 12 requires the Ombudsman to establish and maintain a register of the complaints which he receives or is given notice of by the Police Service.

2.2 CONCILIATION

The conciliation provisions of the Act provide that where the Ombudsman or a police officer "is satisfied that, without an investigation under section 4, he may be able to deal with a complaint in a manner acceptable to the complainant" he may proceed to do so (section 14(1)). A police officer considering conciliation of a complaint, must inform the Ombudsman and Internal Affairs Branch of his efforts. Likewise, the Ombudsman is required to inform the Commissioner of any occasion upon which he deals with a complaint under this Part of the Act.

Where an attempt to deal with a complaint by conciliation fails, the complaint is dealt with as if this Part of the Act had not been enacted. Conciliation is not compulsory and cannot be applied to a complaint concerning an indictable offence, a complaint being investigated by the Commissioner under Part 4, or when the complainant is unidentified (section 13). In his evidence to the Committee, the Assistant Ombudsman explained that, if conciliation breaks down, there is no right to have an investigation. At present, he estimated that complaints which failed to be conciliated in nine out of ten cases were not investigated after re-assessment. The Ombudsman may make recommendations to the

Commissioner or a complainant, or both "as he thinks fit" under this part of the Act. (section 15)

2.3 INVESTIGATIONS

Under section 17, the Commissioner is empowered to commence an investigation of a complaint received by the Police Service and notify the Ombudsman of his actions "as soon as practicable".

The Ombudsman makes a determination as to whether a complaint received by his Office should be investigated and, in doing so, "may have regard to such matters as he thinks fit". The criteria for consideration include whether:

a) the complaint is frivolous, vexatious or not in good faith;
b) the subject matter of the complaint is trivial;
c) the conduct complained of occurred at too remote a time to justify investigation;
d) in relation to the conduct complained of there is, or was available to the complainant, an alternative and satisfactory means of redress; or,
e) the complainant does not or, where the complainant is not identified, the complainant could not have an interest, or a sufficient interest, in the conduct complained of". (section 18(1)).

In special circumstances, the Ombudsman may determine that an anonymous complaint should be investigated. He is required to notify the Commissioner in writing of any determination to investigate a complaint, and provide a copy of that complaint and identify the police officer, who is the subject of complaint. Should the Ombudsman determine that a complaint should not be investigated, he shall notify the complainant of the reasons for his determination and send the Commissioner a copy of the notification and the complaint.

Section 51 of the Act enables the Ombudsman to obtain further information from the complainant in order to determine whether to investigate a complaint. The Ombudsman has reported that this section "is used extensively by the Office to ensure that only serious matters are investigated".

Section 52 states that for the purpose of conciliation, or determining whether a complaint should be investigated, the Ombudsman may request the Commissioner to provide him with information regarding police procedures and practice relevant to the complaint as well as any other explanation or information he may seek. According to the Ombudsman, these preliminary inquiries are increasingly used as part of the screening process.

An investigation of a complaint is usually conducted by the Internal Affairs Branch with the exception of complaints in which:

a) the officer the subject of complaint is, or at the time the conduct occurred was, a member of Internal Affairs Branch; or

b) the officer the subject of complaint is, at the time of investigation, senior to all investigative staff of Internal Affairs Branch.

Provision exists for the Commissioner to direct members of the Police Force, other than Internal Affairs officers, to investigate complaints in categories a) and b). Also, where the Ombudsman and Commissioner have agreed that the complaint relates to conduct "of a class or kind" which should not be investigated by Internal Affairs, the Commissioner may direct other members of the Police Force to conduct the investigation (section 19).

The **"Class or Kind"** agreement was made by Mr Masterman Q.C. (Ombudsman) and Mr Avery (Commissioner) in January 1986 and has been amended on a few occasions since. The object of the agreement was to reduce delays in investigations by Internal Affairs Branch by reducing the number of matters to be handled by that Branch. According to the agreement, conduct other than conduct arising from allegations of "assault (except those of a minor or technical nature), corruption, dishonesty or other criminal behaviour", could be the subject of investigation by members of the Police Force other than Internal Affairs Branch. The Commissioner has responsibility for directing which members would conduct an investigation under this provision.

It was also agreed that complaints of assault, apart from those falling outside the responsibility of Internal Affairs, would be investigated by officers not in the same hierarchical structure as the member who is the subject of complaint (i.e. usually by an officer from another patrol). This part of the agreement has since lapsed. The agreement was made instead of a "case by case" method on advice from counsel that the latter method was not within Section 19. The impact of the agreement was to be monitored and the agreement modified "from time to time".

Under section 20 of the Act, the Commissioner may apply to the Ombudsman for consent to defer the commencement or continuation of the investigation of a complaint, or to discontinue the investigation. The Ombudsman may defer the investigation pending the conclusion of criminal proceedings in which the complaint is an issue, or he may discontinue the investigation if it would be unreasonable or impracticable to do otherwise. Any dispute between the Ombudsman and Commissioner on the question of deferral or discontinuance is adjudicated by the Tribunal.

The Ombudsman's submission gave the following description of the course of an investigation of a complaint. An investigation involves two police officers (one to interview and one to type) conducting lengthy interviews with witnesses and producing a statement. A covering report is attached to this documentation by an officer-in-charge who assesses the evidence and makes a determination. The officer's immediate supervisor assesses the file which is then passed to an Investigation Review Officer who drafts a letter for the Region Commander or Assistant Commissioner (Professional Responsibility). This is then forwarded to the Ombudsman's Office.

The Ombudsman's Office assesses the file upon its receipt and if the investigation is deficient in any way, it is returned to the Police Service. The investigation papers are usually referred to the complainant after the internal investigation has been completed and the Ombudsman then makes a determination as to whether the complaint is "sustained", "not sustained" or "unable to be determined".

According to statute, the police officer conducting an investigation must report to the Ombudsman at the Commissioner's direction on the progress of an investigation and at the conclusion of the investigation. The report includes copies of all statements taken during the course of the investigation (section 23).

After the investigation has been concluded the Commissioner sends the Ombudsman a copy of the report, his comments and a recommendation on what action should be taken with respect to the complaint (section 24).

Where the Ombudsman has not received a report from the Commissioner on the results of the investigation within 180 days after being notified of its commencement, or of notifying the Commissioner of his determination that an investigation should take place, he may investigate the complaint under the Ombudsman Act (section 24A).

The Ombudsman may grant an extension of the relevant period as long as the Commissioner's application is made before the expiry of the 180 day period. The Tribunal may adjudicate on any difference between the Ombudsman and Commissioner in this regard (section 24B).

Where the Ombudsman is not satisfied that the complaint was properly investigated, he shall report his views to the Commissioner who shall direct that a further investigation be conducted to remedy the deficiencies referred to in the Ombudsman's report (section 25).

If dissatisfied with the reports and information provided by the Police Service upon the investigation, the Ombudsman may make the complaint the subject of an investigation under the Ombudsman Act 1974 or determine that no further investigation occur in the public interest.

Under section 26(1), the Commissioner can decide that publication of any material required to be provided to the Ombudsman during an investigation of a complaint might "prejudice the investigation or prevention of crime, or otherwise be contrary to the public interest". The Ombudsman may not publish material or information received from the Commissioner, if a decision has been made under section 26(1). However, he may make a report to the Minister for presentation to Parliament.

2.4 REPORTS

If the Ombudsman is satisfied after his investigation that a complaint has not been sustained then he shall report to the complainant, the Commissioner and the Police

Officer the subject of the complaint. If the Ombudsman is undecided whether or not the complaint has been sustained, he shall report to the parties involved that the complaint is "deemed not to have been sustained" (section 27). In cases where the Ombudsman is unable to determine whether or not a complaint is sustained, he may determine that no further action should be taken or make the complaint the subject to a reinvestigation under section 19 of the Ombudsman Act.

Where the Ombudsman is satisfied the conduct subject to complaint was contrary to law, unreasonable, unjustified, oppressive, in accordance with an unjustified or unreasonable law, based on improper motives or irrelevant grounds, based on a mistake of law, or that the complaint is otherwise sustained, he shall compile a report giving reasons for his conclusion. In such a case, the Ombudsman may recommend that action be taken to rectify or change the conduct or its consequences, that reasons be given for the conduct, that law or practice relating to the conduct be changed or any other action (section 28).

The report is distributed to the Minister administering the PRAM Act, the Commissioner and, as soon as practicable, the police officer subject to complaint. If the Ombudsman thinks fit, the complainant also receives a copy of the report.

Subsequently, the Commissioner must notify the Ombudsman of the action he proposes to take as a consequence of the report, including details of any penalty imposed. Where the Ombudsman and the Commissioner disagree on the action to be taken, or unreasonable delay occurs in taking action, the Ombudsman notifies the Commissioner in writing of his views. The Police Tribunal settles any disputes that arise between the Ombudsman and the Commissioner under this section.

The Ombudsman may report to the complainant on the progress and result of the investigation and make any other comments he thinks fit. He may also make a special report to the Minister for presentation to Parliament on any matter relating to his functions under this Act. If the Ombudsman is of the opinion that the misconduct may warrant dismissal, removal or punishment he shall report to the Commissioner and the Minister Administering the Police Service Act 1990 (section 33).

Section 59 of the Act provides that a document created for the purposes of this Act is not admissible in evidence in any proceedings other than inquiries by the Police Tribunal at the Minister's request or disciplinary proceedings dealt with by the Commissioner, Police Tribunal or Government and Related Employees Appeal Tribunal. The exceptions to this provision are documents incorporating a complaint, documents published by Parliament, a document published under sections 32(3) or 45(5) (reports to Minister by Tribunal etc.) or a document that a witness is willing to produce.

ALLEGATIONS OF CORRUPTION

Allegations of corruption against police officers are dealt with by the Independent Commission Against Corruption under the Independent Commission Against Corruption Act 1988. Allegations of corrupt conduct as defined by Part 3 of the Act are investigated

under Section 13(1) which provides that the Commission is:

"(a) To investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

(i) corrupt conduct; or
(ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct; or
(iii) conduct connected with corrupt conduct,

may have occurred, may be occurring or may be about to occur."

PROBLEMS WITH THE PRESENT SYSTEM

3.1 THE PAPER CHASE - A NEED FOR CHANGE

In his report to Parliament tabled on 2 July, 1991, the Ombudsman referred to the differences in the level of resources needed to deal with complaints under the Ombudsman Act and complaints under the Police Regulation Allegations of Misconduct Act (PRAM Act) as follows:

> "The PRAM Act provides that complaints may be made either to the Ombudsman or to the Commissioner of Police and that each must notify the other of all complaints received. The ultimate decision as to whether a complaint is to be investigated or whether some other action such as conciliation or preliminary inquiries is to be taken is the Ombudsman's. It is the responsibility of the Commissioner to carry out conciliation, preliminary inquiries or investigations and these are monitored by the Ombudsman who must make the final determination on each complaint. These procedures are cumbersome and time consuming and mean that extra resources have to be allocated to handling police complaints and this leads to a lack of resources to deal with complaints under the Ombudsman Act."

Further into the report, the Ombudsman indicated that whilst administrative improvements had produced and will produce greater efficiencies in filtering complaints, with a corresponding saving in investigative resources, they had to be seen against the backdrop of the cumbersome nature of the police complaints scheme under the PRAM Act.

It was these comments which, more than anything else, caused the Committee to set the terms of reference for the current Inquiry.

It was also these comments which were borne out most strongly in oral and written evidence presented to the Inquiry.

In his evidence to the Committee, the Ombudsman described the difficulties he perceived with the current police complaints system:

> **MR LANDA:**"The Ombudsman's oversight of complaints against police is largely an exercise in examining paper. Complaints must be in writing. Reports on the initial investigations by police often run to hundreds of pages, which are then sent to complainants, who again respond in writing."

The amount of paperwork which is presently required to process complaints between the Ombudsman's Office and the Police Service, threatens to make the procedures for handling complaints completely inefficient and unworkable. This was referred to by Mr Landa during a discussion with Mr Moss about the merit of providing the Ombudsman

with the discretion to conduct direct investigations:

> **MR LANDA:** "....what we are looking at here is making a system that is workable as opposed to one that is now becoming unworkable. In other words, we now have this great mass--80 per cent probably--of complaints that fall in the so-called minor category. The reality is that you cannot see through the paper to deal with the complaints."

The Assistant Ombudsman gave further graphic evidence of this:

> **MR PEHM:** "....a two or three month delay is not uncommon before the investigator gets the file back. We get files in our Office 50 thick. Investigation Officers are handling 80 or 90 police files and general files. They may have to put something to one side until they can get some time to go through it. It may then take 2 or 3 hours to read through a file. Delays happen in our Office.
>
> **MR LANDA:** One of the reasons why we talk of moving those minor complaints into another area is to reduce that paperwork."

The Police Service agreed with this assessment of the system and said in its written submission to the Committee:

> "The Ombudsman has described the present system for processing complaints against Police as cumbersome and time consuming. We completely agree with this and would add that it is, in today's climate, far too formalised and legalistic....
>
> For instance, even if preliminary inquiries are undertaken, a full copy of the relevant file is conveyed by the Police Service to the Ombudsman with an appropriate recommendation. That file must be considered in the Office of the Ombudsman and a decision taken on further action - be it to decline further involvement in terms of Section 18 of the Act or to cause an investigation to be conducted. In each instance, correspondence must ensue with the complainant, together with other clerical and administrative tasks."

Dr Greg Tillett, the Director of the Centre for Conflict Resolution at Macquarie University and a former Senior Conciliator with the Anti-Discrimination Board, gave his views on the deficiencies of the existing complaints system:

> **MR TINK:** "Dr Tillett, is there anything you would like to add to what you have put in your written submission or anything you would like to say at this point?
>
> **DR TILLETT:** Yes, I would like to emphasise the points that I made in the written submission, notably, that the existing complaint process against the police

is unnecessarily cumbersome, adversarial and legalistic insofar as the majority of complaints are concerned in my opinion."

Dr Tillett went on to say in his written submission that the existing complaints process is likely to hinder rather than to promote the effective and prompt resolution of complaints.

During oral evidence, Dr Tillett gave an example of difficulties with a police complaint which he resolved while working as a Senior Conciliator at the Anti-Discrimination Board:

> **DR TILLETT:** "I recall one particular matter which related to a police station where a young man had sought attention having been assaulted and alleged that he had been referred to in a derogatory way because he was gay and that service had not been provided. He later complained. We moved into a paper war process essentially focusing on legalistic jurisdictional questions. He was totally distressed by this process and I sought to circumvent it by ringing the Patrol Commander concerned."

Finally, Dr Tillett said that the current complaints process was not conducive to the informal resolution of complaints because it "encourages a legalistic paper war".

It can thus be seen that, on the part of both the Police Service and the Ombudsman's Office, there is a high degree of dissatisfaction and frustration with the present system which is described as far too formalised, legalistic, cumbersome and time consuming. These views are strongly borne out by the independent expert witness, Dr Tillett, and the Committee is strongly of the view that substantial changes to the system are required.

Final word should appropriately go to a complainant, Mr Paul Lynch, who gave the following evidence to Dr Burgmann:

> **DR BURGMANN:** "But you didn't see that therefore as a suitable case to take to the Ombudsman?
>
> **MR LYNCH:** No, I did not.
>
> **DR BURGMANN:** Why?
>
> **MR LYNCH:** Because I had heard that the Ombudsman was full up past the eyebrows and it was pretty damn hard to get things into the queue. My recent reading suggests this is a fairly fair statement."

3.2 THE POLICE CULTURE - AN ADVERSARIAL SYSTEM

Recently, significant steps have been taken to change the "police culture" to emphasise anti-corruption measures and a statement of positive values. However, whilst these

initiatives are a great credit to Commissioner Lauer and Assistant Commissioner Cole in particular, an unintended consequence may have been to make the right climate for conciliation more difficult.

The evidence given by Commissioner Lauer and Assistant Commissioner Cole indicated their belief that Police Officers already have the experience to conciliate a complaint. In a letter dated 9 October, 1991 to the Committee, Commissioner Lauer made the following comments:

> "As was explained before the Committee, the whole experience of Police Officers in dealing with the public could well be described as a conciliation process - Police spend much of their time dealing face to face with members of the public, often in situations of high emotion or distress. As a result of this constant interaction with the public, very many Police are already excellent negotiators, even before specialised input on conciliation of complaints is made available to them."

However, this view was disputed to a greater or lesser extent by a number of other witnesses.

Thus Inspector Stanton agreed with the Chairman that the informal conciliation of complaints to some extent runs at cross purposes with the currently prevailing police ethos to fully pursue a matter if there is any doubt. The following was provided by way of example:

> **MR STANTON:** "...I suppose you could say that with the discretionary power of the Constable you can see somebody doing something wrong, go and talk to them and that is good enough and you let them go. That is fantastic. You have done your job, you have satisfied the citizen. If someone sees you doing that and puts in a complaint about Constable 'A' spoke to citizen 'B' and did not do anything about it officially then you have to answer that complaint. If you have not written up your notebook or made some notes about that then you do have a quite substantial criticism to answer. So the police are very wary about doing that now and conciliation is the same thing. If somebody comes to Mr Standaloft and complains about one of his constables, it is a matter he would normally conciliate and fix at the time, he may think twice about using that power or putting a complaint down".

Similar views were expressed in the following exchange between the Committee Chairman and the Chairman of the Police Board, Judge Thorley:

> **MR TINK:** What I think Mr Landa put—and it has the ring of truth about it to me—is that there has been a change of ethos in the police force where there is now a real bias in favour of scrupulously proper conduct and where people, particularly at the patrol command level, perceive a problem they go in hard and report it and it really becomes, as it were, a big deal. In other words, the result of the change

in the ethos is a bias in favour of taking action, referring it up, gathering evidence, and so forth, and I think what the Ombudsman is saying is, "Look, that is fine but it is at cross-purposes with the conciliation concept in minor matters". In other words, you go in very hard on an investigation basis, and he has given examples of it?

JUDGE THORLEY: I agree entirely with that.

MR TINK: I think he is saying that they have to break out of that mould?

JUDGE THORLEY: I agree.

MR TINK: It is a sort of by-product of this welcome anti-corruption approach, but one of the by-products of it is that they go in like a coach and four on everything, and there needs to be a pulling back from that to deal with appropriate matters in a—?

JUDGE THORLEY: More humane way.

MR TINK: Yes.

JUDGE THORLEY: I agree, and, indeed, we have started on that path.

MR TINK: But that is where he is saying—and I suspect he is right—that there needs to be a bit of work done?

JUDGE THORLEY: Yes.

MR TINK: I must say that I had a little difficulty this morning with Mr Cole's answer, "Look, there is no need for it". With the benefit of hindsight, he may have been misconstruing it; he may have been considering that we were talking about the training of every individual police officer to apologise. That may have been what he perceived us talking about. I did not understand it to be that, but it seems to me that there is scope for some development there?

JUDGE THORLEY: I accept that that might be so, and I would welcome any direction that the Ombudsman's Office has in that regard. I will certainly ensure that something is done about it from the academy point of view."

On the general question of police culture, Dr Tillett made the following comments to the Committee:

DR TILLETT: "A police officer's experience, it seems to me, places him in exactly the opposite position of being a conciliator. The whole judicial system in which the police arose is an adversarial system. The police are about establishing guilt or innocence, but essentially, establishing guilt."

Similarly, the following exchange between Dr Burgmann and Judge Thorley is instructive on the question of police culture:

> **DR BURGMANN:** "Can I ask a question about conciliation? When we questioned Assistant Commissioner Cole he seemed to be of the view that special conciliation training was not really needed, on the grounds that police were trained in conciliation by the very nature of their tasks that they have to fulfil in day-to-day police duties.
>
> **JUDGE THORLEY:** Some of them do it less than gracefully, I must confess."

Whilst warmly welcoming the anti-corruption ethos now encouraged throughout the Police Service, the Committee is nevertheless concerned that one of the unintended consequences of the new ethos may be the creation of a climate which discourages the conciliation of complaints. This problem underscores the strong need for education, training and backup support to promote the right climate for conciliation in appropriate cases.

The Committee's concern is emphasised by the following evidence from Dr Tillett:

> **DR TILLETT:** ". . . I guess the other problem that I would see as an important one is that the police themselves are not trained to conciliate or mediate and it is entirely unreasonable to simply say to someone, "Go and conciliate this matter given that they possibly have not the slightest notion what that means and in my experience occasionally what it has meant is a senior police officer knocking on someone's door saying, "Why don't we talk about it and see if we can fix it." The complainant often agreeing in a way that probably many of us would if a senior police officer turned up on your doorstep, particularly late at night, so that the matter goes away but it is certainly not being conciliated. There clearly is a need for training. I would argue that all police ought to have training in conflict resolution and conciliation because of the very nature of their work but certainly officers who are going to take part in conciliation need to be given at least basic training in what it means."

3.3 THE SIEGE MENTALITY - POLICE PERCEPTIONS OF THE OMBUDSMAN

Notwithstanding the very constructive and professional relationship between Senior Police and the Ombudsman's Office, a negative police perception of Ombudsman's role in the complaints process was frequently mentioned as a significant factor limiting the effective operation of the PRAM Act. This was particularly so in relation to conciliation and rank and file police attitudes.

Commissioner Lauer made the following point concerning police perceptions in his evidence to the Committee:

> **MR LAUER:** "The Ombudsman is still perceived as a boogie man amongst

police. That perception should not exist and we are doing our best to alter it. Nevertheless, he is. Any involvement with him would be to our disadvantage I think in trying to encourage our people to admit mistakes, to give explanations for their conduct and, if necessary, to apologise if the matter is not of a serious nature."

Annexed to the Ombudsman's written submission was a report to the Ombudsman by a former employee who was previously a Federal Police Officer with 12 years experience. His comment about general perceptions of the police was as follows:

> "The Police hate the Office of the Ombudsman and those who work there."

The effect of this perception on the current complaints system was touched on by Judge Thorley who felt that direct involvement of the Ombudsman in the handling of a complaint was sometimes "counter-productive" to police officers admitting error. In his view:

> **JUDGE THORLEY:** "One of the difficulties of the present system, frankly, is that the police get themselves into a siege mentality."

Ideally Judge Thorley wanted police officers involved in conciliating complaints to be able to do admit mistakes "freely" without fear of damaging their careers. If this were the case, Judge Thorley said:

> **JUDGE THORLEY:** "We would hope that it [would make] for a better policeman and a better response to the community. We think that is in keeping with the overall thrust of community-based policing. It is as simple a philosophy as that."

Representatives of the Police Association also felt that lack of police confidence in the complaints system created problems in processing complaints. Mr Chilvers made the following remarks about police perceptions of the complaints system:

> "There appears to be a problem with the system. I observe in the back of the Ombudsman's submission to this Committee on page 2 of annexure A under general perceptions it is stated that police hate the Office of the Ombudsman and those who work there. I think it would be more accurate to say that police are not confident that the system works."

The Committee was pleased to see that the Police Association representatives were more moderate in their comments about general perceptions of the Ombudsman's Office than the former police officer who had worked there.

Nevertheless, police perceptions remain a serious impediment to the effective use of conciliation of complaints.

With this problem in mind, the Committee was very interested in the Commissioner's

evidence that direct involvement of the Ombudsman in the conciliation process would be damaging to any initiative aimed at increasing the rate of conciliation of complaints.

In that regard, the Commissioner advised the Committee:

> **MR LAUER:** "I think in [the Ombudsman's] first recommendation he deals with conciliation, and in that he seeks a more active and direct role in conciliation. I do not think that will be helpful to the direction that we are trying to go along with problem solving and identifying the cause of the behaviour. I believe that is a role we ought to be able to pick up ourselves. But the community needs to be satisfied, and therefore there ought to be an opportunity for the Ombudsman to review what we are doing now. That is why we proposed the audits."

The Commissioner anticipated that the provision of conciliation training for police together with the monitoring and review by the Ombudsman of a new conciliation system in operation would educate police officers about the exact role of the Ombudsman in the complaints process. In the Committee's view, it is most important to minimise the corrosive effect of the Police siege mentality and Police perceptions of the Ombudsman in any proposed police complaints system but this will require more than education alone.

3.4 POLICE RECORDS - EXISTING DIFFICULTIES

According to the Police Service's submission, Section 35A of the PRAM Act requires that when an officer is being considered for promotion to the rank of Sergeant or above, the Office of the Internal Affairs Branch shall submit a Report. This Report must include amongst other things, "particulars of any complaint which has been made against the person" and details of any reference to the officer in an investigation of a complaint made under Part 4 of the PRAM Act, proceedings before the Tribunal, an inquiry or commission under any other Act and or an inquiry authorised by the Minister.

Fear among police officers that complaints, whether sustained or not, are recorded on these promotional reports was identified by the Ombudsman as a source of difficulty in achieving higher rates of conciliation. He informed the Committee that:

> **MR LANDA:** "The other major issue that arises is their fear that what the Ombudsman says about them goes onto their records. That of course is an issue that is out of my control, and I tell them that, but I tell them that I have assurances from the Commissioner: "If the matter is not sustained, deemed not sustained, it does not go on your record and you are not affected by it. The Commissioner is aware that a complaint process is part of policing and you are going to have problems but he will not punish you unless of course you are found wanting, that you are in fact guilty of an offence". We also emphasise with them that mistakes are perfectly understandable."

Drawing on his long and distinguished experience in Canada, Mr Wilson, the NSW

Inspector-General of Police, said that reluctance among police officers to admit guilt for fear of disciplinary action was an obstacle to the effective use of the PRAM Act's conciliation powers. Mr Wilson made the following comments:

> **MR WILSON:** "There is a reluctance on the part of the police holding the view they do about the Complaints Commissioner and his process. I do not want to personalise that—it is the process against which the reaction has arisen—but there is a reluctance on the part of the police to stand up and say, "Yes, I did it", because they think somebody is going to land on them in the disciplinary sense or they will be named in a public report, or they will in some other way have their reputation besmirched, so they do not have confidence that permits them to jump up and say, "Yes, I did it"."

Similarly, the Assistant Ombudsman (Police) Mr Pehm, indicated that police concerns about the reporting of complaints on police promotional records were an obstacle preventing increased conciliation of complaints. Mr Pehm said:

> **MR PEHM:** "The promotion problem is one aspect that perhaps hinders conciliation. We have no problem with the promotion record. It is big in the mind of local police."

Police concerns about promotional records are well summed up in the written submission of the Commissioned Police Officers' Association as follows:

> "An area of great concern is the practice of recording details of complaints on the personnel records of members of the police service whether such complaints are substantiated or not. Those dossiers are available for many purposes including their production at promotional appeals where inferences can be made against a persons integrity by referring to the material contained therein.
>
> Not only should it be noted that criminal records tendered in Courts only refer to convictions whereas police personnel records contain all complaints, but the more active or successful that police are in fighting crime and unlawful behaviour the more likelihood there is that complaints would be made about them. Thus the operational police officer faces additional obstacles to those who work in support roles. However, if they meet in a promotional appeal the unsustained complaints made against them, the operational officer may very well swing the verdict against him or her."

As a result of hearing this evidence, the Committee was concerned to look at ways of altering the notation of police records so that police would have less to fear about both the inappropriate use of records and the keeping of inappropriate records. At the same time, the Committee was also concerned to ensure that the integrity of records, which should be kept in the public interest, is maintained.

3.5 MINORITY GROUPS

Whilst giving evidence about the current complaints system, the Ombudsman made particular reference to his oversight of complaints against police being largely an exercise in examining paper. In this context he made the following telling comment:

> **MR LANDA:** "The illiterate, juveniles, aborigines and the uneducated and ethnic non-English speaking groups become more disadvantaged as the system clogs up with more complaints. It is these very groups who are most victimised by police and where abuse of authority by police is least likely to be detected."

It follows from these comments, that the minority groups referred to by the Ombudsman would benefit significantly from many changes that would alter those legislative provisions currently generating unnecessary paperwork, thus freeing up the Ombudsman to focus more on minority groups who may particularly need the help of his Office. The following exchange between the Committee Chairman and the Ombudsman is instructive:

> **MR TINK:** "It seems to be one of the challenges to try to look at things with a view to ensuring that the people who need it get help and that the resources are best directed there. I am not suggesting for a moment that you do not try to do that. I know that there is an Aboriginal Liaison Officer in the Office. It seems to me from the Police Service point of view in many matters once there is a complaint in writing they are dealt with in the same way without any discretion. I am not saying that necessarily about the Eastwood patrol, but that is the impression I get overall.
>
> **MR LANDA:** It is a correct impression. It is happening. We say that is what is wrong with the system. We deal with that at length in our original submission. It is a paper war."

Thus under the present complaints system, the Ombudsman is obliged to deal with nearly all complaints on an equal footing. The tendency is for most complaints, whether they merit it or not, to absorb the same time and resources from the Ombudsman's Office. For example, the complaint of a well educated resident from Sydney's Northern Suburbs may well get more attention than the complaint of an illiterate aborigine from Bourke or Redfern. Yet it is the Northern Suburbs resident who may be prepared to accept the prompt and effective conciliation of his/her complaint which would free up the Ombudsman's Office to assist minority groups needing more assistance.

In answer to Mr Moss the Ombudsman made these comments:

> **MR LANDA:** "...[any proposal] that is framed has to really take recognition, that it is the underclass, the under privileged people who are most likely to have need for the system and also probably need the greatest assistance in the system. The discretion that we talk about of coming in may or may not be effective but what we are looking at here is making a system that is workable as opposed to one that

is now becoming unworkable."

The Committee expects that if the proposals recommended in this Report are adopted, the resources of the Ombudsman's Office could be significantly redirected to the areas of greatest need and especially to minority groups. In that regard, the Committee welcomes the Ombudsman's initiative in appointing an Aboriginal Liaison Officer and expects that future similar initiatives will be possible under a system where resources can be used more flexibly.

3.6 CONCILIATION 6% - SHOULD BE 25%

Implicit in the earlier parts of this chapter is a great concern that conciliation is underutilised and this is also clear from more direct evidence given to the Committee.

The Ombudsman quoted the following figures in his written submission to reveal that conciliation of complaints has occurred at a rate of only 6% since 1987-8:

CONCILIATED COMPLAINTS

YEAR	86/87	87/88	88/89	89/90	90/91
NUMBER OF COMPLAINTS CONCILIATED	218	116	115	126	169
% OF TOTAL COMPLAINTS	11%	6%	6%	6%	6%

The Ombudsman's written submission stated that these statistics are an indication of the very real lack of change in the area of conciliation since the Bignold Inquiry. In comparison with other jurisdictions, the Ombudsman felt the rate was exceptionally low. However in a recent supplementary submission he said that the conciliation rate was now nudging 10% following the introduction of written conciliation guidelines in August last year.

In evidence to the Committee, Mr Landa said:

> **MR LANDA:** "Let me say that I do not think anything less than a 25% conciliation figure should be considered satisfactory. In the American system, they talk in terms of 50% conciliation."

In addition to the matters already raised earlier in this chapter, the Ombudsman's submission expressed concern that training of patrol commanders in conciliation procedures had not been effectively implemented and that this was one cause for the low conciliation rate. This observation was of particular concern to the Committee, given the

emphasis which the Bignold Inquiry had placed on the need to educate police in conciliation procedures three years ago.

In the Ombudsman's view, conciliation should form an essential part of community policing and the procedure for handling grievances. In addition, conciliation holds the potential to save resources for both the Police Service and the Ombudsman's office which would thereby allow more special attention to be given to the needs of minority groups.

In both his primary and supplementary submissions to the Committee, Commissioner Lauer made it quite plain that the Police Service obviously supports the increased use of conciliation and the informal resolution of complaints as an effective way of dealing with complaints. For all these reasons, it was of special concern to the Committee that the current conciliation provisions provided in Part 3 of the PRAM Act appeared to be woefully underutilised.

CONCILIATION - A NEW PROPOSAL

4.1 CONCILIATION - THE BEST TOOL AVAILABLE

In his written submission to the Committee, the Ombudsman made reference to conciliations in the following terms:

> **MR LANDA:** "Many complaints are best handled through negotiation and informal resolution. Even when the subject of the complaint may be viewed as quite serious complainants say that they would be happy to conciliate on the basis of an apology and that a police officer the subject of complaint is 'spoken to'."

Asked by Mr Moss if his support for conciliation was geared towards a "better system" or more motivated by a lack of resources, the Ombudsman replied:

> **MR LANDA:** "We live in an age of community policing. . . It is a part of community policing that police say, "Sure, we're sorry. We mucked that one up. We didn't mean to do so. This is the reason why". Citizens will accept conciliation. They will walk away from such an event. It will be an experience in their life. They will admire and not denigrate the police. It is not only enormously resource saving for police; it is a most critical tool in the grievance procedure."

The Ombudsman's views were further emphasised in the following discussion he had with Mr Scully:

> **MR SCULLY:** "I do not know whether you actually say it, but I have a perception from your report that you were reluctant to allow the police to take a greater role in conciliation, to the exclusion of your office, and though you encourage the conciliation process you wanted to be there?
>
> **MR LANDA:** I did not mean to give that impression at all. What I want to happen is to see conciliation used as a tool, because I believe that it is the best tool available. If they use it correctly they will receive great credit for it. The community will respond to it. It would be very valuable. I do not really think that I ought to be a part of it. It is a part of police management. It is quality control, if you like. It is something they should do. That is what the Bignold Committee actually identified: it is your job; you do it. The Committee did not say that I should do it at all. I totally agree. To me, everything that should be conciliated and is not is costing me money that I am not able to use where I should be using it."

In a similar way, Dr Tillett was of the view that police should be involved in the conciliation process provided independent oversight was maintained. In his submission to the Committee, Dr Tillett wrote:

> "There is, obviously a need for an independent complaints process which has the support and respect of both the Police and the community, including those sections of the community from which most complaints come. This does not preclude involvement by appropriately trained Police Officers, provided there is, and is seen to be, external and independent oversight.
>
> The majority of complaints against the Police should be resolved by a less formal process of conciliation. Obviously allegations of serious misconduct or criminal actions are exceptions."

Dr Tillett's opinion was shared by Dr Perry, the Victorian Deputy Ombudsman (Police Complaints), who had the following discussion with the Chairman:

> **MR TINK:** "So that I understand this, what you are saying is that there are apparently a group of matters that you have just described which if you could be sure the police hierarchy had a scheme where those matters could be directly conciliated in the way that you have suggested, that need not involve you?
>
> **DR PERRY:** Yes. I say there are three levels of complaints. I would say level one is one which I believe ought never get into the complaints system, which could be resolved down at the police station, down in the district where a person is upset about the manner in which they have been treated. . . It does not necessarily need to get into the complaints system if it can be resolved and if the complainant is happy with that. . ."

In addition, Dr Perry told the Committee that conciliation was, in many cases, a preferable and productive course to take in dealing with a complaint. He told the Committee:

> **DR PERRY:** "If there is a chance to conciliate I would prefer that course to be taken. I see it as a productive use of resources to conciliate with complainants."

All police witnesses, without exception, expressed strong support for the conciliation of complaints and thought that the existing process for conciliating complaints should be changed to utilise those opportunities for conciliation which occur upon receipt of a complaint at local command level. The following exchange between Mr Kerr MP and Mr Day of the Police Association was typical of those sentiments.

> **Mr KERR:** "You say there are other conciliatory powers that are not being used. What is your understanding of the conciliatory powers that are available at the moment?

MR DAY: I believe that conciliation should take place at the very first step between the patrol commander at the police station, his officer who has been complained about, and the complainant."

In evidence, Dr Tillett gave an example of a police complaint he resolved informally while working as a Senior Conciliator with the Anti-Discrimination Board:

DR TILLETT: "I recall one particular matter which related to a police station where a young man had sought attention having been assaulted and alleged that he had been referred to in a derogatory way because he was gay and that service had not been provided. He later complained. We moved into a paper war process essentially focusing on legalistic jurisdictional questions. He was totally distressed by this process and I sought to circumvent it by ringing the patrol commander concerned.

It was possibly an improper thing to do given that the police were arguing that we had no authority to do anything with this matter. The patrol commander expressed the sorts of views that I hoped he would express, was eager to sort the matter out, do a little bit of investigation of his own. I suggested a meeting between the patrol commander, myself and the complainant, which we had in the police station.

The matter was resolved in 15 minutes with the complainant not only being entirely satisfied that his grievance had been dealt with but coming away with positive views about the police which previously he had not held. The fact that we went to the police station and met the patrol commander in the Patrol Commander's office also reassured him that his fears about ever being able to deal with the police again were not necessary."

Lest it be thought that proposals for the conciliation of police complaints are out of step with the theories of dispute resolution in other forums, the comment of Mr Geoff Davies QC (as he then was) and Mr Alan Limbury[2] reported in Australian Law News, December 1991, are instructive. Whilst their comments relate to mediation, it is plain that this concept is interchangeable with conciliation (Macquarie Thesaurus Para 404):

"We see mediation as a necessary and primary part of every dispute, primary in the sense that it should always or almost always be attempted before, and in most cases as a condition precedent to mediation.....

....most people agree that the best means of resolving any dispute is by agreement. It is cheaper and quicker and is more likely to satisfy both parties than the

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2 At the time of making these comments Mr Davies was Vice-President of the Law Council of Australia and Queensland Solicitor-General. He has since been appointed to the new Court of Appeal of Queensland. Mr Limbury is a partner of Minter Ellison Solicitors.

adjudication of some third party.....

....generally, the earlier a dispute is resolved the better it is for the parties. Not only will their costs increase the longer the dispute is allowed to run on before it is resolved, but attitudes will harden making both resolution of the dispute and resumption of mutual respect and confidence more difficult. Furthermore, recollections of relevant events will fade or, worse still, be replaced by reconstructions....

....of course, there will always be cases in which mediation has been pointless. However, except in rare cases that will not be known until it has been tried, for it is often the case that intransigence will change to willingness to discuss and even to agree after mediation has commenced...."

The Committee strongly feels that many complaints should be resolved through conciliation which is seen as a very effective tool and agrees with the Ombudsman's comment that "minor complaints should be able to be resolved by police with very little or no input from the Ombudsman."

4.2 THE POLICE MODEL AND RESPONSES

In his written submission to the Committee, the Police Commissioner outlined a detailed proposal for dealing with minor matters by way of conciliation along the following lines:

- No change to the existing investigation and review procedures prescribed in the PRAM Act is proposed for complaints alleging serious criminal conduct or corruption and those matters would continue to be reported to the Ombudsman and dealt with accordingly.

- On receipt of a complaint involving lesser allegations the Ombudsman would not decline action but refer the matter to the Commissioner for Police for attention.

- Having done this there would be no further direct involvement of the Office of the Ombudsman at that stage of proceedings.

- So far as the Commissioner is concerned, there would be a presumption in each instance of conciliation action to the satisfaction of the complainant of problem solving through the institution of remedial action, improvement systems, training etc as required together with, if needs be, disciplinary action.

- Such a procedure would be accompanied by a commitment from the Commissioner not only to ethical but also speedy resolution of matters referred to him. Quality control measures and safeguards against "backsliding" would be introduced within the professional responsibility command.

- The Service's response should be formally conveyed to the complainant. This should include advice that further recourse lay with the Ombudsman if not entirely satisfied with the outcome. Consequently, the Ombudsman would have the power to accept and inquire into further complaints of lack of or inappropriate police attention to an original complaint.

- The Ombudsman have the power to spot check or audit a resolution of matters referred to the Commissioner for attention. This could take the form of calling on the Commissioner to produce the relevant papers, correspondence with the complainant and/or the police concerned or such other action as deemed appropriate by the Ombudsman.

This proposal is a significant shift from the proposal which was under consideration by the Bignold Inquiry as evidenced by the following exchange by the Chairman and the Assistant Commissioner Cole:

> **MR TINK:** "Am I right in understanding that that is a substantial change from the proposal that was in the 1988 Bill that was before the Parliament?
>
> **MR COLE:** Yes there is a substantial change. The way it was being placed at that stage was that minor matters be returned completely to the Commissioner without any review or oversight. We do not seek that. We believe that review and oversight should still be there in all complaints.
>
> **MR TINK:** Would you be proposing to ensure continued oversight, first, by allowing the Ombudsman in effect a random audit power in relation to how the less serious matters are being dealt with?
>
> **MR LAUER:** Yes they would continue to be the subject of notification to him."

In further oral evidence to the Committee, the Commissioner expanded upon the police proposal as follows:

> **MR LAUER:** "... that most of the complaints would be resolved primarily by conciliation. They would be investigated at patrol level, not using the resources of the Internal Affairs Branch or the Internal Security Branch. The Internal Security Branch should be proactive and not reacting to complaints. The Internal Affairs Branch ought only to react to those more serious complaints. Relieved of the need to investigate the less serious complaints, we would be able to deal with serious complaints far more expeditiously than they are at this time. We claim that that would be desirable. To that end we have met with Mr David Landa. I believe we have general agreement. He finds no fault with the approach that we propose."

The Ombudsman's response to these proposals in his oral evidence could best be described as one of guarded concurrence. In a discussion with Dr Burgmann on the question of major and minor complaints and what should be capable of conciliation and

what should not, the Ombudsman made the following points in relation to conciliable matters:

> **MR LANDA:** "....we are not suggesting by any means that they go totally out of the Ombudsman's sight. That is not proposed. It is not proposed that we go through the paperwork of doing reports on that investigation but we reserve for ourselves and we have the statutory power not only to investigate them if the complainant is unhappy and there is good reason otherwise to do it, but that we have an additional power which is the set off I suppose to intervene."

Again in answer to Dr Burgmann, Mr Landa made the following further comments:

> **MR LANDA:** "I said in the submission that our power to intervene is an important aspect. If there is to be a reduction of our role, basically we need what the Chairman was saying about the analogy of the tax situation. Since we need the ability or a sanction that we are there and we have the jurisdiction to spot check and initiate if we see fit an investigation or quality control."

The Ombudsman referred to his written submission and in particular to the recommendations that the use of conciliation and informal resolution of complaints be increased and that the Office of the Ombudsman take a more direct role in this area. In that regard, he indicated to the Chairman in evidence the following:

> **MR LANDA:** "I think I said in my initial submission the Ombudsman's Office ought to be part of the procedure. I will tell the Committee that I think I withdraw that aspect because clearly there could be a conflict in the event of a break down of conciliation and we then have to decide a issue in which we have been involved and that would tarnish the inquiry."

The Police Model now proposed is significantly different from the Police Model proposed in 1988-1989. These differences are such that there is now evidence of substantial and welcome agreement between the Police Service and the Ombudsman's Office on proposals for what needs to be done. In that regard, the NSW Law Society's written submissions are important:

> "This society is satisfied that there is considerable agreement between the Office of the Ombudsman and the New South Wales Police Service as to the manner in which investigations ought to be conducted and the benefits of closer co-operation.
>
> This agreement which appears to be best expressed in the submission of the Commissioner of Police, is in marked distinction with the tone and substance of the submissions which were made during 1988. At last the Police Commissioner does see the benefit of an independent investigation made by an independent overseer. As the Commissioner says in paragraph 5.4.....
>
> 'We support the independent oversight and review functions of the

Ombudsman and would seek to continue to work with him to enhance the standing, sensitivity, responsibility and hence professionalism of the New South Wales Police Force.'"

At this point, the Committee feels that there is significant agreement between the Police Service and the Ombudsman on changes that are required to current procedures for dealing with police complaints. This is a great credit to all concerned.

At the same time, there are a number of very important matters relating to the proposals which need to be carefully considered, including the nature of the Ombudsman's audit function, the preservation of the right to complain direct to the Ombudsman, the precise way in which appropriate types of matters will be agreed upon to be made subject to the conciliation procedures, and the special concerns which will have to be noted relating to minority groups. In the context of a new proposal for conciliation, these issues are considered in the following parts of this chapter.

4.3 SPOT CHECKS AND BALANCES - THE OMBUDSMAN'S AUDIT

The concept of an audit was first raised by John Hatton at one of the first informal Committee meetings. At that time, Mr Hatton suggested that what the Committee could look at doing was to try and give back as much disciplinary power in the field as possible but, at the same time, have a random audit system which could be used as a check if greater things then followed so that matters could be dealt with quickly.

Mr Hatton indicated that, from his experience in studying the Royal Canadian Mounted Police (RCMP), extensive auditing and cross checking was a key feature of accountability at all levels of the RCMP.

It was principally Mr Hatton's comments about the value of auditing as an accountability tool in the Police Complaints process, which led Committee members to raise the issue with witnesses at the Inquiry. The evidence given, which is extracted below, has convinced the Committee that auditing will be a crucial accountability mechanism in any police conciliation scheme.

The Ombudsman advised the Committee that giving the Police Service the major responsibility for conciliating certain types of complaints would require counter-balancing by giving the Ombudsman an increase in his powers, so as to maintain public confidence in the system. Mr Landa said:

> **MR LANDA:** "Police have proposed an "audit" system or "spot check" of the process with undefined powers. Given that "minor" matters handled at the patrol level will not only involve conciliations but local inquiries and investigations where the complainant will be dealt with directly by police, the Ombudsman's powers to monitor the process need to be clearly defined."

The Assistant Ombudsman asserted:

> **MR PEHM:** "Essentially what our submission comes down to is that we would be prepared to wear the minor matters going back to the Police as long as there is a strengthening of our ability to monitor them."

As to the mechanics by which the Ombudsman would perform this role, Mr Pehm suggested the monitoring process should include "regular progress reports, consultation with the police investigators and, in rare circumstances, to have a civilian investigator present during the initial investigation process".

For the Ombudsman, the audit power meant that he should have the ability to monitor conciliation of complaints with the option of taking subsequent action or doing further monitoring if the process failed in any particular case:

> **MR LANDA:** "It would be a specific complaint that would trigger an action. If there was something wrong with this complaint, we would now want to take over control of the complaint or wish to supervise or monitor the method by which the complaint is being dealt with".

By way of further particularisation, the Ombudsman referred to the tax audit model as follows:

> **MR LANDA:** "We have said in the submission that our power to intervene is an important aspect. If there is to be a reduction of our role, basically we need what the Chairman was saying about the analogy of the tax situation. We need the ability or a sanction that we are there and we have the jurisdiction to spot-check and to initiate if we see fit an investigation or quality control...
>
> Grievance mechanisms, not just here but everywhere, are just quality control mechanisms. They do not pretend to do the whole job. They are there as deterrents and as spot checks."

As indicated in the previous section, the police proposal for a conciliation procedure recognises that the Ombudsman would have the power to spot check or audit the resolution of matters referred to the Commissioner for attention. Furthermore, it is acknowledged that this auditing could take the form of calling on the Commissioner to produce the relevant papers, correspondence with the complainant and/or the police concerned, or such other action as deemed appropriate by the Ombudsman.

As conceded in evidence by Assistant Commissioner Cole, this is not only a substantial departure from the police proposal put to the Bignold Inquiry but a recognition that the Ombudsman must have substantial discretionary powers of intervention to carry out such spot checks and audits.

For example, in evidence Mr Cole conceded that the Ombudsman's audit function should enable Mr Landa to check any file at random and the result of each conciliation would be required to go to the Office of the Ombudsman. In addition, Mr Cole conceded that the police would need to take further steps to improve their own internal audit and monitoring procedures. In that regard, Mr Cole gave the following evidence:

> **MR COLE:** "Certainly I would look at within my area having an ability to work out which patrols were conciliating more than other patrols and, if there was an abnormal conciliation of matters, to work out why. It may be that they are conciliating better than others but it may very well be the point that you raise, that they are becoming somewhat of a forced conciliation and that as I see is the random audit of my particular area and the internal affairs area, a statistical base based on the patrol level so that we are able to say on the number of complaints, "This area is either below in conciliations or above" and working on those that are below as to why they are below, ensuring that those that are above are not starting to either pressure conciliations or whitewashing in any type or form. Naturally what is also built in here is the audit function throughout, not only by the Ombudsman but by ourselves."

Asked about the Service's ability to monitor whether a particular "trivial offence" was being frequently committed, Mr Cole replied:

> **MR COLE:** "To overcome that what we are moving towards with our computers—and we can do it centrally but as yet we cannot quite get it to the Patrol Commanders—is that we are able to print out at each patrol the complaints to that particular patrol, the officers involved, the nature of duties and so on. We would couple that, you will notice, with a copy of the conciliation that will come to the Internal Affairs, the copy of the letter dealing with the complaint sustained or not sustained will all still flow to the Internal Affairs area, so that we will have the ability to look for the trends. In other words, if a police station becomes abnormal in relation to conciliations of a particular type of offence or if there is a consistency of complaint in relation to a particular police station when compared with the other patrols, it becomes inconsistent and that will allow us to highlight and try to work out what is going on at that station.
>
> **MR TINK:** That intelligence would be monitored by Internal Affairs?
>
> **MR COLE:** It would be monitored by Internal Affairs. The intelligence would be within Internal Affairs. It would be my move and it has been my move that this would also be monitored by the internal security unit so that they would act on trends.
>
> **MR TINK:** And to be available to the Ombudsman?
>
> **MR COLE:** Yes, available to the Ombudsman."

Mr Cole said that this intelligence would be reported to the Ombudsman upon request. However he expected that the Ombudsman would be forwarded sufficient information as a matter of course to maintain his own records of trends. Mr Cole said he would seek to exchange information with the Ombudsman on any potential problem areas.

Mr Cole indicated that Internal Affairs would be responsible for detecting any abnormalities in the use of conciliation and would take appropriate disciplinary or remedial action should an officer's conduct be consistently at fault.

The Committee does not for a minute question the resolve of the Police Service leadership to tackle complaints of misconduct as evidenced by the Commissioner's recent announcements about the restructuring of the Internal Affairs Branch and the creation of the Professional Integrity Branch. At the same time, the Committee must acknowledge the references made by Mr Azzopardi to significant ongoing systemic problems in the Police Service such as those disclosed in evidence to the Independent Commission Against Corruption concerning the so called "Information Exchange Club". Ongoing problems such as these clearly require that a system of checks and balances for a Police conciliation system be very robust both within and outside the Police Service.

Mr Wilson gave evidence to the Chairman that monitoring of the conciliation process could realistically be included as an aspect of his duties as Inspector-General of the NSW Police Service:

> **MR TINK:** "Do you have a role, in terms of your duties, of auditing from a management point of view the way patrol commanders conduct their duties and, if so, how would you see that fitting into the question of keeping an eye on how they conciliate complaints?
>
> **MR WILSON:** . . . I could see it as an integral part of my work to assess the conciliation process and to determine the extent to which the organisation, through its commanders and senior people, is meeting the dictates of the Commissioner in that respect and is satisfying the interests of the public, assessing for instance whether any pressure is being brought to bear on a complainant to conciliate; whether members are being encouraged to acknowledge minor errors, with no fear of discipline, in order that the public interest be served in a very efficient, quiet and satisfactory way. I could see that as a significant item within my mandate."

In his letter to the Chairman, dated 30 December, 1991 Commissioner Lauer expressed his belief that it had been agreed that:

> "Conciliated complaints [would] be subject to written confirmation, with copy to Ombudsman, also advising of further redress through the Ombudsman if dissatisfied"; and
>
> "[The] Ombudsman [would] have [the] power to "spot check" or audit successful

conciliations recorded".

Virtually all key witnesses with a Police Service perspective acknowledged the need for the Ombudsman to have a strong monitoring role. Judge Thorley indicated that it would be very valuable for the Ombudsman to have an audit function to identify and assess systemic problems within the complaints process. Early in his evidence, Judge Thorley described his impression of the audit role proposed for the Ombudsman:

> **JUDGE THORLEY:** "I envisage that the Ombudsman should have the right, and indeed exercise the right, to conduct checking within some formula, of his choice, of course. I would imagine that apart from just doing pure random testing, if I were him I would be minded to endeavour to identify—and that will not be very difficult—any particular geographic areas that seem to be more productive of complaints than another area.
>
> Experience may reveal, for the sake of argument, that more complaints are coming out of the Parramatta district than are coming out of Manly. . . In that sense I would think random - if that is the right word, but not entirely without some reason - checking would be undertaken. We would welcome that. There is no problem about that."

Most importantly, the Police Association conceded the need to give the Ombudsman an audit role in relation to complaints which were to be conciliated. This important concession is evidenced by the following exchange between Dr Burgmann and Mr Day of the Police Association:

> **DR BURGMANN:** "If no reporting occurs at anything other than the serious level how can minor matters which might become major issues ever come to the attention of an outside body?
>
> **MR DAY:** You have to give the Ombudsman the right to oversee these minor complaints. He could have a spot check any time that he liked. He could go into any police station and examine a patrol commander's records to see what he has done in relation to any complaint.
>
> **DR BURGMANN:** An audit role?
>
> **MR DAY:** Yes."

Later in his evidence, Mr Day expressed support for John Hatton's view that "if minor matters of whatever description were to be taken out of the direct view of the Ombudsman, one way of keeping oversight would be to have some sort of audit or random system in operation." Mr Day concluded by saying "the audit role has to be there".

Whilst asserting that the "vast majority of complaints" could be conciliated "very quickly and to the satisfaction of all parties", representatives of the Commissioned Police

Officers' Association indicated that such matters "should remain within the province of individual Patrol Commanders but at the same time (they had) no objection to them being oversighted if there problems."

Indeed the Commissioned Police Officers' Association representatives conceded that such a complaints system had to have the Ombudsman as a referee. They conceded that a number of checks and balances were necessary as indicated by the following evidence:

> **MR TINK:** "I suppose what is implicit in this proposal is that there is a delegation of the referee's position to somebody like you, subject to people's rights to refuse to be involved in that system and that being deemed not to be something that cannot be conciliated, subject to pretty fierce audit and education system so that as his delegates, if you like, you fellows know exactly what you should be doing in that system?
>
> **MR STANDALOFT:** We are quite happy with that."

Dr Tillett was also concerned to ensure that there was effective external monitoring of conciliation. He stressed the importance of ensuring that there was a role within the review process for identifying and responding to broader issues and systemic problems, as well as individual complaints. He felt that the existence of an independent monitoring system would ensure that problem areas, or for that matter problem people, would be identified and responded to.

When asked for his comments on the type of information necessary to monitor the success of the conciliation process, Dr Tillett suggested post conciliation monitoring such as follow-up questionnaires and interviews with randomly selected complainants.

In light of the foregoing and lest there be any doubt, the Police Commissioner wrote a letter dated 30 December, 1991 to the Committee Chairman indicating the following:

> "As part of our proposals for change it has been suggested that the Ombudsman retain unfettered power to audit or "spot check" conciliated complaints - in other words up to 100% if he chose. This would be in addition to the written reminder police would give complainants of the option to return to the Ombudsman if dissatisfied with the conciliation reached or proposed. Unsuccessful conciliations would, of course, be brought to the notice of the Ombudsman in any case for consideration of further action to be taken."

Whilst making it quite clear that in any proposed system for oversighting police complaints, the Ombudsman's powers should be effectively maintained, Mr Azzopardi said in evidence:

> **MR AZZOPARDI:** "I think the Ombudsman should have a more free way, in other words to do spot checks himself."

The flexibility of the proposed system, when taken together with the Ombudsman's power to conduct spot checks and, where necessary, extensive audits, would allow the Ombudsman to concentrate effectively on problem areas. For example, such audits could be conducted on an ongoing basis at Police Patrols with significant problems such as Mount Druitt which was referred to in evidence by Mr Azzopardi or Redfern referred to more recently in an ABC documentary.

Finally, and most importantly, as part of the package of spot checks and balances, the Ombudsman suggested other reforms which, when taken together with his auditing function, would constitute a package of checks and balances to be weighted against the increased discretion given to police to attempt, at first instance, conciliation of more matters themselves.

In evidence to the Committee, the Ombudsman further clarified his position on the tax audit model:

> **MR TINK:** "Did I understand you correctly to say a little earlier that one thing we could be looking at in terms of the balance that you talked of when we started off is some type of rearrangement at some point where the police do get more discretion to deal with minor matters in a way yet to be determined, but as a check and balance for that and to better focus resources and so forth, that we also are looking seriously at section 51 and 52 and some type of tax-style audit, if I can put it that way, on matters that are referred down the line so that the thing just becomes sharper and better focused?
>
> **MR LANDA:** That is the main thrust of the submission. Other than the one we have canvassed on conciliation, that is the thrust of the submission.
>
> **MR TINK:** Do you think that is a reasonable way for us to be looking?
>
> **MR LANDA:** Yes, it is.
>
> **MR TINK:** Subject to some of the things that we have expressed reservations about in relation to the coming up to speed on conciliation and so forth, as a broad thrust and within the limits of what is available—
>
> **MR PEHM:** We would be able to live with it.
>
> **MR LANDA:** We have had to balance ourselves what we perceive as being a public apprehension that something like possibly 80 per cent of complaints may now come into a different category that the Ombudsman may not look at, and the only way I believe we can appear to be credible, an organisation that gives a credible solution for people with grievances, is to have that balance where your suggestion particularly of being able to have a spot check and to get the aggrieved people who say, "No, I am not happy with the result", to come forward and say so. As long as you have got those checks and balances I think it is a way of

moving all that paper, or a greater part of that paper, away and yet maintaining the integrity of the system."

Lest there be any doubt about the importance of this linkage, it was another matter which was conceded by the Commissioner of Police in his letter dated 30 December, 1991 to the Chairman in the following terms:

> "If there are still residual doubts then I would point out that I have indicated I would have no objection to an amendment granting the Ombudsman the power to institute 'own motion investigations' under the Police Regulation (Allegations of Misconduct) Act. Taken in conjunction with his proposed 'audit role' there would surely then be more than adequate oversight of police attitudes and approaches should this still be considered desirable."

In evidence to the Committee, the Ombudsman made it plain that he should have the power to monitor police handling of minor complaints in progress in the sense not only of auditing but directly investigating cases of abuse of the system by police and thus there appears to be agreement on this.

Whilst these other matters will be taken up in Chapter 6, which looks at strengthening the Ombudsman's powers, the Committee felt strongly that they were worth mentioning at this stage in the above context because they are seen to be an important part of the checks and balances which are needed as part of an overall conciliation package.

Many references were made to the "tax audit model" during evidence. In that regard, it is interesting to note that the audit concept is now being proposed by the Australian Securities Commission to be used to check the audit working papers of company auditors themselves according to the September 5th 1991 edition of the Journal, New Accountant. Hence the Committee feels that the deterrent effect of the audit concept continues to be well regarded.

At the same time, the Committee feels that the checks and balances proposal for the conciliation of Police complaints will result in a stronger audit system than the one used by the Tax Office. This is because the Ombudsman will be backed up by internal police checking systems and the complainant will have the right to approach the Ombudsman directly in any event. Thus, there are third party fail safe mechanisms in the proposed conciliation system which do not exist in the Tax Office self assessment system.

This is not to say that the tax audit model cannot provide some useful precedents for the sort of powers that the Ombudsman should have to conduct his auditing. In particular, Section 263 and 264 of the Income Tax Assessment Act 1936 (as amended) relating to the Commissioner's access to books and powers to require information and evidence may be relevant.

4.4 ENCOURAGING ADMISSIONS - CREATING THE RIGHT FRAMEWORK

It should, of course, go without saying that the integrity of auditing records must be absolute. Accordingly, there should be severe penalties for anyone who deliberately tampers with or alters such a record especially in anticipation of, or in conjunction with, an audit.

At the same time, it is important in the conciliation process for Police to willingly admit mistakes as indicated by the Ombudsman in the following quote when discussing the ideal attitude of police to conciliation:

> **MR LANDA:** "...Sure, we're (the Police) sorry. We mucked that one up. We didn't mean to do so. This is the reason why."...

Accordingly, to help achieve a conciliation climate most conducive to this response, the Committee feels that a provision similar to Section 6B(5) of the Complaints (Australian Federal Police) Act 1981 should be included as part of the conciliation proposal. Section 6B(5) is as follows:

> "Evidence of a statement made by a member or an answer given by a member to a question asked of the member, in the course of an attempt under this Section to resolve a complaint by conciliation is not admissible against the member in any proceedings (including proceedings for or in relation to a breach of discipline)."

It should be noted that a similar provision applies in the United Kingdom pursuant to Section 104(3) of the Police Criminal Evidence Act. This is a proper and appropriate refinement of Section 59 of the PRAM Act which was described by the then Premier, Mr Wran, in his second reading speech on the PRAM Bill as follows:

> **MR WRAN:** "Clause 59 provides that documents brought into existence for the purpose of investigating complaints under this Act shall not be admissible in evidence in any other proceedings.....
>
> ....Quite frankly, it was anticipated that some persons may seek to use the complaints procedure as a fishing expedition to gain evidence for use in other legal proceedings. This would, if allowed, place any police officer obliged to provide information in connection with a disciplinary investigation in an invidious situation - analogous to the right to remain silent on matters that might tend to incriminate him. Hence there is the existence of this protective provision in Clause 59. It is a public interest provision."

The Committee, therefore, feels that to encourage admissions which will help to conciliate matters, there has to be a framework which will allow such admissions to be made without prejudicing the police officer's position in any other proceedings. Accordingly, a provision similar to Section 6B(5) of the Complaints (Australian Federal Police) Act 1981 is recommended subject to admissions being able to be evidence in any

disciplinary proceedings forming part of the conciliation package in the particular case. However such immunities should not carry across into any offences relating to tampering with audit records which must be severely dealt with.

4.5 COMPLAINT TO THE OMBUDSMAN - ALWAYS AN OPTION

The question of whether or not a conciliation procedure can be imposed upon an unwilling party, at first sight appears to be a contradiction in terms in as much as there cannot be a conciliation where one party refuses to be involved.

However, on closer examination, the matter is not so simple. In that regard the Macquarie Dictionary defines conciliation as 'a way to overcome the distrust or hostility of by soothing or pacifying means; placate; winover'.

In support of this, Dr Tillett, who has had experience dealing with police matters as a Senior Conciliator with the Anti-Discrimination Board, gave the following evidence:

> "I don't take the view that conciliation ought to be an option necessarily. It certainly isn't under the Anti-Discrimination Act. People cannot proceed further until conciliation has been attempted."

Notwithstanding these comments, the Committee feels that a distinction has to be drawn between conciliations which take place in the presence of a party who is not in any way connected with the Police Service and conciliations which take place involving a third person who is a member of the Service but who is not involved in the particular dispute.

In relation to the compulsory conciliation referred to by Dr Tillett, an example of which is given in Chapter 4.1., it may well be that this is attempted under Part 3 of the PRAM Act and that, in the presence of somebody from the Ombudsman's Office, something in the nature of a compulsory conciliation can properly take place subject to there being an adequate level of resources in the Ombudsman's Office to cover it. However, in the system now proposed by the police, where responsibility for conciliation is taken up by a member of the police service (albeit somebody not involved in the dispute, which is of course a critical condition precedent) then the question of a compulsory conciliation takes on a totally different complexion.

For minority groups or individuals with particular concerns about the prospect of police attempting to conciliate their complaints, recourse to the Ombudsman is seen as vital. Representatives of the Aboriginal Legal Service were adamant on this point:

> **MR MUNRO:** "We would not be a party to the proposal that less serious matters, minor matters, should be dealt with by way of conciliation. We would think that the Ombudsman should have the power to immediately be involved at the very lowest level of complaints. We would not agree also with the system that is proposed to spot check the conciliation, because we do not agree with

conciliation in the first place."

Whilst the Committee certainly does not see this as a basis for dismissing the conciliation proposal, it is keen to ensure that those who express such concerns about police conciliation are able to have access to the Ombudsman. At the same time, if the Ombudsman, having received a matter, from whatever source then decides that it is an appropriate matter to be conciliated under Part 3 of the Act in the presence of himself or one of his officers, other considerations may apply. In those circumstances, it seems to the Committee that the issues raised by Dr Tillett, namely that in some circumstances conciliation ought to be insisted upon, take on a totally different meaning. Thus, in some cases, a mandatory conciliation in the presence of a third party, may well be an appropriate way to deal with a matter.

Accordingly, the Committee's concern is to ensure that in the context of developing a police conciliation process, there is a mechanism whereby those who choose not to be involved in the police conciliation process can be deemed not to have been able to conciliate the matter and thereby get access under the scheme to the Ombudsman.

In his letter dated 30 December, 1991 to the Committee Chairman, Commissioner Lauer stated:

> "Under the Service's proposals, there should effectively be no poor conciliations - complainants will be advised of the agreed terms and the action taken and also of their right to take the matter up further with the Ombudsman if not completely satisfied."

In oral evidence, the following exchange took place between the Chairman and Judge Thorley:

> **MR TINK:** "The other proposal was to allow anybody who was unhappy with the result of a conciliation to have a right to go further?
>
> **JUDGE THORLEY:** Of course, if he is unhappy with the conciliation, there would have not been a conciliation under my definition of it. There would have been an attempt at it, but it would not have happened."

The Police Service's position was further clarified during the following exchanges:

> **MR TINK:** "People who are not satisfied with the Commissioner's determination of a matter by his servants and agents would have a right to go to the Ombudsman for further consideration of the matter?
>
> **MR COLE:** Yes, and we would see it as part of our investigative process or the conciliation process that we should serve some type of document upon that complainant to indicate that that right is there, and openly to state that the right of review is there."

The Commissioner reiterated this idea in conversation with Mr Scully:

> **MR SCULLY:** "I still accept that he [the Ombudsman] has an oversight role in your proposal but that it is a lessened role, and I wonder if at the coalface of the Patrol Command there may be an element - I do not like to use the words "forced conciliation", but a much gentler form of encouraged conciliation that may well not be the best way of resolving conflict?
>
> **MR LAUER:** What we have sought to do there is to ensure for public confidence reasons that the Ombudsman's Office continues the review function of even the conciliatory process. I think we have strengthened that with a notice at the time of conciliation to a person about rights where he can walk away from the environment, if he is unhappy with it, that conciliation took place in and then cause a complaint to be made about the conciliation process that quite clearly David Landa would pick up."

In addition to this, the Police Service proposed the establishment of a "help desk" to assist complainants who were confused or dissatisfied about an aspect of police conduct. The Assistant Commissioner detailed its operation for the Committee:

> **MR SCULLY:** "On page 11 you refer to the help desk. As I understand it, if someone went to a police station, bearing in mind it could be at some late hour, and was not happy with the police at that station dealing in any way with the matter, that person would contact the help desk and a police officer independent of that station would then take the matter up and might even try to resolve it or conciliate it on the phone with the person?
>
> **MR COLE:** Yes. The basis of that is that a lot of the time the public does not really understand that we have great limits on what we as police officers can do. Particularly if they have not had much to do with the police force, they will call the police and believe that they can solve a problem which we do not have the rightful entitlement to do. The benefit of the help desk is that you can ring and talk that matter through. It may be that if it is a night shift, the only officers available at the station are the very officers they have been dealing with. We would seek, in other words, for the help desk to be again a problem solving resolver of the problem, if necessary to instigate action."

Judge Thorley and several other witnesses asserted that if a complainant was unhappy with the results of conciliation then by definition, conciliation could not be said to have occurred.

The Commissioned Police Officers' Association expressed these views as follows:

> **MR TINK:** "It seems to follow that if somebody just says point blank, "No, I do not want to talk to the police about it" for whatever reason, "I do not trust them" or whatever the reason may be. If they just point blank say no, it seems to me

like night follows day if you look at a definition of conciliation that you cannot conciliate that?

MR STANTON: As a matter of fact we do not.

MR TINK: In that circumstance they then get advice that they go to the Ombudsman?

MR STANTON: In any matter, if you are advised to conciliate, if either party does not want to conciliate, then it has to be investigated and we would carry on that way."

The Internal Affairs Branch proposed that the complainant would be notified of this option in writing after an attempt had been made to conciliate the matter:

MR MYERS: "Part of what we had in mind was writing - when we wrote to the complainant was saying, "This is the agreement, this is what we have done. If you are not happy, you have the option - one of the options is to go back to the Ombudsman", to make it very clear that the Ombudsman [would] still be involved."

Weighing all this evidence, it seemed to the Committee that there were two quite distinct situations that could arise.

The first situation would be one where a complainant had willingly consented to have a matter conciliated. This would result in inquiries being made by a police conciliator over a short period and, a little further down the track a result in the form of the proposed action on the complaint being relayed back to the complainant including, possibly, an apology by the Police concerned. At this point, it might be that the complainant is unhappy with the proposed action of the police conciliator. If so, the involvement of the Ombudsman would then become an issue. As the Committee understands the Police proposal, this would be the point at which the complainant would be advised of his right to take the matter to the Ombudsman.

The second situation, which appears to be of particular concern to the representatives of the Aboriginal Legal Service, would arise in circumstances where a complainant absolutely refused from the outset to deal with the police in relation to his complaint. This might arise because, in the past, the complainant had had, what in his eyes, was an unfortunate experience in similar circumstances and did not feel comfortable with the police handling the matter.

It seems to the Committee that, if the refusal referred to in the second situation is made plain to the police at the outset, there cannot possibly be any meaningful steps taken to attempt conciliation through to the type of agreement proposed by Mr Myers,or indeed by the Commissioner in his letter to the Chairman. In these circumstances, it seems to the Committee that there is no practical alternative but to say that, if somebody refuses to

attempt conciliation, then conciliation at that point has broken down. At that point, there ought to be a mechanism operating to offer the complainant the option of going to the Ombudsman. The Committee feels strongly that such a mechanism should be part of any proposed package for police conciliation and that it is a very important safeguard. At the same time, this mechanism would not preclude conciliation because it would then be open to the Ombudsman to determine whether to attempt conciliation under Part 3 of the PRAM Act with himself or someone from his Office acting as a mediator.

These situations squarely raise the issue of just how and when complainants should be advised of their rights. Whilst it is important to let people know in writing that any attempted conciliation result can, as suggested by Mr Myers and the police model, be challenged by referral to the Ombudsman, the Committee feels that it is also important to ensure that people are aware that they can, if they so wish, take the matter up straight away with the Ombudsman.

One witness, Mr Paul Lynch said there should be a notice conspicuously displayed in every police station indicating that people have a right to complain about the police. The Ombudsman indicated in evidence that such a proposal was open to criticism because it could be seen as touting for business and encouraging people to complain against the police.

As an alternative, it was suggested that a brochure could be developed which, at one and the same time, places emphasis on services provided by the Police whilst also making reference to the role of the Ombudsman and providing appropriate contact numbers.

This idea was explored in the following exchange between the Chairman and the Assistant Ombudsman (Police) Mr Pehm:

> **MR TINK:** "[....what...] about something which gets the information across but provides something about what they are trying to do as a service as well as providing clear information on what you do if you are not happy with the service?
>
> **MR PEHM:** There is nothing now, so anything would be better. We would work with the police to develop something if they wanted to."

To some extent, this issue has been raised by the Police witnesses themselves in as much as it is clearly anticipated that written advice will be given to complainants about their rights to go to the Ombudsman after a conciliation attempt has been made. In addition, the Police Commissioner has given evidence about proposals for a 'help desk'.

The Committee feels that a well balanced pamphlet, setting out in positive terms the role of the police service together with information about how those who are dissatisfied can take further action, is not out of place with the general thrust of the police submission. It is also something which the Police and the Ombudsman's Office could work on to develop further.

4.6 POLICE CONCILIATORS - A SUBSTANTIAL EDUCATION PROGRAM PROPOSED

Any proposal for a Police Complaints scheme which increases the use of conciliation and gives Police a central role as conciliators raises the question of police competency in such methods of dispute resolution.

The Committee sought information about the nature of training in conciliation which is presently given to Police Officers and about the role the Ombudsman plays in this process. Generally, witnesses felt that it was essential to provide specific training for police officers involved in conciliation. A question then arose as to who should provide such training and who in the Police Service should receive it.

In this context the Ombudsman's submission referred to the lack of progress with training of police officers in conciliation techniques since the Bignold Inquiry:

> "In its Final Report (in April 1989), the Upper House Select Committee found that conciliation was an under-used method of resolving complaints and that more effort should be made to utilise it. The Committee also recommended that the Commissioner of Police should consider the training of patrol commanders in conciliation procedures. No such training has been implemented.
>
> In lectures to Internal Affairs investigations staff, training sessions for both Internal Affairs investigators and at regional meetings of senior police, both the Ombudsman and Deputy Ombudsman stressed the usefulness of conciliation in the complaint handling process and encouraged its greater use. These sessions occurred regularly through 1989 and 1990 but, despite the Ombudsman's efforts and the expressed support of senior police, there was no apparent increase in the rate of conciliation."

The Police Service's submission indicated that the Police are in the process of developing a "major initiative within the limitations of the existing legislation" to conciliate complaints in cases where allegations other than serious ones have been made. After consultation with the Ombudsman's Office, guidelines have been issued by the Assistant Commissioner (Professional Responsibility) on 26 August, 1991 in the Police Service Weekly. These guidelines directed officers or supervisors receiving complaints of "a minor nature, whether orally or in writing", to attempt conciliation as follows:

"● A written complaint still has to be reported upon and forwarded as required by Police Instructions and the Police [Regulation] (Allegations of Misconduct) Act but there should be some attempt at conciliation when the complaint is first received. If the complaint has been successfully conciliated, is likely to be conciliated or for some reason cannot be conciliated then this should be indicated when the complaint is forwarded.

● In future, all written complaints of a minor nature which are received

directly by the Internal Affairs Branch will be firstly forwarded to the local area for attempted conciliation.

- Conciliation does not require a written withdrawal of complaint, although, it would be preferred to obtain one. However, the conciliation process does require the conciliating officer to report the terms of the conciliation or the action taken.

- Patrol Commanders should ensure that whenever an oral complaint is conciliated that some form of local record is kept. This will act as a record of events should a written complaint be later made and it will also allow us to demonstrate that we have the capacity to deal with minor complaints ourselves. (This local record is not to become a form of personnel record)".

However, to date, it appeared to be the Police Service's only significant initiative in the area although it must be said that recent figures provided by the Ombudsman indicate that the conciliation rate has risen from 6% to 10% since the circulation of the guidelines. The Committee feels that the initiative warrants further development and the introduction of a comprehensive training programme. This conclusion is based on the evidence of a number of witnesses considered below.

The Assistant Ombudsman advised the Committee that a joint sub-committee was working on guidelines for use in conciliations. However, a major problem with the guidelines is that the police "feel it can be done by instruction, by issuing memos or guidelines". The Assistant Ombudsman clearly considers this action alone to be insufficient.

Representatives of the Commissioned Police Officers' Association asserted that the Assistant Commissioner's guidelines should be regarded as a starting point for other initiatives rather than an end in themselves:

> **MR STANTON:** "Those four dot points put out by the Assistant Commissioner appear to us to be a good starting point but it is just a starting point. We would require the Patrol Commanders or any manager to get quite a lot more education and training in conciliation skills as a matter of course. That is a good starting point. A couple of the points we are in agreement with you is that greater use of conciliation by Patrol Commanders, better education of Patrol Commanders in those conciliation skills and that again gets down to—I know you say it is difficult and we agree with you—defining of the matters that you can conciliate. If you are going to be trained in the art of conciliating then you really have to know when you can use those arts and skills."

A Patrol Commander gave evidence that Mr Cole's guidelines were the first formal directions from senior management on the use of conciliation:

> **MR TINK:** "Mr Standaloft, you are a Patrol Commander at Earlwood?

MR STANDALOFT: Yes.

MR TINK: How long have you been a Patrol Commander?

MR STANDALOFT: Three years.

MR TINK: What communications have you had with your superiors about your responsibility to conciliate in relation to complaints that are made against police officers?

MR STANDALOFT: Until recently, when a circular was issued by the Assistant Commissioner of Professional Responsibility, that area was somewhat vague. From time to time any number of complaints are made about police from a variety of sources. They may be from complainants themselves; they may be made through the office of the local member of Parliament; and they may be made at community consultative meetings. A great many are never really formalised. They are conciliated quickly and to the satisfaction of all parties involved. They never get into the complaints process.

MR TINK: Am I right in assuming that at least until a couple of months ago you had not had any formal communication from your superiors about the way in which matters were to be conciliated?

MR STANDALOFT: Yes.

MR TINK: Something appeared in the *Police Service Weekly* on 26th August— a document with about four or five dot points—dealing with the steps to be taken in cases of conciliation?

MR STANDALOFT: Yes.

MR TINK: Is that the first formalisation of what conciliation involves from a Patrol Commander's point of view?

MR STANDALOFT: Yes."

Notwithstanding his original assertion that the "general tenor" of police officers' training was sufficient experience to equip them with the skills to conciliate complaints, Mr Cole subsequently indicated that the Service intended to fully educate Patrol Commanders and other officers about the conciliation process once agreement had been reached with the Ombudsman on appropriate guidelines.

Mr Cole felt that the Ombudsman's main role in the training area was to maintain the police perception that he supported police officers in their attempts at conciliation. He advised the Chairman that he saw a role for the Ombudsman because he believed that the Police Service "must be careful of perceptions":

MR COLE: "It is alright for myself and the Commissioner to say to people, "If you make a mistake, it is okay; if you conciliate a matter properly, it is okay", but there is a necessity for them to understand or to perceive that where they do act correctly there is no remedial action therefore coming from the Ombudsman."

Commissioner Lauer indicated that training in conciliation would extend beyond that currently provided by Internal Affairs to encompass training at the Police Academy. In addition to the need for a "substantial education program," the Commissioner acknowledged that police culture would need to change to accommodate this new emphasis.

However, other witnesses including Judge Thorley and Dr Tillett envisaged a much more comprehensive training program and a wider educative role for the Ombudsman.

On a number of occasions, Judge Thorley inferred that training in conciliation was necessary for members of the Police Service involved in conciliating complaints. In this regard, he envisaged a role for the Ombudsman's Office and assured the Committee that such training would be included in the Police Academy's education program. This was clear from his discussion with the Chairman about the tendency of officers to formally resolve complaints because of the Service's emphasis on "anti-corruption":

MR TINK: "But that is where [Mr Landa] is saying—and I suspect he is right—that there needs to be a bit of work done?

JUDGE THORLEY: Yes.

MR TINK: I must say that I had a little difficulty this morning with Mr Cole's answer, "Look, there is no need for it". With the benefit of hindsight, he may have been misconstruing it; he may have been considering that we were talking about the training of every individual police officer to apologise. That may have been what he perceived us talking about. I did not understand it to be that, but it seems to me that there is scope for some development there?

JUDGE THORLEY: I accept that that might be so, and I would welcome any direction that the Ombudsman's Office has in that regard. I will certainly ensure that something is done about it from the academy point of view."

On a related matter, the following exchange took place between Dr Burgmann and Judge Thorley:

DR BURGMANN: "Can I ask a question about conciliation? When we questioned Assistant Commissioner Cole he seemed to be of the view that special conciliation training was not really needed, on the grounds that police were trained in conciliation by the very nature of their tasks that they have to fulfil in day-to-day police duties.

JUDGE THORLEY: Some of them do it less than gracefully, I must confess."

Dr Tillett strongly disputed that a police officer is a conciliator due to the nature of his or her work experience:

> **MR SCULLY:** "I found it unconvincing that a police officer's experience puts him in a position of being a conciliator?
>
> **DR TILLET:** That is simply patent nonsense. A police officer's experience, it seems to me, places him in exactly the opposite position of being a conciliator. The whole judicial system in which the police arose is an adversarial system. The police are about establishing guilt or innocence, but essentially, establishing guilt.
>
> That is exactly the opposite of what a conciliator does."

Dr Tillett stated that police culture and inexperience in conciliation resulted in police officers being unable to appropriately conciliate some complaints. He gave the Committee an example of what he meant:

> **DR TILLETT:** ". . . I guess the other problem that I would see as an important one is that the police themselves are not trained to conciliate or mediate and it is entirely unreasonable to simply say to someone, "Go and conciliate this matter given that they possibly have not the slightest notion what that means and in my experience occasionally what it has meant is a senior police officer knocking on someone's door saying, "Why don't we talk about it and see if we can fix it." The complainant often agreeing in a way that probably many of us would if a senior police officer turned up on your doorstep, particularly late at night, so that the matter goes away but it is certainly not being conciliated. There clearly is a need for training. I would argue that all police ought to have training in conflict resolution and conciliation because of the very nature of their work but certainly officers who are going to take part in conciliation need to be given at least basic training in what it means."

Overall, Dr Tillett was very positive about the role appropriately trained Police could play in the conciliation process:

> **MR TINK:** "I guess it really comes down to this, can there be training given to appropriate police officers to allow them, in the first instance, in relation to some types of matters, can they get the delegation to, in the first instance, attempt to conciliate subject to some checking by the Ombudsman?
>
> **DR TILLETT:** Yes, I think that would be a useful model."

Although Dr Tillett had reservations about police involvement in conciliation at present, this was not the case once training and experience had led to expertise in conciliation:

MR TINK: "Whilst you are saying you have got problems with the police being involved with conciliations, what you are saying by way of clarification is, that is as things stand at present?

DR TILLETT: Yes.

MR TINK: But with the sort of things put in train that you are suggesting, there is a role for them?

DR TILLETT: I think it is critical that they are involved because if the complaints conciliation process is seen as totally outside the police, we move into the issue that was raised over here of the whole thing becoming a question of defensive responses. I would far rather see in ultimately, an ideal world, the police deal totally with complaints against the police. I believe complaints are most effectively dealt with at the lowest level and closest to the action. I think, because we are not in the ideal world, there are major problems with doing that now."

Specifically, Dr Tillett recommended that training in conciliation should be provided to "selected Police Officers who would then have responsibility for attempting to resolve by conciliation less serious matters."

The Committee was most impressed by the knowledge and professionalism of Dr Tillett in the conciliation area and believes that Dr Tillett could play a very useful role in developing conciliation training principles.

Dr Tillett said that appropriate training would provide police conciliation officers with the knowledge to decide whether it may be more appropriate to send a Community Relations Officer to see an Aboriginal complainant first before going himself. Thus some special cases might warrant the assistance of an independent third person in the conciliation process. These special cases would also provide excellent opportunities for the exchange of notes and ideas between the Police and civilian conciliators involved.

Conversely, the use of conciliation by police officers without appropriate training would be counter-productive to the successful resolution of complaints. Addressing the Committee, Dr Tillett said:

DR TILLETT:"The use [of] untrained and inappropriately selected Police to try to conciliate with complainants is likely to promote a perception of Police pressure, if not intimidation".

He later told the Committee:

DR TILLETT: "The process will be improved by the introduction of clear, written policy and procedures for conciliation, details of which should be made available to all complainants. The procedures should ensure speed, informality

and flexibility, should not promote an adversarial approach, and should seek to solve problems, rather than to defend or discipline Police, or to establish guilt or innocence."

In addition to explicit guidelines and training, he proposed the establishment of an oversight mechanism, acceptable to the Police, the Ombudsman and the community, to "ensure that Police conciliators are appropriately trained and supervised, and that conciliation is properly undertaken". In the Committee's view, an automatic oversight mechanism could be provided by the flexible definition referred to in the last section.

Whilst initially proposing for his Office a direct role in the conciliation process, the Ombudsman later changed his view and told the Committee:

> "I think I said that in my initial submission that the Ombudsman's Office ought to be part of the procedure. I will tell the Committee that I think I withdraw that aspect because clearly there could be a conflict in the event of a breakdown in conciliation and we then have to decide an issue in which we have been involved and that would tarnish the inquiry.
>
> Clearly we do not have a role in that issue other than in the education."

One suggestion from Mr Landa was that, for training purposes, the Police Service utilise the experience gained by the police officers seconded to the Office of the Ombudsman.

In his letter of 30 December, 1991 to the Committee Chairman the Police Commissioner addressed the question of lack of training in complaint handling as follows:

> "I would gather that Inspector Standaloft may have given some unfortunate evidence before the Committee nevertheless our position remains that many police are indeed excellent negotiators - they spend their whole operational police experience dealing with people face-to-face, often in situations of some emotion, trauma or stress. Most cope remarkable well with these situations and I simply cannot accept the proposition that police, as a class, cannot be relied upon to deal appropriate with people and conciliate complaints.
>
> This is not to say that we cannot learn from others. I have already indicated that as we move further into a program of conciliation and problem solving every consideration will be given to other expertise which may be available and which could be made available to police. This may well involve input from the Ombudsman's Office and private enterprise. Any such assistance would of course be an addition to resources already available internally through the internal affairs training team, the police academy, and the human resources command."

Whilst acknowledging the tremendous work which has been done in particular by Commissioner Lauer and Assistant Commissioner Cole in improving the level of integrity and training in the police service, the Committee feels it simply cannot ignore the

evidence not only of Inspector Standaloft but also that of Mr Stanton in considering the need for further education in conciliation matters.

The Committee's concerns are given added weight when consideration is again focused on an earlier part of this report dealing with "the police culture - an adversarial system." In that regard particular consideration has to be given to the anti-corruption initiatives which have placed quite an emphasis in effect on doing things "by the book" thus cutting across the notions of an essentially compromise nature which are implicit in conciliation.

Lest there by any doubt about this, the Committee feels that it is important to emphasise the following extract of the Police Service submission:

> "One result of the emphasis placed on ethics and integrity and the accountability of supervisors is that these officers are more inclined to report, rather than to resolve locally, incidents within their system of influence.
>
> Supervisors often are anxious to ensure that allegations of misconduct are not ignored. They are anxious to comply with the provisions of the Police Regulation (Allegations of Misconduct) Act and reduce to paper incidents coming to their notice for eventual transmission to the Ombudsman.
>
> Consequently the Service believes that insufficient use is made of the conciliation or resolution process at the local level before a formal complaint is lodged. This may in part be explained in terms of a perception that <u>all</u> misconduct must be reported to the Ombudsman as a first priority, of increased ethical standards and of inexperience on the part of younger supervisors.
>
> This situation is being addressed. Time, experience and education should largely overcome this. Recent instructions issued by the Assistant Commissioner (Professional Responsibility) regarding the conciliation of complaints will go a long way towards resolving this situation.

In all these circumstances the Committee feels strongly that there are a lot of Patrol Commanders and Senior NCO's who may be called upon to conciliate matters who need to be given appropriate training and instruction in reconciling these sometimes apparently conflicting notions of compromise and going "by the book".

Whilst expressing concern about the need for further education in conciliation techniques and conciliation responsibilities for appropriate police officers, the Committee is not suggesting that attention to these matters is a condition precedent to the police conciliation proposal coming into operation in some form. This is because many very minor complaints are effectively and informally conciliated within the patrol command structure. Thus whilst formal education in conciliation techniques is not seen as a condition precedent to particular police officers being able to act as conciliators in all cases, ongoing education for officers who act as conciliators is seen by the Committee as highly desirable.

The Commissioner's comment that many police are indeed excellent negotiators in that they spend the whole of their operational police experience dealing with people face to face may be true. However, if serious consideration is to be given to the scope of the Commissioner's police conciliation proposal which incorporates the vast majority of police complaints, then the Committee is strongly of the view that a lot of work has to be done in the education and instruction area.

To acknowledge existing practice and to encourage further work in this area, the Committee is proposing in a subsequent section of this report, a flexible definition of matters which can be conciliated in the manner proposed by police. Amongst other things, this will allow for the development of Police education in conciliation and the monitoring of progress in that area before more serious matters are considered for police conciliation. In addition, the Ombudsman's concurrence on the precise nature and definition of those matters will be required and is seen by the Committee as a check, balance and monitor on progress of police education in conciliation.

Perhaps the last word here should go to Mr Azzopardi whose experience with the Police Citizens Boys Club and Mount Druitt matters give him an important insight into the Police complaints process. In that regard the following exchange took place between Mr Hatton and Mr Azzopardi:

> **MR HATTON:** "Have you really addressed your mind as to what mechanisms we could recommend or you recommend that would overcome some of those problems in trying to sort out the investigation of complaints, other than just saying to the Ombudsman, 'You must investigate everything, no matter how minor" Is there any other track that you might like to take?
>
> **MR AZZOPARDI:** .....The only way to get rid of all the defects is by knocking the house down and start from scratch and build a new foundation. You cannot do that. All you need is more education, to educate them and to change some of the Police rules...."

Mr Azzopardi went on to outline stiff penalties for giving false evidence but the key comment for present purposes was his emphasis on the need for education.

4.7 CONCILIABLE COMPLAINTS - A FLEXIBLE DEFINITION

Part 3 of the PRAM Act presently empowers the Ombudsman or a member of the Police Service to undertake conciliation of some complaints. In that regard, Part 3 in effect applies to all complaints except those described in the following manner:

> 13. This part does not apply to or in respect of a complaint of conduct by a member of the police force where:
>
> (a) "that conduct appears to have involved the commission of an

indictable offence;

(b) the Commissioner has informed the Ombudsman that he has directed that the complaint be investigated under Part 4;or

(c) the complainant is not identified."

In his letter of 30 December, 1991 to the Committee Chairman, the Commissioner indicated that the Service's proposal for police conciliation would involve the following:

> "The Service's proposal is that the most serious complaints (serious assaults, bribery and other corruption allegations etc.) continue to be the subject of full and complete investigation by members of the Internal Affairs Branch and in turn full review by the Ombudsman. However all other complaints (not 'minor' complaints) would be referred with a presumption of conciliation action in the first instance. If the problem can be resolved to the satisfaction of the complainant and any internal issues addressed, then we have a successful conciliation of a grievance. If conciliation is not possible or is not appropriate in the particular circumstances, we then fall back on other procedures provided for in the Act including investigation.
>
> Obviously a large degree of commonsense would have to be exercised and some matters would be quite inappropriate for attempted conciliation. The example quoted by Mr Landa of the theft of $10 from a police station tea club is obviously one such, quite apart from the fact that an incident of this nature would be seen as a serious light within the service, raising as it would the suggestion of dishonesty on the part of an officer.
>
> Simply put, we are proposing conciliation in all cases where possible and appropriate. We are not talking of "minor matters" nor do I wish to belittle complainants."

Whilst it can be seen that the ambit of the existing conciliation provisions and the proposals put forward by the police are similar, the Committee feels strongly that the change in emphasis proposed by the Police, which is now to be a presumption of conciliation by the Police in all except the most serious matters subject to the oversight of the Ombudsman, creates a situation where the definition and categorisation of conciliable matters has to be most closely examined. This is particularly so given that, elsewhere in this report, it is to be proposed that the PRAM Act be amended to emphasise the presumption of conciliation in Part 2 of the Act as an integral part of the police consideration of every complaint. It is also important because, elsewhere in this report, there is clear concern about the steps which are still required to be taken to ensure that police who are to be involved as conciliators have received sufficient education and training to carry out their roles.

As a general rule, it could be said that the more serious the complaint, the greater the

level of training and instruction in conciliation which should be required before conciliation of a complaint is attempted. For these reasons, the Committee was interested to establish whether or not a flexible "class or kind" agreement could be arrived at from time to time between the Commissioner and the Ombudsman which could be varied to reflect the growing capacity of an appropriately trained and instructed Police Service to deal with conciliable matters.

Both the Office of the Ombudsman and the Police Service indicated that it should be possible to determine the types of complaints which are appropriate for conciliation by agreement between them. In his opening remarks to the Committee, the Police Commissioner stated that for the purpose of focusing police emphasis in the complaints procedure upon conciliation, classes of complaints should be created. The Service proposed that those matters less than "class or kind" should be conciliated, if possible, at command level.

If modelled on the "class or kind" agreement already in existence pursuant to Section 19 of the PRAM Act, the Committee and the Ombudsman regard such a flexible definition as an effective, adjustable safeguard against the inappropriate use of conciliation. Moreover, the Police Service and the Ombudsman's Office are apparently confident of being able to arrive at such an agreement.

Precedent already exists for such an initiative. As the Ombudsman's Office explained in its submission, the Commissioner and the Ombudsman had come to agree on a working categorisation of complaints in 1986 aimed at reducing the workload of the Internal Affairs Branch. At that time, it had become apparent that Internal Affairs was incapable of dealing with the number of complaints it received. Consequently, the Ombudsman wrote to the Commissioner proposing an agreement under Section 19(c) of the Act on certain "classes or kinds" of conduct that could be delegated to police outside the Internal Affairs Branch.

The Ombudsman agreed with the Commissioner's proposal that Internal Affairs should investigate "only complaints about assault (except where minor and technical in nature), corruption, dishonesty or other criminal behaviour". This agreement was modified further in 1986 when the Commissioner and Ombudsman agreed to decrease the workload of the Internal Affairs Branch by restricting its investigation of assault to complaints of "serious assault".

Furthermore the Commissioner and Ombudsman had also determined that investigation at patrol command level of complaints not within the "class or kind" categories need not be performed by a patrol commander from an area outside of the area in which the misconduct occurred. This point was clarified by the Assistant Ombudsman:

> **MR TINK:** "As I understand it the position that Inspector Standaloft described where invariably the Patrol Commander comes in from another area is not strictly speaking correct now?

Mr PEHM: No, for the last three years Patrol Commanders have been doing investigations of anything that is not within the current class or kind, matters of serious assault, corruption, dishonesty or other criminal behaviour can be investigated at patrol level now. That is happening now."

This agreement gave the Assistant Ombudsman confidence that a similar arrangement could be devised in relation to those complaints which were deemed suitable for conciliation. He informed the Committee that:

Mr PEHM: "There is a significant capacity for agreement. We regularly reach arrangements with Assistant Commissioner Cole in particular. There has to be provision for flexibility within the agreement for either party to decide whether a matter is serious."

These agreements were reached at monthly meetings at which the categorisation of specific cases were discussed and decided. The meetings were minuted and distributed as a record of the decisions made.

This level of cooperation was referred to by the Law Society in its submission to the Committee. The Society was "satisfied that there is considerable agreement between the Office of the Ombudsman and the New South Wales Police Service as to the manner in which investigations ought to be conducted and the benefits of closer cooperation".

The Commissioner gave further evidence of his ability to reach agreement with the Ombudsman on determining matters appropriate for Police action: this time in relation to "internal" complaints. Transposing this experience to the area of conciliation, the Commissioner said:

MR TINK: "In relation to your proposal do I understand it that you would have some confidence that between you and the Ombudsman you could fairly readily agree that that is one type of matter, say, in relation to internal complaints, which would be of a class or kind that could be dealt with internally by the police?

MR LAUER: It already happens. In fact, the Ombudsman takes no action but nevertheless the procedures start. They are costly procedures, people have to produce all this paperwork. I am saying there is no need and there will be a considerable saving in resources both to us and to the Ombudsman.

According to Mr Pehm agreement on a division between "minor and serious" was essential and would "[require] some strict legislative definition of what is minor or serious, but also with a fourth or fifth clause dealing with provision for agreement".

The Committee pursued the issue of distinguishing complaints under the Police Service's proposals with Judge Thorley:

MR TINK: "In relation to the definition of what would or would not fall

within this new proposed scheme, is there any scope for having a class and kind approach to it in the way in which various classes and kinds of matters are currently agreed upon between the Commissioner and the Ombudsman as to which will be dealt with by Internal Affairs and which will not?

JUDGE THORLEY: Yes, I believe there is, and I believe, given the existing relations between the Police Service and the Ombudsman's Office, that could be worked out in some way. If it needs closer definition by the Parliamentary draftsman, I do not think it is beyond the wit of man to do something about it. Reducing it to simple terms here for the purposes of this discussion, undoubtedly there will be odd cases which are hard to categorise, but it is the broad thrust of it, with respect, that you people should be concerned about."

Asked if Parliamentary Counsel should draft a bill containing such a distinction Judge Thorley said:

"That would be one attractive proposal, but I think if you expressed a policy view which was accepted by the Government, acceptable to Parliament, in the usual run of events, the parliamentary draftsman would have a go at it and both the Ombudsman's Office and the Police Service would contribute to the deliberations and, hopefully, you would come up with a formula that fits. It could be a useful formula to allow the Ombudsman and the Police Service to go about it with perhaps some escape formula in the event of there being disagreement. But I would not anticipate there would be much area for disagreement, except in odd cases."

Like the Assistant Ombudsman, Judge Thorley advocated that any agreement should be flexible and open to amendment. He responded to a question by the Chairman on the value of being able to amend any agreement in the event of some types of complaints proving unsuitable for conciliation by saying that nothing should be "set in concrete": if the agreement was not working, it should be changed.

In contrast, a note of warning was sounded by Sir Maurice Byers QC, who, in the context of considering whether or not a floating definition was appropriate, made the following comments:

SIR MAURICE BYERS: "Is it desirable that these questions should depend upon the discretion or the agreement of the people from time to time in office? That is what I am saying. Or is it not better for the certain operation of both of these arms of the government, the Ombudsman and the Police Force, that there should be some precision about it. That is what I am saying. If you leave it to be subject of agreement, people may well agree. What happens when they do not agree and what is the likelihood of there being an absence of agreement? It is the

possibility that seems to be undesirable, because of the nature of the functions of the police on one side and the Ombudsman on the other. That is the point."

Whilst the Committee readily concedes that the law should be certain, the reality nevertheless is in the present instance that a degree of flexibility to encourage the progress in police conciliation techniques is desirable, leading to a maximum area of jurisdiction for matters to be dealt with in this way which is clearly defined. The desirability of this is illustrated by the evidence of the Inspector-General Mr Wilson who, not only has a New South Wales police perspective on the matter, but the police perspective of somebody who has had a long distinguished police law enforcement career in North America. In that regard, the following exchange took place between Mr Turner and Mr Wilson:

> **MR TURNER:** "You still have the problem of determining what is a minor or major matter? Under your interpretation you would be saying that the Commissioner would be still determining minor or major events.
>
> **MR WILSON:** I would see it as quite legitimate for Parliament, on the advice of a Committee such as this, to assist in the definition of what is major and what is minor. It seems to me that with a little thought, that should be capable of definition in general terms. There will be things that might not be cut clearly on one side or the other, but it seems to me that should be possible as guidance to both the Ombudsman and the Commissioner.

Mr Wilson developed these ideas further in evidence to the Chairman as follows:

> **MR TINK:** "It seems to me that you could in a similar sort of way have an agreement which may not necessarily have to be reduced to statutory form in terms of saying, "This matter is a minor matter, that matter is a major matter" etcetera, but there would be some sort of floating capacity for the Commissioner and the Ombudsman to agree from time to time broadly as to what matters could be dealt with through the service and what matters could be dealt with in the way they are dealt with now. . .
>
> **MR WILSON:** If something like that could be devised, I think it would be ideal. The one thing though you might wish to consider as well is the means by which differences of opinion are going to be resolved. It is bound to occur because it is such a contentious issue that you are looking at. It is bound to occur that there is going to be a difference of opinion regardless of the good will. Would it have a salutary effect to build in an appeal mechanism, if you like, to the Minister of Police or to your committee or to the courts or whatever?"

Turning to the sorts of matters which might be appropriate for conciliation, Dr Tillett provided the following insights into the types of complaints he considered to be appropriate matters for conciliation:

"In many of those matters the allegations related essentially to something like rudeness or manner of service delivery or indifference to the needs of particular groups of people and normally, in my view, they should have been dealt with at a Patrol Commander level with something like an apology and just a chat to the officer concerned".

In early informal Committee discussions, the Honourable Ron Dyer MLC, who was then a member of the Committee and who had also been a member of the Bignold Committee, suggested that matters or "incivility" or matters such as slapping the notebook might by pass the Ombudsman without problems and would have benefits for morale. Similarly the Honourable Peter Anderson, M.P., who was also then a member of the Ombudsman Committee, suggested that the concept or categorisation of minor matters might involve words or actions which upset a member of the public but were not to be confused with corruption or serious matters such as assault.

Whilst these comments were not made within the specific framework of police conciliation now proposed they make a useful guide to and corroboration of evidence by most of the witnesses at the Inquiry.

The Commissioned Police Officers' Association recognised the difficulty of categorising complaints for the purpose of conciliation. In its submission it observed:

"It has been suggested that a major complaint only remains so until it is resolved and then it becomes minor. However, this Association considers that there are many issues which could be more properly and conveniently left within the province of Police Commanders, as minor complaints."

It then gave the following example:

"A complaint was made to the Ombudsman by residents of a dwelling that had been broken into, concerning the apparent failure of the investigating Police to take a wine bottle, which had been stolen from those premises and located nearby, for fingerprint examination. The matter was referred for conciliation and a subsequent inquiry showed that the Police in attendance, who were experienced investigators had themselves examined the article and found no latent fingerprints. The complainants, one of whom was a school teacher, refused to accept that explanation and demanded that the bottle be fully examined. When that examination was conducted by an expert the view of the original Police was vindicated. The complainant still would not conciliate the matter, claiming that it was her former neighbours who broke into her home. There was no evidence to support this allegation, and the alleged suspects who had a very common surname, had left sometime prior to the offence. The matter was returned to the Ombudsman without any conciliation, however a considerable amount of Police time and effort was wasted in an attempt to satisfy the complainant, when the matter should have been addressed and concluded by the local Patrol Commander."

According to the Association, matters such as rudeness, discourtesy, lack of service and harassment could be left to Police Managers to resolve while matters encompassing "criminal offences, or serious breaches of Police Rules and Instructions could be left within the present system".

These comments really get back to the Commissioner's written submission to the Chairman that what may be a small monetary matter involving a theft of $10 Police Station tea money could, as far as the Police Service is concerned, be an extremely serious matter. Thus definition in each case is not easy.

To underscore the Committee's concern about the preparedness of the Police Service to undertake any extensive police conciliation program at this stage, it is interesting to note that the Ombudsman and Assistant Ombudsman voice doubts over the quality of local command investigations but argued that any problems in this area could be counterbalanced by ensuring effective accountability within the section of the system delegated to the Police Service. They argue that there are no real alternatives to delegating conciliation matters to the local command level. They told Mr Scully:

> **MR PEHM:** It is probably inevitable because of the volume of complaints and the overload on Internal Affairs. We think it is probably better for Internal Affairs to be freed up for the very serious matters, so that they can do them quickly and well. There is nowhere else for the complaints to go but to the local level. We are saying there are a lot of problems with local level investigations. They are just not equipped and trained to do them very well at the moment. The follow-on from that is that they need closer, independent oversighting.
>
> **Mr LANDA:** And accepting that that is the direction in which it is going, the only counterbalancing to ensure that the public have some recourse is to give the power to intervene, to supervise, about which we are talking."

Bearing these comments in mind, and bearing in mind also, the public interest benefit in freeing up the Ombudsman's Office from pursuing a paper war with every complaint, as distinct from, in effect, delegating conciliation with a view to having more effective and sharply focused oversight mechanisms, the Committee feels that a flexible definition of conciliable matters to be agreed upon from time to time between the Ombudsman and the Police Commissioner in the public interest, but subject to a statutory maximum definition of a cut off point, is the way to go.

The consideration of a flexible proposal to categorise conciliable complaints raises the question of whether or not there needs to be any amendment to the PRAM Act. In that regard, notwithstanding that wide powers of conciliation are available in Part 3 of the Act at present, it appears that these provisions have been drastically underutilised and that in key areas of the police service, there is doubt about the nature and extent to which conciliation powers currently exist. The evidence of Mr Stanton of the Commissioned Police Officers' Association is instructive on this point as follows:

> **MR STANTON:** "A couple of points where we are in agreement with you is that greater use of conciliation by Patrol Commanders, better education of Patrol Commanders in those conciliation skills and that again gets down to - I know you say it is difficult and we agree with you - defining of the matters that you can conciliate. If you are going to be trained in the art of conciliating then you really have to know when you can use those arts and skills."

Taking up this comment, it appeared to the Committee that Part 3 of the Act dealing with conciliation stands quite separately from the machinery provisions for dealing with complaints under the Act, which are dealt with quite separately in Part 2. In a sense, Part 2 provides a fairly comprehensive set of steps and procedures which are required to be taken to process complaints notifiable under the Act such that compliance with Part 2 exhausts the responsibilities of a police officer required to notify a complaint and there is thus no need to proceed to look at Part 3. The Committee's strong suspicion is that Part 3 tends to, in many cases where conciliation might otherwise be appropriate, be totally overlooked.

A possible solution to this, would be to amend Part 2 of the Act to incorporate a proposal for conciliation which is thus, in the statutory scheme of the PRAM Act, an integral part of the steps ordinarily required to be considered by any police officer dealing with a notifiable complaint. In a supplementary written submission to the Committee, the Commissioned Police Officers' Association dealt with this issue in the following way:

> "In the circumstances this Association would fully support the movement of portions of Part 3 of the Act into Part 2 that would make conciliation a necessary step in processing complaints under the later part of the Act. Of course, some firm guidelines agreed upon by the Ombudsman, the Police Service, Members of Parliament, and other interested parties (legal practitioner, legal/welfare agencies) would need to be developed to avoid criticism and to ensure that this proposal is mutually acceptable."

Considering the underutilisation of conciliation within the current statutory scheme the Committee feels that the Commissioned Police Officers' Associations views on this matter are important, given that they represent that section of the police service which is most closely concerned with the conciliation of complaints, particularly Patrol Commanders.

Therefore, the Committee feels that there should be provision made for conciliation in Part 2 of the Act and this will require consequential amendments to Part 3. In that regard, the Committee feels that it is important to retain the conciliation power in Part 3, at least insofar as it relates to the Ombudsman, because it may well be that a matter is referred by a complainant in circumstances where the complainant absolutely refuses to be part of a police conciliation or is unhappy with a police conciliated result and in taking it up with the Ombudsman, the Ombudsman is of the view that it is a matter that could be further conciliated with perhaps the assistance of the Ombudsman or somebody from the Ombudsman's Office being directly involved or indeed some other third party.

Accordingly, it is most important that Part 3 remain in force at least so far as the Ombudsman is concerned to provide that flexibility although changes would be required to be made as far as the Police are concerned to reflect the new provisions of Part 2.

As far as Part 2 is concerned, the precise wording of an amendment would, of course, be a matter for Parliamentary Counsel. However, something Part 2 should indicate in some form is that, where the conduct to which the complaint relates is of a class or kind that the Ombudsman and the Commissioner have agreed should be dealt with in the first instance by way of attempted police conciliation, then notification should be to the relevant Patrol Commander or his Senior NCO delegate who should attempt to conciliate the matter accordingly.

The Committee feels that the amendments to Part 2 should be limited to the insertion of just enough words to indicate in effect that conciliation is a key consideration in the processing of complaints. Part 3 should contain full particulars of the new proposed system and be incorporated in Part 2 by reference only.

Part 3 would thus be substantially amended to include provision for "class and kind" agreements between the Ombudsman and the Commissioner from time to time within the definition of matters currently conciliable under Part 3. In addition, the precise provisions of the record keeping requirements, auditing and spot checking powers of the Ombudsman and ancillary matters could be specified in Part 3.

However, the specific mention of the conciliation proposal in Part 2 as an integral step to be taken in the consideration of all complaints, is one that the Committee feels is important to insert so that all police officers have to consider the question of conciliation when dealing with any complaint.

4.8 POLICE CULTURE - INCENTIVES TO CHANGE

The Ombudsman gave extensive evidence about difficulties with the existing police culture. Commenting on remarks made by Commissioner Fitzgerald in the Queensland context, Mr Landa said in evidence:

> **MR LANDA:** "Under the code, loyalty to fellow officers is paramount. It is impermissible to criticise fellow police particularly to outsiders. Critical activities of police, including contact with informants, are exempt from scrutiny. Police do not enforce the law against or carry out surveillance on other police and those who breach the code can be punished and ostracised."

Referring to the Police Service's submission, the Ombudsman said in evidence:

> "The police submission contains no realistic assessment of police culture as it presently operates in New South Wales, nor any description of how the changes it proposes will impact upon, and be absorbed by, police at the local level."

The Ombudsman then referred to comments by Chief Anthony Bouza of the Minnesota, U.S.A Police who, in commenting on the advice by senior police to "rookie" police said the advice was:

> "Forget all the bullshit they gave you at the Police Academy kid, I'm going to show you how things really work on the streets."

Committee members noted that this was almost word for word the comments made by a rookie police officer on the ABC documentary "Cop it Sweet". Such problems remain current as evidenced by the ongoing ICAC inquiry into the "Information Exchange Club".

Whilst there is no doubt that great advances have been made in tackling police corruption especially under the leadership of Commissioners Avery and Lauer, there is also no doubt as far as the Committee is concerned that the negative aspects of police culture remain a very significant problem. The Committee recognises that the police often work under great pressure and in great danger and that the close bond between police especially in those situations has a very positive side. However it must never be an excuse for Police themselves to break the law or to treat training and education with contempt.

In that regard, Recommendation 228 of the Aboriginal Deaths in Custody Royal Commission, to the effect that police training courses be reviewed to ensure that a substantial component of training both for recruits and later in-service courses relates to interaction between police and Aboriginal people, is being supported and acted upon by all Governments in Australia.

It is therefore of great importance that such training be taken with the utmost seriousness by police.

Bearing the police culture problem in mind, the Committee feels strongly that the flexible class and kind definition of conciliable matters when taken in conjunction with the Ombudsman's proposed power to audit and spot check, will provide powerful incentives for police to do the right thing.

The flexibility of the definition will allow the Ombudsman to recognize when matters are being properly and effectively handled by giving the police associated with them progressively more control and responsibility for conciliation. Conversely in problem areas the Ombudsman may remove from police the authority to conciliate matters which are not being handled properly until such time as the police concerned demonstrate that they are able to deal with such matters in an appropriate way.

The auditing power will be a key tool in achieving this on a district by district or if necessary patrol by patrol basis. To quote Judge Thorley:

> **JUDGE THORLEY:** "I envisage that the Ombudsman should have the right and indeed exercise the right, to conduct checking within some formula, of his choice, of course. I would imagine that apart from just doing pure random testing, if I

were him I would be minded to endeavour to identify - and that will not be very difficult - any particular geographic areas that seem to be more productive of complaints than another area.

Experience may reveal for the sake of argument, that more complaints are coming out of the Parramatta district than coming out of Manly. If that were the experience, I would imagine he would be wanting to pay a bit more attention to what had been going on at Parramatta, and indeed to the administrative decisions that had been made within the police headquarters to try to solve any management matters that they may have highlighted. In that sense I would think random - if that is the right word, but not entirely without some reason - checking would be undertaken. We would welcome that. There is no problem about that."

In this way, the Committee feels strongly that a conciliation procedure of the type now proposed would free up resources and enable them to become more targeted and focused on problem areas thus providing an emphasis and incentive among police for desirable changes to the negative aspects of prevailing police culture. There may also be an important role for the Inspector-General, Mr Wilson, to play in this process.

Finally, the Committee feels strongly that the secondment of serving police officers to the Ombudsman's Office should be encouraged to aid in the ongoing education process. Accordingly, the Committee resolved to recognise the merit of secondment to the Ombudsman's Office and to request the Police Board to advise how that merit could be recognised within the Police promotion system.

4.9 POLICE RECORDS - DESIRABLE CHANGES

Police concerns about the nature of records required to be held under the current provisions of the PRAM Act, were dealt with in Chapter 3.4 of this report. It appears that those concerns are a major obstacle in the way of achieving higher rates of conciliation of complaints.

At present, a record is kept of all complaints made against police. This includes even those complaints found to be baseless or not sustained and they are used in conjunction with applications for promotions and such like. The effect of this on the Police is that they tend to dig in when a complaint is made against them. As a result, they require all the formal procedures to be carried out in investigating a complaint lest any finding against them, no matter how minor, is recorded resulting in adverse consequences for their promotion reports.

It is clearly very important for records to be kept of complaints made so that any general trends can be picked up. It is also important that different types of records be kept depending on the severity of the matter alleged. However, it has been put to the Committee by both the Ombudsman and the Police Service that relatively minor changes to the type of records taken and kept could significantly increase the number of

complaints resolved by conciliation.

In evidence to the Committee, representatives of the Police Association expressed strong views about Section 35 of the of the PRAM Act which is the key section dealing with records of complaints. In that regard, the following exchange took place between Mr Scully, Mr Green and Mr Day:

> **Mr SCULLY:** "Your members are obviously concerned about promotions being affected by any complaint. Assistant Commissioner Cole gave us a number of examples of ludicrous comments being put on promotion reports. As I understand it the suggestion is that after three years only minor complaints will be expunged from the record. I wonder how you feel about that and whether you believe that is adequate to balance the public interest of not having officers promoted who may have had legitimate complaints made against them as opposed to not promoting worthwhile officers who have had trivial complaints made against them?
>
> **MR GREEN:** Section 35 requires there to be a report furnished on the promotion of any police officer. I do not know how it can be sustained. That is, the proposition that allegations unsustained, not proven allegations that have been subject to a full inquiry and the Ombudsman's oversight, should still appear on the record. That is the situation we presently have. The Police Association believes it is simply outrageous.
>
> **MR DAY:** It should be wiped altogether."

One reason why it was put that some records needed to be kept for certain purposes although not on promotion reports was provided by Mr Myers and the Internal Affairs witnesses in the following context:

> **MR MYERS:** "Fifteen years down the track when Constable Myers applies for a promotion he is going to have a list of these on his promotion report and we are saying that it is not appropriate to be listed there. Record it certainly, we want it recorded in our records, we want it shown, this man might come up 15 times a year, then we have got to look at him...."

Responding to a comment by the Committee Chairman that a 'relatively small alteration' to Section 35A of the Act might have a major impact on Police perceptions, the Ombudsman said:

> **MR LANDA:** "It could have a major impact because, you see, as much as I say to the Police that mistakes - we understand, for instance, that police have discretions, enormous discretions, and as anybody in normal business would know, when you have discretions and you take one course or the other, you can be wrong as often as you can be right, and in the case of policing, an honest, well-intentioned mistake is not punishable. It should not be criticised by the Police themselves other than to point out, to tutor and to counsel so it does not happen

again. It certainly would never be an area that is disciplined by the Ombudsman, and this is part of the talk that we have with the Police. I have to say I do not think that they believe me, and I do not think they believe the Commissioner either. I think this is very much a part of the problem. I think it is very much a part of why you see the conciliation figures have not moved at all."

In order to overcome any obstacles presented by the recording requirements of the Act to increasing the use of conciliation, the Police Service recommended that Section 35A of the Act be amended.

In its view "the requirement for notification of any complaint made against an officer [was] bound to militate against the successful introduction of an expanded program of conciliation or resolution of complaints without formal investigation". According to the Service, if complaints such as rudeness continue to be registered on an officer's promotional record officers would prefer to have a full investigation of the complaint to try to obtain a "not sustained" finding on their record instead of resolving the matter informally. This was perceived by the Service to be "completely contrary to the spirit of resolution of complaints which we are now seeking to introduce" but is felt to be unavoidable in view of the statutory requirements.

Although "minor" complaints apparently have no bearing on an officer's assessment for promotion it is perceived, especially by junior police, that "each and every complaint against them will be recorded and documented forevermore so that when they seek promotion, they will be held against them." The inclusion of such matters in these reports also used significant Internal Affairs Branch resources - it prepared 532 such reports in the first six months of 1991.

Consequently, the Service advocated reforms to this section of the Act. It proposed that:

> "In the interests of efficiency, fairness and gaining the co-operation of Police generally in a much expanded conciliation or resolution program, it is our view that Section 35A of the Act should be amended to require the inclusion only of those complaints found sustained or which are unfinalised as at time of preparation of a report.
>
> Further, even when a complaint is sustained, the subject matter may not be of major moment and consequently relevant for the purpose of consideration of integrity. We therefore also propose that where a sustained complaint does not result in the preferment of a Departmental charge, or is otherwise regarded by the Officer in Charge of the Branch as being of a serious nature, that reference to that matter not be included in a subsequent Section 35A promotional report after a period of three years, provided that the officer concerned has not been the subject of further complaint in the interim".

To provide for the recording of repeated "not sustained" or "conciliated" complaints against an officer, Internal Affairs Branch or the Commissioner would be able to include

such matters in the promotional report under Section 35A(2)(e). This provision enables the Commissioner or the Officer-in-Charge of Internal Affairs Branch to include any matter in the report should they think it relevant.

The general thrust of the Police Service's submission towards the removal of reference to certain categories of complaints from promotional records, whilst maintaining particulars of some for monitoring purposes, appeared to gain some possible support from the Police Association President Mr Day during the following exchange with Mr Coleman:

> **MR DAY:** "You would never hear the police prosecutor read out to the court in relation to a person charged with criminal charges a number of offences of which he was not convicted. That is exactly what this comes down to.
>
> **Mr COLEMAN:** I do not want to take any side but is there a compromise for promotion purposes in having anything not proven kept clear but for internal situations for the Ombudsman keeping the record for a certain period in relation to the pattern that he might be looking for? Is there anything along those lines that could be looked at?
>
> **MR DAY:** It is maintained in that way now. I believe the compromise would be to expunge it from the record of any person coming up for promotion. Why does it need to go before a selection committee or an appeals board?"

To further develop its existing strategies to "deter misconduct and improve the level of ethics and professionalism of its members", the Police Service proposed several new strategies, including, the introduction of "Admonishment" for Officers.

This proposal was outlined in the Service's submission:

> "3.2.18 For disciplinary purposes, the Commissioner has a range of options open to him. At the lower end of the scale, there is "counselling" - the simple tendering of advice for future guidance; and "parade and reprimand" - regarded as a penalty and subject to imposition after the formal disciplinary processes under the Police Service Regulation.
>
> 3.2.19 It is our view that there are cases where the required litigation, followed by a formal reprimand, may not be warranted, yet the circumstances would dictate more than mere counselling by a superior Officer was appropriate.
>
> 3.2.20 To overcome this, the Commissioner proposes to introduce a category of "admonishment" of officers, which would be regarded as a mid-point between the two other options mentioned. This would allow a matter to be investigated, some formal action taken where justified, yet stop short of the fairly drastic step of preferment of a Departmental charge.
>
> 3.2.21 Under other proposals advanced in this submission, such action would

normally be classed as in the less serious category and hence only appear on a positional promotion integrity report for a period of three years. We see this arrangement as in fact strengthening the Commissioner's disciplinary options in the superintendence of the Service, yet also favourable to the maintenance of Police morale overall."

The Commissioner and Assistant Commissioner clarified these proposals during the public hearing on 4 October:

MR TINK: "My final question relates to records and promotion. I understand that you are saying that there should be an amendment whereby if a complaint is made but not sustained or pursued—at the moment the fact that that complaint has been made is currently required to be noted on the record—it not be so noted?

MR LAUER: Yes.

MR TINK: Moving on from that point, the Ombudsman seems to be suggesting that there be some way of handling matters where a complaint is sustained in a very minor area where it not go on the record?

MR COLE: We have addressed that by saying that perhaps after two years they could be absolved and the complaint could be stricken from the record.

MR TINK: Three years, I think?

MR COLE: Three, I am sorry. After three years they could be absolved.

MR TINK: That is this new class of admonishment?

MR COLE: No, there is a difference. If a complaint is sustained and that could result in admonishment, it would still stay on the record for three years. In other words, it is not the admonishment part of the discipline or the counselling; it is the complaint being sustained that says it goes on the record. We would say that that ought to be taken from his record for the purposes of promotion—not from the records of the Police Service—after three years."

The Commissioner later confirmed that only sustained complaints would be recorded for promotional purposes for a period of three years. Mr Myers, Director of the Office of Professional Responsibility, New South Wales Police Service indicated that these complaints would be subject to an investigation.

The Committee noted that the Police Service's proposal only affected police promotional records. The Police Service would continue to maintain a record of all complaints made against its members. Nor was it intended that details of these complaints would be removed from the Ombudsman's records:

MR LAUER: "Under our proposal they would only be available for three years. So, they would no longer feature.

MR TINK: A conciliation would be recorded for a short time?

MR LAUER: Yes.

MR MYERS: Recorded for ever more, as the legislation stands.

MR COLE: It would still be recorded for ever more but it would not appear when he went for a promotion."

Mr Myers illustrated further the Service's difficulties with Section 35A of the Act and outlined what senior management in the Police Service would prefer to happen with recording procedures:

> "The problem will be not so much telling the Ombudsman, but 15 years down the track when Constable Myers applies for a promotion he is going to have a list of these on his promotion report and we are saying that is not appropriate to be listed there. Record it, certainly, we want it recorded in our records, we want it shown, this man might come up 15 times a year then we have got to look at him, but we would have no problem with telling the Ombudsman."

Judge Thorley indicated support for a disciplinary option involving something less than the formal charging of a police officer in the following discussion with Mr Kerr:

MR KERR: "There is need for legislative amendments?

JUDGE THORLEY: We believe so, yes. I would also like to see the Police Regulation (Allegations of Misconduct) Act amended to enable us to do something less than charging police with disciplinary offences. I think even Mr Landa would share that view because I know of one particular report in which he recommended that the officer in question—I think he used the phrase—be reprimanded. He was really using that word in the sense that the officer should have pointed out to him the error of his ways."

The broad thrust of the concept of admonishment was also supported by the Ombudsman in his written submission as follows:

> "The traditional emphasis on discipline and fault in the complaints system has produced considerable resistance by Police to conciliation. The attitude has been that unless the officer, the subject of complaint, is prepared to admit fault and apologise, conciliation is impossible. Conciliation can, however, take place between the Police Service and the complainant without any admission of fault by the Officer concerned. The Officer can be 'spoken to' which is all many complainants ask and the Service can treat this as part of the general education of

its Officers."

By reason of the foregoing, the Committee is strongly of the view that amendments are required to Section 35A of the PRAM Act in the manner outlined by the Police Commissioner and that the new category of admonishment should be introduced.

CONCILIATION - THE BENEFITS

5.1 COMPLAINANTS - WILL GET LISTENED TO AND TAKEN SERIOUSLY

In its written submission to the Committee, the Police Service maintained that the public would receive a number of benefits from a more efficient complaints system:

a) "more efficient and effective utilisation of public resources in both the Office of the Ombudsman and the Police Service;

b) quicker resolution of their complaints, with positive remedial action put in place where necessary;

c) a more caring, understanding approach from conciliating Officers, rather than the basically adversary approach inherent in present systems; and

d) the option to still approach the Ombudsman should Police endeavours fail to satisfy the original complaint".

As it is the Police Service's model which is the starting point for the proposals contained in this Report, the Committee felt that it was important to ascertain just how the suggested benefits might occur.

Overall, witnesses thought that the new system would have a number of benefits for complainants generally although there were some reservations expressed in relation to Aboriginal and minority groups which are specifically dealt with elsewhere in this Chapter. The benefits for ordinary complainants were stressed by Dr Tillett who gave the following evidence to Dr Burgmann:

> **DR TILLETT:** "...The majority of people in my experience want something very basic and at a much lower level than changing the world or their day in Court.
>
> What they want is their particular concerns fixed up. So, what this guy in the case I referred to really wanted was firstly, his complaint to be taken seriously. He wanted people to say 'O.K, if you say this happened, we are going to listen to you and take you seriously'. Secondly, he wanted the person he was making the complaint against told that that behaviour was unacceptable, and thirdly, he wanted to feel comfortable with the Police and he hoped that Police attitudes would change.
>
> He got all of those things and he probably would have got none of them in a day in Court because it would have been a matter of his words against the officer and

all the other officers who were on shift at that time. He would have got nothing and what he certainly would've ended up with was a sense that he could never set foot in that Police Station again. Whether that was a reasonable perception or not I don't know."

Mr Lynch, who gave evidence from the perspective of a complainant experienced in two police complaints, provided an instructive example of what can be achieved through an informal conciliation. In that regard, the following exchange took place between Mr Scully and Mr Lynch:

MR SCULLY: "But tell me, what did you want out of the system? Would you have been happy with a conciliation? Say you have put your complaint in, a Senior Officer contacted you and said, 'I would like you to go and visit the Patrol Commander at that station and discuss it with him and the officer concerned?'

MR LYNCH: Yes I certainly would have.

MR SCULLY: And say the officer said, 'I am not going to concede that I did do it, but I might be able to concede that you perceived I did certain things in a wrong way' as a process of give and take in a conciliation. And say the Patrol Commander said, 'look, it sounds to me like there is a problem with the facts, but I am prepared to concede that you may have something to complain about. I am going to counsel the officer concerned to make sure that it doesn't happen again', but not necessarily agreeing that it did happen. This sort of thing --?

MR LYNCH: I understand what you are talking about, and I have, in fact, some five or six years ago gone through a process almost exactly like this with two other policemen. If you would like the circumstances? My step son was at school where some thefts were taking place. He was at that time six or seven years of age he came home at the end of the day and said two policemen had questioned him at school and the floor had moved back and forward, by which I undertook him to mean that he was on the point of fainting. And I said, 'what did they question you about?'. He said, 'there is someone trying to kidnap Prince Charles and Lady Di'. At this moment I thought, this is a fevered imagination, but I respect my children and I believe they tell me the truth.

So I checked with another parent and learned that, in fact, some coins had been stolen which were of value and the police apparently were asking all the children whether they had seen coins that had a picture on them that looked like Prince Charles and Lady Di. In fact, it was King George VI and his wife. I became very angry at this point and the following morning at 7.00 am I called the local police station which was North Sydney and I asked to speak to the area Commander. He was not on duty, so I then called the Commissioner's Office and I spoke to the Commissioner's Orderly and I explained what I had in mind and said I wanted to hear from the Area Commander within 30 minutes.

I received a call from this gentleman within 30 minutes and I explained what had happened and he said, 'this is a bad business' and I said 'yes, I know it is a bloody bad business'. 'I don't want this happening to my son and I don't want any stain on his name'. He said, 'if you like I can talk to these men and get them sacked' - and I know that game - and I said, 'that is not what I want at all. I want something else. I want those two same policemen to go back to the school today. I want them to go to my son's classroom, I want them in front of the teacher and in front of their classmates to shake his hand and thank him for helping them in their investigation yesterday'.

I would assume that when the Area Commander spoke to those Detectives - whose names I have never learnt and am not interested in - he said certain harsh things which shouldn't be said in a sacred Committee atmosphere in this room. But that was the end of it so far as I was concerned. That was the appropriate response.

It was an incident, I believe they made a mistake, they had certainly breached the law, but they had basically made a mistake. There was nothing vicious about it, there was nothing corrupt about it. They were simply trying to investigate a theft with the skill and learning at their command, obviously not enough learning."

Mr Lynch gave the following account of the sequel to Mr Scully:

MR LYNCH: "....Incidentally, I was satisfied.... when the child came home with a face full of joy that evening and told me the policemen had come back and thanked him."

By contrast, Mr Lynch's other police complaint concerned serious allegations about a Court case. Not surprisingly, Mr Lynch said he did not consider that matter to be an appropriate one for conciliation. Accordingly, under the proposed system, the inference is that he would have exercised his right to insist that the matter be referred to the Ombudsman.

In his written submission to the Committee, the Ombudsman made reference to a very significant survey conducted of the British Police Complaints System:

"A survey of the British System indicated that a far greater proportion of complaints (over half) declared themselves to be 'broadly satisfied' with the outcome of informal resolution, than the proportion who were satisfied by full, formal investigation (only 10%) of their complaints. From the results of the survey and other work, it was concluded that:

> what complainants are seeking in most cases is not something akin to trial and punishment of the officer concerned, but a full explanation, an apology, some pointed remarks to the officer from somebody in a Senior position, and/or a clear assurance that steps will be taken to see that "it does not happen again". Maguire M. ibid."

The British survey referred to was strongly corroborated by the Ombudsman's direct experiences in New South Wales. In evidence to the Committee, the Ombudsman said:

> **MR LANDA:** "It is part of community policing that police say, 'sure, we are sorry. We mucked that one up. We didn't mean to do so. This is the reason why'.. Citizens will accept conciliation. They will walk away from such an event. It will be an experience in their life. They will admire and not denigrate. It is not only enormously resource saving for the police; it is a most critical tool in the grievance procedure."

By reason of the foregoing, it seems to the Committee that there is substantial evidence from a professional conciliator, a complainant and the Ombudsman himself to support the following benefits of conciliation asserted by the Police:

- Quicker resolution of their complaints, with positive remedial action put in place where necessary;

- A more caring, understanding approach from conciliating officers rather than the basically adversarial approach inherent in the present system.

To sum up, the Committee believes that, in appropriate matters, complainants should be able to obtain speedy and commonsense results. Such results will save time and money all round and result in resources being directed to the areas of greatest need thus ensuring that real problem areas are dealt with by the Ombudsman.

The other matters raised by the Police Service relating to utilisation of resources and the option to approach the Ombudsman are dealt with in subsequent sections of this Chapter.

5.2 MINORITY GROUPS - MORE HELP FROM THE OMBUDSMAN

The Committee is acutely aware of the grave concerns expressed by Mr Munro of the Aboriginal Legal Service about the expanded use of conciliation in the resolution of complaints against police. In that regard, Mr Munro's comments are referred to on page 39 of this Report.

Mr Chris Cunneen, who is a Lecturer in the Institute of Criminology at Sydney University, referred in his evidence to the Royal Commission into Aboriginal Deaths in Custody as follows:

> **MR CUNNEEN:** "....I am quoting from recommendation 226 that:
>
> > 'Complaints against police should be made to, be investigated by or on behalf and adjudicated upon by a body or bodies totally independent of Police Services.'

It is of concern to me, and I am basing this on a fairly quick read of some of the submissions that have already been brought to the attention of the Committee that some of those submissions contradict quite basically the principles that have been set out in recommendation 226. I reiterate that there are 11 principles there."

Dr Tillett also expressed particular concerns about minority groups as follows:

DR TILLETT: "There are particular difficulties in the perceptions of minority groups who claim to experience hostility from (and often discrimination by) police that existing mechanisms are strongly biased in favour of the defence of police, and there is usually a strong imbalance in favour of the police, whether in reality or perception when they deal with such groups. Many minority groups (eg. Aboriginal people, gay men and lesbians, sex workers and injecting drug users) view the police as hostile towards them as people (regardless whether or not they commit offences) and consider the present complaints process as equally discriminatory."

In general terms, it seems to the Committee that minority groups lose out under the current system. This is because the system is bogged down under a mountain of paper referred to in Chapter 3.1 and is thus unable to direct an appropriate level of attention and resources to particular concerns of minority groups. It is worth repeating the evidence given by the Ombudsman on this issue:

MR LANDA: "The illiterate, juveniles, aborigines and the uneducated and ethnic, non-English speaking groups, become more disadvantaged as the system clogs up with more complaints. It is these very groups who are most victimised by police and where abuse of authority by police is least likely to be detected."

It seems to the Committee that the Police Service proposal for conciliation would free up resources currently exhausted in the so called 'paper war' to focus more specifically on problem areas such as complainants from minority groups.

This is not to say that many members of minority groups will not stand to benefit from a proposal which places a greater emphasis on conciliation. In that regard, reference is again made to the example of a successful conciliation undertaken by Dr Tillett and referred to in Chapter 4.1. In that matter, Dr Tillett was able to resolve a matter involving a gay male, on an informal conciliated basis where the matter was otherwise degenerating into a legal and jurisdictional farce.

However, the refocusing of resources generally, which would be achievable under a more comprehensive conciliation scheme, would have the very positive flow on effect for minority groups of allowing greater resources to be directed to their special problems.

The question of resources for aboriginal complainants was of special concern to Mr Turner whose electorate has a significant aboriginal population. In the course of discussing relevant issues, the following exchange took place:

MR TURNER: "What occurs when there is a reinvestigation by one of these seconded officers and the complainant is not satisfied because, for instance, he says it is only police investigating police again? Is there a further mechanism that can come into play at that time?

MR LANDA: It is a very real point. Particularly within the Aboriginal community there is a great deal of sensitivity. In fact, we started civilianising some of those positions especially so as to draw back from that situation of creating an intimidation for a complainant. We tended more towards a civilian investigator, and certainly a non seconded officer in many areas."

In general terms, the Committee feels that the conciliation proposal will allow the redirection of further resources into the initiatives Mr Landa mentions above.

The extremely grave systemic problems revealed by the sort of evidence given to the Royal Commission into Aboriginal Deaths in Custody and the systemic problems related to matters such as Operation Sue, would be better able to be addressed if the Ombudsman was given a power to directly investigate matters. In that regard, it should be noted that just such a power is proposed to be given to the Ombudsman in Chapter 6 as a direct result of the rejigging of the overall police complaints system which can be effected if the proposal for the conciliation of police complaints suggested in this Report is adopted.

In a supplementary written submission dated 11th February, 1992, the Ombudsman referred to an incident at a railway station which involved a fight between Asian and non Asian students. The Asian students were charged but the non Asian students were not dealt with. According to press reports, the Asians were charged because "they were the ones remaining at the station when the Police arrived."

The matter was later raised with the Ombudsman by the Australian Chinese Forum. At this stage, the Ombudsman is awaiting the outcome of Police inquiries which may take some time. In these circumstances, the Ombudsman feels that the matter requires immediate attention to alleviate the Chinese Community's concerns and ensure systems are put in place to prevent a recurrence.

In the Committee's view this is precisely the type of systemic minority group problem which the Ombudsman cannot but should be able to directly investigate as proposed in Chapter 6.2.

At a lower level, the resources released by the introduction of a more comprehensive conciliation system would allow the Ombudsman's Office to turn some of its resources towards the conciliation of matters under Part 3 of the Act involving the use of independent referees in some difficult minority group cases.

For those matters which are agreed to be conciliated by the Police, there is the added protection of knowing that the Ombudsman has the power to conduct random audits and spot checks of any matters which are handled exclusively by the police. In that regard,

the Committee's view is that this is in many ways more likely to be an effective incentive to the proper conciliation of matters than current procedures where the amount of paper floating around the system tends to obscure many real problems especially those of minority groups.

As indicated in Chapter 4.8, the flexible definition of conciliable matters, when taken in conjunction with the auditing power will provide powerful tools for the Ombudsman to monitor and push for the practical implementation of recommendation 228 of the Aboriginal Deaths in Custody Royal Commission relating to police training and the interaction between Police and Aboriginal people on the streets as well as at the Police Academy.

Finally, the Committee is very mindful that the conciliation system must be safeguarded so far as minority groups are concerned in general and Aborigines are concerned in particular, by ensuring that every complainant clearly understands that he or she has a right from the outset to approach the Ombudsman rather than have the matter dealt with by way of a police conciliation.

5.3 POLICE - WILL GET GREAT CREDIT

In its written submission to the Committee, the Police Service specified a number of advantages to the Police which would accrue if its proposals for the conciliation of complaints were implemented. The advantages were:

a) "reduced allocation of resources on investigations to determine guilt [versus] innocence, with added emphasis on speedy resolution of the customer's problem and putting remedial action in place where required";

b) placement of the Service in "a position to immediately address supervisory practices, Police attitudes or cultural problems and systemic or procedural failures as a first step, without the necessity for involvement in the present time-consuming and legalistic processes and without holding off awaiting determination or concurrence by the Ombudsman";

c) placement of the Service "in a position to display its commitment to ethics and at the same time proceed with the task of superintendence and supervision of its members, remedy of problems and rehabilitation, if not removal, of problem officers";

d) an ability to more closely monitor the role and performance of Commanders and front-line supervisors";

e) more ready acceptance and co-operation by Police "in a non-adversarial situation, designed to remedy defects rather than sheet home blame with all the implications of disciplinary action and prospects on future

advancement".

A refined system would also enable significant resource savings for the Service. It stated that in 1990, 687 "preliminary inquiries" were undertaken together with 340 investigations at the Patrol level and another 475 investigations by Internal Affairs Branch. Although it found any potential savings difficult to quantify the Service estimated that, given the figures above, its proposals for increased conciliation of complaints would have resulted in 1000 cases being resolved in 1990 using far less resources than presently required.

One of the key concerns of the Police Association was its members' concerns about the lengthy delays involved in the investigation and resolution of complaints.

In oral evidence, the following exchange took place between the Committee Chairman and Mr Day:

> **MR TINK:** "Do I understand your submission to be principally concerned with delay? Is that really the key concern of the Association?
>
> **MR DAY:** We have two major objections certainly the delay, and trivial matters being dealt with."

If the new conciliation proposals are adopted, they will see an increasing number of trivial matters being dealt with by way of conciliation which, if the examples referred to earlier in this report are any guide, will see a more speedy and effective resolution of those matters for all concerned. This should also mean that more resources will be available to tackle serious complaints thus enabling them to be dealt with and finalised more quickly. In that way, the Committee feels that the conciliation proposals are geared towards addressing the key concerns of the Police Association.

Furthermore, the Committee feels that the proposals would result in trivial matters being dealt with in a more realistic way for all concerned especially the Police. Provided the changes proposed are made to Section 35A of the PRAM Act concerning police reports and promotion records, then it seems to the Committee that the following evidence from the Ombudsman is an appropriate way from the Police Officers' perspective for dealing with minor matters:

> **MR LANDA:** "Then you must ask yourself: If it seems that the fault is obvious and the policeman did something that was a mistake or a wrong judgement what is stopping the policeman saying, 'Gee, I am sorry?' What is stopping the Commissioner from forcing him to do that? Industrial relations perhaps stop coercion so it needs to be inculcated into the service and the policemen that they will be supported for well meaning actions that are, in fact, mistakes; that they will not be disciplined; and that they will not be punished."

Again with respect to the twin concerns of the Police Association, namely delay and the

handling of trivial matters, Dr Tillett's evidence is also instructive:

> **DR TILLETT:** "In many of those matters the allegations related essentially to something like rudeness or manner of service delivery or indifference to the needs of particular groups of people and normally, in my view, they should have been dealt with at a Patrol Commander level with something like an apology and just a chat to the Officer concerned. What inevitably happened was an extensive paper war usually involving the police laying claim that the Anti-Discrimination Board had no jurisdiction, refusing to take part in proceedings and correspondence would go backwards and forwards."

The Committee firmly believes that the conciliation proposals will allow these sorts of matters to be tackled in a much more effective and efficient way thus reducing delay and providing effective and appropriate results to all concerned including the police in the vast majority of cases.

The following comments by the Ombudsman are instructive:

> **MR LANDA:** "....What I want to happen is to see conciliation used as a tool, because I believe that it is the best tool available. If they use it correctly they will receive great credit for it. The Community will respond to it. It will be very valuable."

Finally, the question of the investigation of more serious complaints warrants brief mention at this stage because it is important when coupled with the questions of delay and conciliation of trivial matters. Lengthy delays are, of course, the Police Association's key concern and this was underlined in the Association's further evidence:

> "The delays are still part and parcel of the system which has not changed in reality regardless of legislative attempts to speed it up."

The Association has proposed that all investigations should be concluded and 'charges preferred or the complaint deemed not sustained' within three months of receipt. In that context, it is interesting to note that the Commissioner has proposed a 90 day limit instead of the 180 day time limit currently imposed on the investigation of matters. However, whatever formal limitations there may be, the question is whether the system's resources will be there for the investigation of serious matters within an appropriate time frame and the Committee feels that this is most likely to occur where resources have been released from dealing with matters that do not warrant their application.

Further into this Report, there are proposals for the Ombudsman to more speedily and directly investigate matters of concern to him. This will in many instances obviate the rather cumbersome and time consuming investigation and re-investigation processes currently required under the Act.

5.4 BETTER ALLOCATION OF OMBUDSMAN'S AND POLICE RESOURCES

The Ombudsman forcefully made the point in oral evidence at least twice that resources used by his Office in the handling of minor complaints against police decreased the resources available for the proper consideration of serious matters and for the Ombudsman's other responsibilities set out in the Ombudsman Act. In that regard, the Ombudsman said in answer to Mr Scully:

> **MR LANDA:** "The money that would be saved from an increase in the rate of successful conciliation would be considerable. The money saved is the money that may be put into any system."

Further on in his evidence, the Ombudsman again stressed the resources point as follows:

> **MR LANDA:** "To me everything that should be conciliated and is not is costing me money that I am not able to use where I should be using it."

In a similar way, the Ombudsman's concern that "you cannot see through the paper to deal with the complaints" (referred to in Chapter 3.1) indicates that, a proposal which reduces the paper flow and allows the Ombudsman to become more focused on the matters which really need attention, will be of benefit to his Office.

Thus, under the proposed conciliation system, the Ombudsman's Office will not have to spend quite so much time following through the affairs of well educated complainants who may themselves be able to have a matter successfully conciliated at Patrol Commander level. Mr Lynch's complaint, documented earlier, is an example of the type of matter which may, under the current system, be occupying some of the Ombudsman's time.

An even more stark example is contained in a written submission from Mr G. Reading as follows:

> "I wrote to the Director of Public Prosecutions on a matter, and in the course of it I was critical of certain police action.
>
> As a courtesy I forwarded a copy of the letter to the Police Commissioner. I concluded the accompanying note by saying: 'My complaint is not to be construed as criticism of the Police as a whole, and so far as I am concerned the matter is now at an end.'
>
> To my astonishment some weeks later I received a polite letter from the Office of the NSW Ombudsman, saying the Commissioner had forwarded to them my criticism, that he was bound to do this and that no further action would be taken because I had said I didn't want any further action to be taken.
>
> The Director had behaved correctly and sent me a courteous reply, the

Commissioner had behaved correctly, as required by law, and the officer of the Ombudsman had behaved correctly, as required by law also.

Yet the whole thing is totally absurd. How much taxpayers' money is being wasted by all this nonsense? Similarly how much of the time of the Commissioner and his staff is being wasted?

It seems to me that if a citizen wishes to deal with the police with respect to criticism or a complaint, that is his business, and it is an invasion of privacy to involve a third party. If he wishes to deal with the Ombudsman, that too is his prerogative, but it ought not to be compulsory.

I hope the Minister and the Government can sort this imbroglio out and in doing so save money, promote efficiency and get off the Police Commissioner's back.

So far as my original complaint is concerned, as I have said, that is private and it is over."

Plainly Mr Reading did not require the Ombudsman's assistance and expressed astonishment that the current law required the Ombudsman to be involved regardless of Mr Reading's wishes.

Under the proposed system, such matters will not occupy the Ombudsman's time thus freeing him up to deal with complainants who really need his assistance.

In addition, the Committee feels that the Ombudsman's capacity to audit the proposed conciliation system will allow him to stand back and appropriately assess what is going on in a systematic and representative way based on proper sampling. In that regard, the Committee feels that the Ombudsman is hindered in doing this at present because the current system is swamping him in indiscriminate paper work.

Moreover, if the proposed conciliation system is introduced, considerable savings in time and resources will also accrue to the Police Service as indicated in the following exchange between the Chairman and Mr Standaloft where the level of resources sometimes used in investigating often minor complaints was discussed:

MR TINK: "Do you spend a lot of time doing that?

MR STANDALOFT: Yes, you can. It may be that you receive a complaint which will require you to interview 15 or 20 people including police. They might be all around the metropolitan area or even in the country. You have to go and gather those statements and then make your recommendations as to what action should be taken, if any. They can be very time consuming because you have to do them so that they will satisfy not only the Internal Affairs section but also the Ombudsman's Office, because you do not want them coming back again for a lack of investigation. It may be that you will have five or six of those to do at any one

time.

In considering this evidence, the Committee was mindful that under the proposed new conciliation system, any complaint could still be made the subject of a full investigation following a complainant's election to have the matter referred to the Ombudsman. On the other hand, the sorts of practical results achieved by Dr Tillett and Mr Lynch referred to in Chapter 5.1 indicate that good practical results can be achieved in appropriate cases without the need for the level of resources Inspector Standaloft has described being taken up in many cases.

The sort of procedures described by Inspector Standaloft have been of concern to the Ombudsman. In his written submission to the Committee, the Ombudsman gave a number of examples of minor matters being investigated:

> "In a number of recent cases, police have advised this Office that they have commenced full investigations of matters such as the misplacement or misappropriation by unknown officers of very small amounts of money from police station tea funds or the like; the failure by police officers to record appropriate details in motor vehicle diaries; of the conduct of police officers in country towns who have allowed their finances to fall into disarray and have written a bouncing cheque. Whilst such matters may well be of concern for internal management and discipline and, in a small number of cases, may be symptoms of a more serious problem, they generally are not viewed by this office so seriously as to merit the resources involved in a formal investigation.
>
> This is especially so in view of the rigid and formulaic approach taken to such investigations by police investigators. In a case of missing tea club funds, routine questions would be asked of all staff with access to the relevant jam jar - which in a large station may be scores of police. Experience in past matters has shown that such investigations produce little more than routine denials. Nothing has been gained and a lot of investigatory time has been wasted. The Ombudsman has no power under the existing legislation to stop such investigation but does his best to persuade the police to request they be discontinued. Sometimes, this is not easy."

In a supplementary written submission to the Committee, the Ombudsman indicated that delay has a significant negative impact on complainants and may, if extreme, taint the investigative process. In that regard, the supplementary submission made the following comments:

> "Investigation is necessarily time consuming and labour intensive. Relevant witnesses must be located and interviewed etc.. If an investigation results in criminal charges the delays in the Criminal Courts compound the delays in the complaints system. Delays result in complainants losing patience and faith in the system and in unfairness to police officers who are the subject of complaint."

The Committee hopes that one of the benefits from the new conciliation proposals will be

that matters which are not required by the complainant to be fully investigated will not be so investigated. The resources thus saved will then be focused more effectively on matters which must be investigated thus cutting down the delay which occurs prior to those investigation being completed.

Essentially the issues raised in this Chapter boil down to the focusing of scarce resources on the areas of greatest need.

At the same time, the Committee recognises that there has been a steep increase in the Ombudsman's workload in recent years and will be examining how this relates to the resources of his Office at its next Inquiry.

STRENGTHENING THE OMBUDSMAN'S POWERS

6.1 REJIGGING THE SYSTEM

In the preceding chapters of this Report, consideration has been given to a rejigging of the current system to ensure that, whilst the Police get more delegated responsibility to deal with properly conciliable matters, the Ombudsman is given sufficient powers of auditing and spot checking to ensure that the quality of the work delegated to the Police is of an appropriate standard in the public interest. As the Police Service witnesses have pointed out, this proposal is a substantial departure from the Police Force's submission to the Bignold Inquiry which would have seen the Ombudsman completely removed from any checking of minor matters that were conciliated.

Thus the conciliation system now contemplated is a rejigging of both the existing system and the 1988 proposal such that whilst the Ombudsman will not be looking at every matter which has been conciliated, he will be able to look at matters at random and if needs be as the Commissioner has conceded, every matter, although this is not envisaged.

However, the rejigging now proposed and which emerged during the course of the hearing, will in fact have far wider consequences than this. As another set off to the Police assuming more responsibility for the conciliation of some matters, it is felt that the Ombudsman can thereby allocate further resources to the investigation of significant matters and indeed minor matters which, by audit or otherwise, catch his attention and in some sense become significant. In this way, the rejigging of the system proposed, not only involves just matters which are within the ambit of conciliation, but all matters falling within the Ombudsman's jurisdiction under the PRAM Act. Accordingly, substantial changes are now proposed to the Ombudsman's other powers to assist him firstly, in the audit function and secondly, in the effectiveness of his oversighting of more serious police complaints. Indeed, the reorientation of his resources made possible by the conciliation proposals, is seen as a major boost to his overall effectiveness in oversighting police complaints, especially those of a serious nature.

This chapter looks at proposals for enhancing the Ombudsman's powers in other areas to facilitate the oversighting of serious complaints and to provide him with extra scope for the appropriate auditing of the conciliation scheme proposed.

These issues and the general rejigging of the system were referred to by the Ombudsman in his evidence to the Committee as follows:

> **MR LANDA:** "The thrust of this is the prospect of surrendering those minor matters for the control of the Police, but given protections that will enable the public to feel not intimidated by being once again out in the cold without any

where to go and having the police the total arbiters of their fate in the complaints situation.

What we are looking at is, sure, concede what the police are wanting but what we are talking then about is what the protections are that are needed to keep the system legitimate and keep the public at least able to feel that there is nothing to fear. It is those areas we are talking about. We are talking about sections 51 and 52 of the Act that would need amendment and the right of the Ombudsman in line with so many other jurisdictions in Australia and elsewhere. This is very important."

In a similar fashion, the general nature of the rejigging of the system referred to above, was described by the Assistant Ombudsman (Police) Mr Pehm as follows:

MR PEHM: "Essentially what our submission comes down to is that we would be prepared to wear the minor matters going back to them (the police) as long as there is a strengthening of our ability to monitor them. One, the direct power of investigation, which the Commissioner has conceded to some extent. But the other very important thing is the power to monitor initial internal investigations as they go on, which the Commissioner has given no ground on. We think that is extremely important. There are various examples from other jurisdictions that work effectively - the Northern Territory, South Australia and the Commonwealth."

Whilst not necessarily agreeing entirely with Mr Pehm's proposals, the Police Service made it plain in similar language that they saw the review of the complaints process as being one involving an overall package of amendments. Thus, whilst the concept of rejigging was not used in so many words, there does seem to be overall agreement between the Ombudsman and the Police Service that an overall realignment of the system is what the review boils down to. On the part of the Police Service, these views were expressed by Commissioner Lauer in his letter of the 9 October, 1991 to the Committee Chairman as follows:

"Whilst I do not support all the recommendations of Mr Landa, there is obviously much common ground between us. Indeed, after discussion with him, it is my understanding that he is not adverse to the proposals contained in my submission to the Committee. With some amendment to include those proposals of Mr Landa where we are in agreement, I feel a much simplified system could be introduced which would be much more acceptable to the Police generally, it would enable greater public or customer satisfaction to be achieved and would require less resources in the Office of the Ombudsman, while still retaining the benefits of independent oversight by the Ombudsman. This indeed would be a significant improvement on existing arrangements."

In a similar vein the Ombudsman said the following in evidence:

MR LANDA: "The other matters we are putting can only be dealt with by legislative change and it seems we have narrowed the gap and things that three years ago would not have been considered possible seemed now to be possible."

By way of further particularisation the following instructive exchange took place between the Committee Chairman, the Ombudsman and Assistant Ombudsman (Police Complaints) as follows:

MR TINK: "Did I understand you correctly to say a little earlier that one thing we could be looking at in terms of the balance that you talked of when we started off is some type of rearrangement at some point where the police do get more discretion to deal with minor matters in a way yet to be determined, but as a check and balance for that and to better focus resources and so forth, that we also are looking seriously at section 51 and 52 and some type of tax-style audit, if I can put it that way, on matters that are referred down the line so that the thing just becomes sharper and better focused?

Mr LANDA: That is the main thrust of the submission. Other than the one we have canvassed on conciliation, that is the thrust of the submission.

MR TINK: Do you think that is a reasonable way for us to be looking?

Mr LANDA: Yes, it is.

MR TINK: Subject to some of the things that we have expressed reservations about in relation to the coming up to speed on conciliation and so forth, as a broad thrust and within the limits of what is available—

Mr PEHM: We would be able to live with it.

Mr LANDA: We have had to balance ourselves what we perceive as being a public apprehension that something like possibly 80 per cent of complaints may now come into a different category that the Ombudsman may not look at, and the only way I believe we can appear to be credible, an organisation that gives a credible solution for people with grievances, is to have that balance where your suggestion particularly of being able to have a spot check and to get the aggrieved people who say, "No, I am not happy with the result", to come forward and say so. As long as you have got those checks and balances I think it is a way of moving all that paper, or a greater part of that paper, away and yet maintaining the integrity of the system.

MR TINK: As you know, Malcolm Kerr and I are also on the Independent Commission Against Corruption committee, and that is an Act much more recently passed than the Ombudsman Act. The thing that one gets the impression of, rightly or wrongly, with the Independent Commission Against Corruption is that with its charter, which I readily appreciate is different from yours, it does seem to

have that greater freedom and flexibility, if you like, to go in and focus and hit hard, and it has the power to do that. Given that the structure you are working under is quite a bit older than that and whilst I appreciate that you are dealing with a different class of matters entirely, that general idea to give you that capacity is something that is desirable but will also free you up—

Mr LANDA: Absolutely.

MR TINK: —from the massive paper war.

Mr LANDA: This is what I said at the outset. In terms of a watch dog, we are a poodle. We are the tail being wagged by the dog. We do not have the power to intercede and any attempt to frustrate an investigation, if there is such an intent ever evinced, we can really be left waiting for 180 days with extensions and anything meaningful after that is lost.

MR TINK: The final thing is it also gives you a chance to perhaps better focus on particular groups that need assistance more than others.

Mr LANDA: Yes.

Mr PEHM: Yes, that is the basic position we are at, that if we think there will be a big spillover with police handling minor complaints, in about three to five years we will still be using a lot of resources to catch that.

In a further letter dated 30 December, 1991 to the Committee Chairman, the Police Commissioner again indicated substantial agreement on a rejigging or, what in effect amounts to a rejigging, of the overall system:

> "In fact, it seems to me that we are now close to general agreement on a package of amendments which will streamline the system and considerably reduce the commitment of resources, whilst providing benefits to the public, the Police Service and the Office of the Ombudsman. Given mutual good will and willingness to compromise I believe that we will be able to develop a scheme which will benefit all parties concerned and be not only workable, but also acceptable to both the Ombudsman and the Police Service. I hope this letter will contribute to that end."

It can be seen from the foregoing, that there is substantial agreement between the Police Service and the Ombudsman's Office on the need for a rejigging of the system to better utilise police complaint resources in the areas of greatest need. The major parties are agreed that the current system does not best utilise available resources and that the paper war it creates is really in nobody's interest. In the context of devolving authority for dealing with minor matters of an agreed nature to the police for conciliation, the key questions come down to how best to use resources to check and ensure the integrity of that process and to better utilise resources to deal with the more serious matters which

can now be given more attention. The succeeding parts of this chapter will look at specific proposals for increasing the Ombudsman's powers in various areas to achieve these two results.

6.2 DIRECT INVESTIGATIONS

In his written submission to the Committee, the Ombudsman made a recommendation that the Police Regulation (Allegations of Misconduct) Act be amended to provide the Ombudsman with a discretionary power to conduct direct investigations in the public interest into complaints against police.

In his submission, the Ombudsman referred to other Australian jurisdictions to support the recommendation as follows:

> "The Victorian Ombudsman, and the Police Complaints Authority before him, has the discretionary power to directly investigate allegations of police misconduct. Section 86N of the Ombudsman Act (Victoria) provides for referral of complaints to the police in much the same way as in NSW but subsection 4 provides that:
>
> > 'The Deputy Ombudsman -
> >
> > (a) must investigate a complaint if the conduct complained of is conduct of the Chief Commissioner or of a Deputy or Assistant Commissioner; and
> >
> > (b) may investigate a complaint if the conduct complained of -
> >
> > (i) is of such a nature that the Deputy Ombudsman considers that investigation of the complaint by the Deputy Ombudsman is in the public interest; or
> >
> > (ii) is in accordance with established practices or procedures of the force and the Deputy Ombudsman considers that those practices or procedures should be reviewed.'
>
> The South Australian Police Complaints Authority also has the power to conduct independent investigations from the outset. Section 23(2) of the Police (Complaints and Disciplinary Proceedings) Act 1985 is in similar terms to the Victorian legislation giving the power of direct investigation where the conduct under complaint is that of a high ranking officer, a member of Internal Investigations or where the conduct:
>
> > 'Should for any other reason be investigated by the Authority.'
>
> Advice from the Authority is that the power to conduct its own independent

investigation from the outset is rarely exercised and that the criterion for so doing is where the Authority believes it to be in the public interest."

The New South Wales Ombudsman has never had the power to directly investigate complaints against Police. The Ombudsman's annual report for 1982/83 made reference to a number of general criticisms of the then existing procedures and to a recommendation by the "Stewart" Royal Commission that the Ombudsman should have the power to independently investigate complaints against police. The then Police Minister, Mr Peter Anderson, announced that legislation would be introduced to address the apparent deficiencies with the system and the subsequent legislative changes became known as the "1983 Package". However, the package did not include provision for the Ombudsman to independently investigate police complaints.

In his written submission to the Committee, the Ombudsman gave the following description of the powers of investigation that he does have under the current legislation which were part of the 1983 Package. In that regard, there is a very important procedural distinction between the current right to in effect reinvestigate, with all the delays consequent upon the machinery to support that, and the proposal whereby the Ombudsman could directly investigate as follows:

> "The 1983 package of legislation did not give the Ombudsman the power to directly investigate complaints from the outset. The Ombudsman was given his own power to investigate but under an elaborate system which kept the initial investigation process in the hands of police. There was no time limit on the initial police investigation and it was only after receiving the report of the initial police investigation that the Ombudsman could decide to conduct his own, independent, "reinvestigation ". Further, if the police investigation was deficient, the Ombudsman could not proceed immediately to reinvestigate, but had to specify the deficiencies and refer them back to the police for remedy. There was also a further restriction that, in conducting the reinvestigation, the Ombudsman could only use police officers who had been seconded to his office for that purpose.

The result of this convoluted procedure was that both police officers and complainants were subject to extensive delays in the consideration and finalisation of complaints and this is a matter of great concern to the Committee. The question of delay was of grave concern to the Police Association and, during oral evidence, Mr Green gave a telling account of his perception of the delays inherent in the current system. Although the quote is lengthy, the Committee feels that it is most important and instructive to reproduce Mr Green's comments:

> **MR TINK:** "I am looking for an answer to the question (of how) to reduce delay. That is really what it gets down to, is it not?
>
> **MR GREEN:** The system as it is presently structured is never going to be other than it is because Internal Affairs, rightly or wrongly, do their inquiries. If it is not Internal Affairs, it is someone else within the Police to whom Internal Affairs

have passed it on. That is the only effect of them deciding whether or not, in conjunction with the Ombudsman, a matter is to be dealt with by Internal Affairs. If Internal Affairs do not deal with it, someone else investigates it within the Police Department. The results of that investigation are oversighted as you know by the Ombudsman's Office, and the Ombudsman's Office at times is very slow in coming to a decision itself as to whether or not the investigation has been correctly done. I would suspect at times that they cause further inquiries to be made by the investigating Officers of Internal Affairs or other Police. On a rare occasion - I think we heard eight times last year if my memory serves me rightly - they have a reinvestigation of their own under the powers that they have in the Ombudsman's Office.

One would think that perhaps that is the end of it but, of course, it is not. It is only one part of a play that goes on and on and on. Those documents then go back to the Police Department. Invariably the Ombudsman's reinvestigation is because he does not agree with the initial findings of the Police investigation. So if he decides that on a review he comes to a different conclusion, he will in all likelihood recommend that there be legal advice taken as to what further taken action, if any, should be taken. Those documents then go through the Police Legal Services Branch and the Director of Public Prosecutions. If he makes a decision that there are no criminal charges, they will come to Internal Affairs Branch and then go back to Legal Services Branch because they have to be looked at on the basis of whether there are any departmental charges that may or may not arise from the brief. There is a decision to charge departmentally, those charges are served and the Officer has to decide whether he wishes to defend the matter. If he does, the documents all go back off to the Police Legal Services Branch to prepare a prosecution. It is listed in the Police Tribunal, which is a District Court Judge sitting alone. The matter goes to the District Court, where it is called over until finally a day for Hearing is set down. In the meantime the Officer has to arrange his legal defence, usually through the Police Association. Lawyers have to be briefed and Barristers seen. One day it all gets to the Police Tribunal. The Police Tribunal sits and they come to the decision that the Officer is guilty or not guilty, the offence is proved or not proved. If it is proved, the matter then goes back to the Police Commissioner, who has to set a penalty. That penalty is based on his review of the facts as they have come out in the Hearing. So there is more reading of transcript. He sets the penalty. The Police Officer is dissatisfied with that penalty, he has a right of appeal against the severity of the penalty. The matter then goes off to the Government Related Employees Appeal Tribunal for hearing of an appeal against that penalty.

I am sorry to labor the point but I hope that it gives you some understanding of what a complex drawn out system we have. I am not suggesting that much can be done with the tail half of the system. Once the matter is in the Police Tribunal a quasi judicial function is taking place and I do not think much can be done. But in the initial stages, the investigation of a complaint, you know that the Parliament saw fit to impose a 180 day limit on Internal Affairs for a very good reason that it

believed that inquiries simply were not being completed within the 6 month period. We understand - these figures are not available to us but we commend to you that you ask for this information - that there is provision for the Ombudsman to grant extension to those 180 day investigation periods."

Whilst the Committee is not concerned to apportion blame between the Police Service and the Ombudsman's Office as to where delays lie in the first half of the complaints process, the Committee is concerned to ensure that the procedures are streamlined to minimise as much of this delay as possible. This is particularly important because, as Mr Green points out, there is little that can be done to alleviate delays in the second half of the investigation process which involves Court proceedings.

The Committee is strongly of the view that the artificiality of the procedure, whereby a complicated process of investigation and reinvestigation takes place as between the Police and the Ombudsman's Office, should be streamlined in appropriate "public interest cases" and feels that giving the Ombudsman a direct investigation power would go someway to circumventing this and answering the Police Association's concern about delay.

In his oral evidence to the Committee, Dr Perry, the Deputy Ombudsman (Police Complaints) for Victoria outlined to the Chairman how the Victorian provisions operate as follows:

DR PERRY: "The Act does set down the three prescribed circumstances where the Deputy Ombudsman may investigate the matter rather than it going to the Police. When I say 'may' there are two prescribed circumstances where the Deputy Ombudsman has a discretion. There is one certain prescribed circumstance where it is mandatory that the Deputy Ombudsman carry out the investigation rather than the Police. If I could just mention the latter first, the first is that where a complaint or the conduct complained of is against an Officer of the rank of Assistant Commissioner or above - and in Victoria you have approximately six Assistant Commissioners, two Deputy Commissioners and a Chief Commissioner - if the complaint is against the conduct of one of those officers then it is mandatory that the Deputy Ombudsman investigate that complaint, and that is regardless of whether the complaint is made initially to the Police or to the Deputy Ombudsman. In Victoria I think there have been four of those investigations which I have carried out. The other two are the discretionary circumstances and first and foremost is where the Deputy Ombudsman, if he believes that in the public interest that he investigates the matter rather than the Police, he may and the second one is that really where the conduct complained of is in accordance with normal police practices or procedures or standing orders so that what is really being complained against is the particular practice procedure or standing order. In those circumstances again the Deputy Ombudsman has a discretion to investigate rather than pass it on to Police so that they are the three prescribed circumstances.

MR TINK: Pausing there, that in practical terms is translated into whether there

is a problem with the system?

DR PERRY: Yes."

Slightly further on in his evidence, Dr Perry gave an instructive example of what he meant by a problem with the system:

> **DR PERRY:** "An example I can give of that is that I investigated a number of allegations concerning police raids. I also reviewed a series of those and what I found in a number of the cases is that police were raiding the wrong premises, but on other occasions they were raiding the right premises but the warrant did not disclose or identify those premises; it described the address incorrectly. Now, in Victoria law, a warrant for searching and giving the powers of forceful entry must clearly identify the property which that warrant is to be executed against. Now, in those circumstances, while a complainant did not complain to me that the warrant had the incorrect address on it and Police certainly said, "well we got the right address and we got the right people", the complainant has come to me more so because of certain conduct in the course of that investigation, but I was critical of Police on the basis of having the incorrect address on the warrant, because in effect that made the warrant invalid and, being invalid it therefore took away the authority for police to forcefully enter those premises. It also raised into doubt, apart from some common law powers, whether or not Police could rely on any evidence they had acquired on the course and in the execution of relying on that warrant."

The Committee found this example particularly instructive because it dovetailed very well into an example given later in oral evidence by the Ombudsman as follows:

> **MR LANDA:** "Let me give you an example of what we mean by direct investigation, because we have done it. Operation Sue was the raid in Redfern. It shows you the benefits of it. Of course, we did not have the power to do it under the Police Regulation (Allegations of Misconduct) Act so we did it as a mixed and linked - there is authority to do that under the Ombudsman Act which gave us power to initiate investigations ourselves. We were not challenged. Whether it was able to be challenged or not, I am not certain, but the Commission did not challenge our jurisdiction. We had a major investigation which started and finished inside eight or nine months with about sixty or seventy witnesses. It involved major police officers. It was a Report tabled in Parliament, Operation Sue, and was an important investigation. It is the only one the Office has ever done and it is an example, if we are given the power and important instances, of what can be done. We achieved a result that probably could never have been achieved under the Police Regulation (Allegations of Misconduct) Act. What would have happened, the Inquiry would have taken a year or two years, at which stage most of the witnesses would have been disaffected and would have left, and at the end of the day we would have been allowed to go in and decide what action to take. If we decide to reinvestigate ourselves, all that time down the track, and,

or course, you are dealing with a most Senior Officer and you might expect perhaps that those people who have the conduct within the Police Department that that investigation might be somewhat intimidated by investigating that officer's conduct. You might not have got the same result."

In his Annual Report for the year ended 30 June, 1991 the Ombudsman indicated that his report on this raid stated:

> "....the intelligence on which the (Operation Sue) raid was based was pathetically inadequate, and while Redfern's intelligence officer was grossly inexperienced, the senior officers responsible for the raid not only failed to supervise him, but failed to notice that intelligence he provided as a basis for some targets was completely different from information they had given him as a basis for search. This was probably the most disturbing factor in the investigation that such [potentially deadly force] could be implemented without any sound intelligence basis" (p106)

The Committee notes that the circumstances surrounding the "Operation Sue" matter were recently the subject of some adverse criticism in the Court of Appeal during which warrants for the raids were ruled invalid lending strong general support to the Ombudsman's comments on shortcomings in the system.

In considering the question of the public interest involved in the independent investigation of serious systemic problems, the Committee feels that it is in the Police Service's interest to have such problems independently looked at. In that regard, the issue of the misuse of search warrants is an excellent example in both Victoria and New South Wales. In other words, the Committee feels that it is in the Police Service's interest, as much as anybody else's to ensure that any systemic problems with search warrant procedures are ironed out to the satisfaction of the public with independent input.

In addition, it is important to rank and file police officers that such inquiries are handled as expeditiously as possible because the concerns expressed by Mr Green are very real. In that regard, the Ombudsman has indicated the way in which his direct investigation of Operation Sue led to a short cutting of the time frames usually involved with the investigation of such matters. This is to be contrasted with the conventional procedure in the Ombudsman's Office which would have involved a reinvestigation after seeking further particulars from the Police who conducted the initial investigation. Whilst the Ombudsman carried out this investigation on a mixed and linked basis relying on provisions of the Ombudsman Act, the Committee considers this situation to be highly unsatisfactory. This is especially so because, as the Ombudsman infers himself, he was open to some challenge on jurisdiction by the Commissioner although the Commissioner, in that particular case, chose not to take it up.

In all these circumstances, the Committee was extremely pleased to see a general consensus emerge about the need for the Ombudsman to have a direct investigation power.

In his letter dated 9 October, 1991 to the Committee Chairman, the Police Commissioner dealt with the Ombudsman's recommendation that the Act be amended to allow the Ombudsman the discretion to conduct direct investigations into complaints in the first instance in the public interest. Mr Lauer made the following comments:

> "Nevertheless whilst the proposal here involves a major policy shift, I raise no objections to it. Provided that agreement can be reached with the Ombudsman on a suitable definition included in the Legislation regarding matters of sufficient moment, and "in the public interest", then I have no quarrel in principle with the Ombudsman having the right to conduct his own enquiries under the Act in the first instance.

Again in his further written submission dated 30 December, 1991 the Commissioner made the following comments:

> "I have already indicated that I have no objection to direct investigations at the outset by the Ombudsman - ie. 'own motion' investigations under the Police Regulation (Allegations of Misconduct) Act. This is a major policy shift and a major concession on my part - I think it reasonable therefore to propose substantial agreement between the Ombudsman and the Commissioner before proceeding with any such amendment.
>
> Obviously I appreciate the difficulty of defining "public interest" if that is to be the sole consideration (and it is not where Section 26(1) of the Act is concerned). I merely reiterate my earlier comment that provided agreement can be reached with the Ombudsman or a suitable definition included in the legislation then I have no quarrel with the Ombudsman having the right to conduct his own inquiries under the Act at first instance."
>
> Whilst the Ombudsman offers no definition and simply asks that he be trusted to exercise the discretion reasonably, I am confident that this aspect could be settled with further discussion between the parties involved."

There is thus substantial agreement between the Ombudsman and the Police Commissioner in relation to direct investigations which boils down to giving the Ombudsman statutory power to conduct direct first instance investigations (own motion investigations) in relation to matters which are in the public interest.

This, of course, raises the question of what is in the public interest and the Committee feels that, as with the Victorian model, it is sufficient to state the public interest test in the legislation and to thereby rely on the good sense of the Ombudsman and others in determining in the first instance, what that might be in a particular case. However, the Committee was concerned about the possibility of any dispute between the parties as to what might or might not be in the public interest, and explored the question of whether or not there was a need to provide a mechanism for breaking any deadlocks.

In oral evidence, the Committee Chairman put the possibility of a Tribunal breaking deadlocks between the Ombudsman and the Commissioner to Dr Perry the Deputy Ombudsman (Police Complaints) of Victoria as follows:

> **MR TINK:** "I guess what I am saying is my worry at the moment is that there is competing public interests concerns. That seems to me to be the evidence that we have had in here that there are competing public interest concerns, and it seems to me that the Tribunal option offers some independent arbitration of what they are?
>
> **DR PERRY:** Look I think it is the sensible way to go."

In evidence, Dr Perry told the Committee that, in Victoria, deadlocks were broken by reference to the Minister. When queried on the advisability of this, Dr Perry said:

> **DR PERRY:** "I see it as sensible having some tribunal that is seen to be independent of either investigative body making a final determination. I see nothing wrong in having to go to that tribunal and arguing your case at all if you are going to have that conflict."

Under the current provisions of the PRAM Act there is a power in Section 30 to break deadlocks between the Commissioner of Police and the Ombudsman by referring some types of disputes to the Police Tribunal for adjudication. Whilst this might seem to be a clumsy proposal in relation to an urgent matter, the Committee was provisionally of the view that, just like a Court, Tribunal procedures could be utilised on an urgent basis by way of an appropriate application in Chambers or such like.

The Ombudsman expressed some concern about this proposal which was discussed with the Police Commissioner and the Committee at the Round Table Conference on 18 March 1992. As a result of the discussions, a consensus developed in favour of a proposal to adopt the public interest test which already exists in Section 25A of the PRAM Act for certain other purposes. Thus it was agreed that the Ombudsman would determine whether or not to directly investigate a matter "having regard to the public interest".

On the question of jurisdiction, it was also noted and agreed at the Round Table Conference that Section 35B of the Ombudsman Act would give the Commissioner of Police power to apply to the Supreme Court if he felt that the Ombudsman was acting outside his jurisdiction in this area.

A final word on the fundamental issue of direct investigation goes to the Law Society which, in its written submission, made the following comments:

> "....initial Ombudsman involvement appears to be an ordinary part of the procedure in Britain, South Australia and in the Commonwealth. The New South Wales Ombudsman appears to be asking for no more than those ordinary procedures which apply elsewhere, apply here in New South Wales."

By reason of the foregoing, the Committee's view is that the PRAM Act should be amended to allow the Ombudsman the discretion to conduct direct investigations into complaints. This discretion should be exercised having regard to the public interest. Finally, it was noted that Section 35B of the Ombudsman Act would give the Commissioner of Police power to apply to the Supreme Court if he felt that the Ombudsman was acting outside his jurisdiction in this area.

6.3 SECTION 20 (POWER TO DISCONTINUE INVESTIGATIONS)

In his written submission to the Committee, the Ombudsman proposed that Section 20 of the Police Regulation (Allegations of Misconduct) Act be amended to permit him to discontinue investigations when he considered it desirable to do so in the public interest.

The Ombudsman made the following comments about the present unsatisfactory situation concerning discontinuance of investigations:

> "...the present legislation dictates a cumbersome process for the discontinuance of an investigation once it has commenced. Essentially the Commissioner of Police has to apply for the Ombudsman to consent to discontinue an investigation 'where it is unreasonable or impractical to continue. At present, where the Ombudsman considers that investigation resources should not be expended on a futile investigation, he has to persuade the police to apply for his consent to discontinue. If for some reason, the application is not forthcoming, the Ombudsman is locked into the investigation process."

In his letter of the 9 October, 1991 to the Committee Chairman, the Police Commissioner made it plain that the Police Service supported this proposal and commented that it seemed an anomaly that the Ombudsman could only agree to discontinuance of an investigation when so requested by the Commissioner.

At the same time, the Commissioner indicated that, even if the Ombudsman were to choose for his own reasons to discontinue an investigation which police felt was of some significance, this would in no way prevent the Service from continuing with any action it felt appropriate.

The result would be simply that the matter would be removed from the ambit of the reporting requirements of the Act. This would save the Ombudsman the time and waste of resources involved in his Office having to continue to deal with a matter when it didn't want to but it could not get the Commissioner's consent to discontinue.

The Commissioner reaffirmed his general agreement to this proposed amendment in his later correspondence to the Committee Chairman dated 30 December, 1991.

If ever there was an example of a cumbersome and time consuming procedure which is of no real value, then this is it. Accordingly, the Committee whole-heartedly concurs that

Section 20 ought to be amended to allow the Ombudsman to discontinue investigations of his own volition where he considers it desirable to do so in the public interest.

6.4 SECTION 28 (JUSTIFIED COMPLAINTS)

In his written submission to the Committee, the Ombudsman proposed that the Police Regulation (Allegations of Misconduct) Act be amended to permit the Ombudsman, when he agrees with a sustained 'determination' and consequent action by Police, to take no further action other than advise the interested parties of his decision.

A clearly unnecessary burden on the Office of the Ombudsman is the procedure which the Office is required to follow in the case of certain sustained complaints. In that regard, the Ombudsman covered the cumbersome and time consuming procedures involved in this area in his written report to the Committee as follows:

> "If the Ombudsman finds a complaint 'sustained', the legislation dictates that the Ombudsman compile his own report, giving reasons for his conclusions. A copy of the proposed terms of the report is then sent to the complainant, the Commissioner and the Officers the subject of the complaint and they are given the opportunity to comment. Police Officers under investigation usually hear nothing after their report and interview by the Police Investigator until this contact from the Ombudsman's Office. Where a complaint is 'sustained', they will often request a copy of the Police investigation papers, which can run to hundreds of pages, to assist in preparing their response. This is provided by the Ombudsman. Generally, Police do not take 'sustained' findings lightly and will argue every conclusion and often complain about the conduct of the Police Internal Investigation. The Ombudsman is then faced with new material and the decision making process can be further prolonged. If further material requires significant changes to the proposed report, a further report may be issued so that the relevant parties have a further opportunity to comment. The irony with this process is that, even if the Ombudsman agrees with the submission from an officer against an adverse determination and changes his finding, the Police Service adheres to its original determination and that is what goes on the officer's service record.
>
> Following the various comments from affected parties, the Ombudsman then compiles a final report. Before publishing it, he must inform the Minister of the report and, if the Minister desires, consult with him. The bulk of the reports which are routinely reported to the Minister received a response that no consultation is required. The Ombudsman then makes the final report and must send a copy to the Minister and the Commissioner. He also sends his report to the officers concerned and the complainant.
>
> Clearly the above process is time consuming. It is designed to ensure fairness and accuracy to all parties and obviously places a considerable administrative burden on the Office. There are however, many complaints, usually less serious matters,

where the Commissioner finds the complaint sustained, the Police Officer concerned accepts the disciplinary action decided upon and the Ombudsman agrees that the outcome is satisfactory. Although it would appear reasonable to end the matter there, the Act still requires the Ombudsman to compile his own report, issue it to interested parties, ask the Minister whether he wishes to consult and issue a final report. Although the Ombudsman has developed 'letterform' reports, as administrative procedures designed to minimize the cost involved in this process, it remains an unnecessary burden on the Office."

In his letter to the Committee Chairman dated 9 October, 1991, the Police Commissioner made it plain that he supports the Ombudsman's proposal to permit the Ombudsman where he agrees with a sustained finding and consequent police action, to take no further action other than to advise interested parties of his decision. In that regard, the Commissioner comments that no useful purpose is served by the Ombudsman issuing a formal report in terms of Section 28 of the Act where the Service has found the matter sustained and taken appropriate action. The Commissioner again confirmed this view in his letter dated 30 December 1991 to the Committee Chairman.

Plainly Section 28 is a very important accountability mechanism and there will be matters which continue to be reported to the Ombudsman under the new scheme in the usual way.

However, there is significant paper work involved. In these circumstances, where the Ombudsman and Police Commissioner agree there is room to save costs and reduce the cumbersome nature of the procedures, the Committee feels the change ought to be made so that, in the public interest, the resources can be used elsewhere in the system.

Accordingly, the Committee supports the Ombudsman's proposal to amend the PRAM Act to permit him, when he agrees with a 'sustained determination' and consequent action by Police, to take no further action other than to advise the interested parties of his decision.

6.5 SECTION 52 - (COMMISSIONER TO PROVIDE INFORMATION)

In his written submission to the Committee the Ombudsman proposed two amendments to Section 52 of the Police Regulation (Allegations of Misconduct) Act.

The first amendment proposed was to permit the Ombudsman to require the production by Police of wider information, including documents and records of interview for the purpose of determining whether a complaint should be formally investigated. The second amendment proposed that the section should empower his officers to telephone individual police officers in simple matters to briefly ascertain the background of the complaint before proceeding in writing. In support of this recommendation, the Ombudsman made the following comments in his written submission to the Committee:

"Another effective method of diverting complaints from the expensive investigation process is by greater use of preliminary inquiries under Section 52 of the Act, which allows the Ombudsman to require information from the Police to assist him in deciding whether or not a complaint should be formally investigated. Although the relationship with the current Police administration has resulted in few problems with the Ombudsman gaining access to such information, it is clear that the narrow terms of Section 52 can be read to limit the Ombudsman's access under this Section.....Police have in the past frustrated the Ombudsman's request for information under Section 52. Any lack of access to material through this relatively informal method can only increase the number of investigations required by the Ombudsman."

The Commissioner responded favourably to the Ombudsman's first proposal in his letter of the 9th October, 1991 to the Committee Chairman. In that regard, the Commissioner said:

"I have no difficulty with.....this recommendation. As you will be aware Section 52 of the PRAM Act now requires the Commissioner to provide the Ombudsman when so requested with an explanation of the relevant 'policies, processes and procedures' or explanation, comment or information in connection with a complaint.

In practice, relevant documentation is almost invariably now supplied to the Ombudsman in response to a request in terms of Section 52. The recommendation merely confirms current practice and I have no objection to its implementation.

However, I would have to include the proviso that in this event there be a concurrent amendment to extend the confidentiality provisions of Section 26(1) of the Act to such documentation. The wording of the Act is such that this protection is not now available to any documents provided under Section 52. Whilst the Service is always happy to co-operate with the Ombudsman and make relevant documents available to him to satisfy himself [of the] merits the case, some police information is highly classified and at times completely inappropriate for forwarding on to a complainant. For the purpose of protection of classified information, it matters not whether the document in question is forwarded to the Ombudsman as a result of an investigation (which has the protection of Section 26(1) in terms of Section 52) where this protection is not currently available.

In summary then I am happy to support the proposed amendment to Section 52 provided protection of Section 26(1) can be applied in appropriate circumstances."

The Committee's view is that the Ombudsman's first proposal to amend Section 52 would do no more than put in the PRAM Act the existing practice which has been agreed upon between his Office and the Police Service. Accordingly, there are no practical difficulties with the matter. However the Committee is mindful of less cooperative relations between the Ombudsman's Office and the Police Service in past years and feels that the proposal

should be incorporated in legislation.

The Committee is mindful that much of the documentation would be of a sensitive nature and may relate to pending criminal charges. Accordingly, the Committee feels that Section 26(1) should apply to such material as requested by the Commissioner.

The Ombudsman's second proposal was to be empowered to telephone individual police in simple matters to briefly ascertain the background to a complaint. Again the Commissioner's response was supportive as indicated below:

> **MR LAUER:** We have met with Mr Landa on those issues. I have said to him 'my view is that you can ring now and speak to any officer you would like to. If your call is unsuccessful because of his lack of co-operation, or you do not believe that you got what you were looking for, you are quite at liberty to come back to Mr Cole, and Mr Cole will see you.' I do not know that we have to enshrine it in more legalese legislation. I see nothing wrong with an Assistant Ombudsman ringing any police officer."

Apparently this already occurs but the Committee feels that, given past difficulties in relations between the Police Force and the Ombudsman that it would be prudent to incorporate it in legislation. This will ensure the statutory continuity of an arrangement based on the personal goodwill and commonsense of the current Police Commissioner and the Ombudsman evidenced by the following:

> **MR LAUER:** "So far as I am concerned if the Ombudsman has a minor query on a complaint received in his office there can be no real objection to a telephone request to the Police Officer concerned for information or advice on the matter. indeed as I have advised the Committee, if such a request did not receive the appropriate response from Police, then Assistant Commissioner Cole or his officers would wish to be informed so that the appropriate action could be taken.
>
> I have no substantial objection to this proposal, but I very much doubt that it needs to be enshrined in legislation. Common practice and courtesy surely suffice in this area."

By reason of the foregoing, the Committee is of the view that something ought to be put in the legislation so that the current practices do become protected by statute.

The Police Commissioner's other concern was that, whilst he didn't think the recommendation was unreasonable in itself, there was some difficulty in defining a simple matter. The Committee's provisional view was that the most obvious answer would be to define a simple matter as any matter agreed from time to time to be one the subject of the police conciliation proposals.

The Ombudsman subsequently expressed the view that this proposal should not be placed within the conciliation scheme because it would be confusing and inconsistent with the

Police having primary responsibility for conciliation. Accordingly, the Ombudsman recommended that the proposed power be explicitly vested in his Office as part of Section 52.

This matter was considered at the Round Table Conference on 18 March 1992 by the Committee, the Ombudsman and the Police Commissioner and agreement was reached that it was desirable to amend Section 52 of the PRAM Act to empower the Ombudsman to telephone individual police officers in simple matters in order to obtain brief background information which would assist in determining whether a complaint should be formally investigated.

At the round table conference, it was further agreed that simple matters should be defined as any complaints which on the face of them were unlikely to be investigated where a brief explanation of the Police conduct would decide the matter.

6.6 SECTION 51 (THIRD PARTIES TO PROVIDE INFORMATION)

In his written submission to the Committee, the Ombudsman proposed that Section 51 of the Police Regulation (Allegations of Misconduct) Act be amended to enable the Ombudsman to request further information from persons other than the complainant for the purpose of determining whether a complaint should be formally investigated.

The Ombudsman outlined the purpose of Section 51 and the way in which it operates in his written submission to the Committee as follows:

> "Where the initial written complaint raises serious issues but does not provide sufficient detail for the Ombudsman to determine that the complaint should be investigated, Section 51 of the Act empowers the Ombudsman to require further information from the complainant either in writing or orally. This power is used extensively as part of the Ombudsman's screening procedures to ensure that only the most serious matters are investigated. There are no figures recorded, however, as use of the power is not an end in itself. Depending on the response from the complainant, the complaint is dealt with in a number of ways."

The Ombudsman then recorded the problems he saw with Section 51 as it stands as follows:

> "...it is limited to requests for further information only from the complainant. There are many cases where persons other than the complainant can provide information verifying a complaint and are prepared to talk to the Ombudsman but unwilling to join the complaint as a further complainant. At present the Ombudsman is unable to require further information from such persons even though it may be relevant in determining whether or not a formal investigation is required. Instead the decision on investigation is either made in the dark or the complainant is required to gather the information themselves for presentation with

their complaint. Even where other relevant persons are prepared to provide written statements to the complainant, many complainants when told that the Ombudsman cannot request such information himself, rightly ask whether it is the Ombudsman's job to investigate complaints or not. This puts the Office in an publicly embarrassing and not very defensible position."

In his written submission dated 9 October, 1991 to the Chairman of the Committee, the Police Commissioner noted that he saw no real justification for the Ombudsman's proposal to expand the ambit of Section 51 and made the following comments:

> "The purpose of Section 51 of the Act, as I see it, is to merely enable the Ombudsman to ask the complainant for further information if insufficient detail has been included in the original letter of complaint. I see this as perfectly reasonable and proper.
>
> On the other hand, the obtaining of statements, complaints, etc, from others who might have knowledge of a particular matter is surely part of the investigative process - in terms of the Act a police responsibility and rightly so in my view.
>
> I see no real justification to this proposal under the existing provisions of the Act. If the recommendations I put to the Committee for conciliation of all but the most serious complaints are implemented, then I would see even less justification from Mr Landa's suggestion.
>
> I do have some difficulty with this particular recommendation and prefer it not be proceeded with."

In his supplementary written response to the Committee Chairman dated 30 December, 1991, the Commissioner indicated that he remained of the view set out in his earlier letter that there is no real justification for the proposed amendments to the Section. On this issue, the Commissioner indicated that in his view the Ombudsman had advanced nothing in his latest submission which would cause the Commissioner to alter his thinking in that regard.

In his oral evidence to the Committee, the Commissioner gave further particulars of his reasons for opposing the expansion of the Ombudsman's powers under Section 51 as follows:

> **MR LAUER:** "Section 51 was designed to permit the Ombudsman to go back to the complainant to develop just what was the complaint. In my time I have seen complaints in which it was difficult to really determine what the complainant was complaining of. I believe that is still essential. I do not know that it is necessary to go any wider. To do so will be to start the investigative process and will certainly involve him in the commitment of more resources and funding. The purpose of Section 51 is so that we can clearly understand what the complaint is and in our view ought to stay as it is.

MR TINK: I suppose it might allow him to speak to somebody who for example has written a document. So if in relation to the proposed change that you go along with he gets access to documents, he may then say 'look, I have this document I want to ask a question to the person whose document it is,' who may not be the complainant. Is that a huge leap?

MR LAUER: Yes, it seems a long bow to draw to determine where the complaint falls. It is really the start of the investigative process. The provision as we understood it was put there so that he could clearly understand the nature of the complaint. On the basis of what issues were disclosed in any complaint document, and there might be a number - there are courtesy in assault - each of them in itself has to be satisfied in our view. There is no difficulty now with that office telling us what it sees as the issues involved in the complaint to be. We would welcome it. I do not think it needs legislative power."

Mr Cole expressed his reservations on expanding the Ombudsman's powers under Section 51 as follows:

MR COLE: "If 51 is going beyond the complainant being spoken to, we feel we are probably into an investigation, and that should properly be done in the investigative sphere. In my opinion, once we get to the investigative sphere, I welcome at any time any input from the Ombudsman as to how we are going, where we are up to, etc. The trap we have to watch there is that we do not have the Ombudsman actually supervising the investigation."

At the same time, Commissioner Lauer said that, from his perspective, there would be some latitude allowed for the Ombudsman to informally contact Police Officers involved with a case by telephone. The following exchange which took place between the Chairman and the Police Commissioner and is referred to earlier, is worth repeating in the current context:

MR TINK: "....I understand the Ombudsman to be saying 'look we have this very formalised procedure whereby the Police do an inquiry, then it comes to me. I am not happy with it or have some questions, I can only talk to the complainant; I cannot see documents. If I could simply ring somebody else and ask, what about this or that, I would get to the bottom of it quickly, rather than having to send it formally back to the Police and then have it come back to me again'. I suspect that is his perspective. I do not know whether there is a possibility to reconcile that or whether the reality from your relationship is that you could work your way through those sort of things. That is the way I see the two sides of the coin.

MR LAUER: We have met with Mr Landa on those issues. I have said to him 'my view is that you can ring now and speak to any officer you would like to. If your call is unsuccessful because of his lack of co-operation, or you do not believe that you got what you were looking for, you are quite at liberty to come back to Mr Cole, and Mr Cole will see you.' I do not know that we have to enshrine it

in more legalese legislation. I see nothing wrong with an Assistant Ombudsman ringing any police officer."

From the above, it can be seen that, as far as the Ombudsman was concerned it was a nuisance that he could not simply pick up the phone and informally follow-up issues with witnesses other than the complainant to get to the bottom of matters quickly. Instead, the Ombudsman had to follow the cumbersome procedure of going back to the complainant and asking the complainant to get further information.

On the other hand, the Police concern was that the proposed change might result in the Ombudsman becoming directly involved in many many investigations in a way that would be doubling up on police resources and possibility hampering police investigations in an unintentional fashion.

In attempting to deal with this impasse, the Committee was particularly mindful of two things. Firstly, whilst Commissioner Lauer and Assistant Commissioner Cole were concerned that the Ombudsman's Section 51 power would lead him into the direct investigation of matters, this is precisely what they agreed his Office should be able to do in situations which are in the public interest. In these circumstances it at first sight seemed odd to the Committee that the Ombudsman could have a direct investigation power but could not speak to civilians other than the complainant. However, in fairness to the Police, the congruence of these matters is not quite complete because the direct investigation power is proposed to be used sparingly whereas a power to talk to people other than the complainant would be a power for much wider purposes under the Act.

Secondly, the Committee felt that the issue of checks and balances in the overall rejigging of the system must be considered in relation to the Section 51 proposals. If those proposals had been introduced under the existing system, then the Ombudsman could have become involved in checking a very large number of issues with numerous people other than complainants in possibly every matter that he was required to oversee. However under the new system of conciliated complaints, this will occur less and less frequently as the definition of conciliable matters is progressively expanded. Indeed, in those matters where the Ombudsman is able to spot check conciliable complaints and does so, it is most important that he be given the power to talk to people other than complainants as part of his audit. Thus if the Ombudsman is to have an effective auditing power, he should not be restricted to speaking merely to the complainants in relation to those matters. Indeed, the Commissioner and the Police Service have generally conceded that the question of auditing is one where the Ombudsman ought to have as much freedom as possible.

Weighing up these matters, it appeared to the Committee that there was a strong public interest factor in the Ombudsman being able to make extensive checks on both the auditing of conciliable matters and systemic problems which should be investigated in the public interest. Accordingly, the Committee felt that the power to interview people other than complainants was implicit in both proposals. Therefore the Committee was minded to recommend that in both cases, the Ombudsman should have the power to question civilians other than complainants as he requests in his Section 51 proposals.

The most difficult area related to the "middle group" where there may be serious allegations of misconduct against a police officer and the prospect of criminal charges being laid. Such matters would be far too serious to conciliate but would not necessarily involve systemic problems or matters warranting direct investigation in the public interest. The Committee was provisionally of the view that it was in this area where the multiple questioning of witnesses might become a problem. In evidence to the Committee, the Coroner, Mr Waller, made the following comments:

> **MR WALLER:** "From the Court's point of view, the more statements a witness makes the worse it becomes. Have you ever been to the Courts and seen lawyers in action? They love that. The more statements a witness makes the better they are able to say you said one thing in this statement and something different in another. There might only be a few words different. They then say 'can you explain the difference? In this statement you have left it out altogether'. That leads to lengthy hearings. Witnesses are ordinary people. Very few people can describe one thing in precisely the same terms. They do leave things out..... but this is all grist for the lawyers' mill. They love statements where witnesses do not say the same things. Witnesses become embarrassed in the box and ask, 'are you suggesting I am a liar?' The lawyers then say 'no but you could have made a mistake'. Confusing witnesses is part of the game that is played. The more statements they make the easier it becomes."

The Committee was very concerned about this problem in relation to matters which might go to Court. This problem was further explored by Judge Thorley and Mr Kerr:

> **MR KERR:** "In any event you see no problem with the Ombudsman doing a preliminary inquiry?
>
> **JUDGE THORLEY:** No, not the slightest. I am talking about the situation when we are down to the point where there is a strong chance that a charge will be laid, then to have different representatives at the interview other than the Solicitor of the person being interrogated, to protect him, I would see difficulty with that. I also see difficulty with the Office of the Ombudsman being involved in the strategy of it too."

Bearing all these matters in mind, the Committee was provisionally of the view that there may be a category of more serious matters where it might not be in the public interest for the Ombudsman to have the power to directly question witnesses other than through police involved in the case. Resulting concerns about public interest safeguards and integrity of this process then arise.

Accordingly the Committee's provisional recommendations for Section 51 were as follows:

a) In relation to those matters which are referred for conciliation within the Police Service, the Committee is emphatically of the view that the

Ombudsman must have the power to interview people other than the complainant as part of his auditing function if the oversight mechanisms are to have any veracity at all.

b) In relation to matters where the Ombudsman is using his power to investigate matters directly in the public interest, it plainly follows that his Office will be obtaining information from civilians other than the complainant.

c) In relation to matters which are being dealt with by Internal Affairs where charges are quite likely, the Committee has reservations about the Ombudsman having the power to talk to people other than the complainant except with the concurrence of the Police Commissioner.

Commenting on these provisional recommendations prior to the Round Table Conference of 18 March 1992 between the Committee, the Ombudsman and the Police Commissioner, the Ombudsman wrote:

> ". . . I proposed an expansion of this provision (Section 51) to allow my officers to require information from citizens other than the complainant for the purpose of determining whether an investigation should be required. The Commissioner opposed this because he saw it as a "back-door" method by which my Office could become involved in an investigation. The draft report suggests that the power be expanded to allow the interview of civilians other than complainants where the complaint is a conciliable matter or where I am exercising a power of direct investigation but not 'in relation to matters which are being dealt with by Internal Affairs where charges are quite likely."
>
> Once a complaint reaches the stage of formal investigation by Internal Affairs Section 51 is redundant and no longer has force. Its value is in determining whether the resources involved in a formal investigation should be committed before the decision is made. The draft report seems to assume that, even at the early stage of a complaint's receipt, the question of whether or not there is sufficient evidence to ground criminal proceedings can be determined. It is difficult to see how the draft recommendation takes into account, or can be incorporated into the existing legislation."

Following discussions at the Round Table Conference, the Ombudsman wrote the following about the Committee's provisional recommendation:

a) "This recommendation could be included with recommendation 9 (which covers the audit proposals);

b) This recommendation seems unnecessary. The power of direct investigation under the Ombudsman Act includes the power to take evidence from any relevant witness; and

c) This recommendation suffers from the misconception that the Ombudsman's initial proposals entailed parallel, separate investigations with those of Internal Affairs and consequent damage to evidence. In so far as this recommendation deals with formal investigations it can be subsumed into the Ombudsman's proposed powers to "monitor" internal police investigations as they occur. Recommendation 25 contains the central proposal in this area.

In so far as this recommendation deals with the Ombudsman's proposal to expand Section 51 beyond requiring information just from a complainant but from other civilians as well, it should be clarified. Expansion of Section 51 as proposed would be a significant tool in sifting through complaints at an early stage rather than requiring formal investigation to clarify matters. My initial response to the draft report deals with the relevant issues at pages 5 and 6. If the fear still exists that it is a "backdoor" method of investigation, and this is hard to see given the proposed increases in the Ombudsman's direct powers, then a proviso similar to that outlined at paragraph 20(a),(b) above could apply i.e. information obtained under this section not form part of the evidence constituting the formal investigation where the matter does proceed to formal investigation."

There was no further comment on these matters by the Police Commissioner.

After carefully considering the Ombudsman's comments the Committee accepts that the thrust of Section 51 by its very words is to allow the Ombudsman to require further information for the purpose of conciliation or for the purpose of determining whether a complaint should be investigated. Therefore, by definition the Ombudsman's request for power to interview civilians other than the complainant, is not as the Police Commissioner originally suggested part of the investigative process. It is by definition preliminary to it to help the Ombudsman determine quickly and economically whether the investigative process is required in a particular case.

Being thus defined, the Committee's concerns that evidence would be tainted if the Ombudsman obtained this power, also disappear especially where in a slightly different but not totally unrelated context, Judge Thorley thought there was no trouble with the Ombudsman being involved in a preliminary inquiry. In addition, the Committee noted that the Ombudsman proposed a safeguard that information obtained in this way should not form part of the evidence in any subsequent formal investigation.

Turning now to the Ombudsman's comments on each of the provisional recommendations, the Committee has reached the following conclusions:

a) This recommendation has been included with recommendation 9;

b) Whilst the power of direct investigation under the Ombudsman Act includes

the power to take evidence from any relevant witness, the Committee feels it is important to restate and thereby reinforce the Ombudsman's power to question civilian witnesses as part of his direct investigation power; and

c) In lieu of the provisional recommendation, the Committee now proposes the following:

> In order for the Ombudsman to determine pursuant to Section 51 of the PRAM Act whether or not a complaint should be formally investigated, the Ombudsman should have the power to talk to people other than the complainant with the concurrence of the Police Commissioner.
>
> Statements made to the Ombudsman and gathered by him in connection with this provision should not form part of the evidence in any subsequent formal investigation.

Finally, the Committee notes that this proposal is similar to the power of the Commonwealth Ombudsman to interview any person other than the complainant with the consent of the Police Commissioner pursuant to Section 35 of the Complaints (Australian Federal Police) Act.

6.7 PARTICIPATION IN INITIAL POLICE INVESTIGATIONS

In his written submission to the Committee, the Ombudsman proposed that the Police Regulation (Allegations of Misconduct) Act be amended to provide a discretionary power for the Ombudsman to supervise and participate in initial investigations presently conducted by Police under the Act. The amendments should provide for the Ombudsman's officers to meet with Police Investigators to determine the scope and strategy of the investigation and to participate in the gathering of evidence.

In support of this proposal, the Ombudsman's written submission put the following arguments to the Committee:

- "At present, it is police officers who interview complainants, police and other witnesses; police officers who define the issues to the investigators; police officers who analyse the material, collect it and forward it, some six months (by Statute) after the complaint was notified to the Office of the Ombudsman. The matter by then is weary, stale, flat and unprofitable. Six months after the event, longer in many cases, the Ombudsman must analyse the papers that have been produced by the police investigation, seeking to determine whether or not police have addressed the relevant issues or whether the investigation has been properly conducted. Where they have not, the waste of resources by the police investigation is compounded by the resources which the Ombudsman must expend in examining

the papers and remedying the deficiencies.

The way to improved efficiency in investigations is through closer involvement of Ombudsman investigators from the outset. This should occur through co-operation with police investigators, through supervision and participation in initial investigation, where necessary, and in rare public interest cases, through direct investigation by the Ombudsman. As set out in Part 9 above, there is ample precedent for these procedures both in Australia and overseas. It is also evident that, if properly instituted, they will reduce the level of resources presently consumed and improve the quality of investigations. Such improvements will also have an effect in retaining experienced investigators in the Ombudsman's Office. Some of the most experienced Ombudsman Officers including seconded Police, leave fairly rapidly because of the distance of the Office from the investigation process."

In a strong response, the Police Commissioner disagreed with the proposals put forward by the Ombudsman that he be involved in this process. In that regard, the Commissioner's concerns which are taken from the Ombudsman's letter dated 9 October, 1991 to the Chairman are of sufficient moment to be set out in full:

"I do not support this recommendation. The Act as presently constructed carefully delineates between the investigative role of police and the oversighting and reinvestigative role of the Ombudsman. The Ombudsman is now seeking a role in the investigative process at a time when his resources are clearly strained and when the effect of my submission to the Committee was in fact to reduce the commitment of the Ombudsman's resources in matters not requiring such attention.

With all due respect to Mr Landa, I believe the proposals outlined here are inherently illbased. They involve a major change in emphasis in the operation of the Act - one which I can see no justification for and which would undoubtedly be most difficult to "market" to the Police generally.

In discussing a proposal such as this, it is probably easy to point to the odd investigation poorly conducted within the Police Service. There have been such in the past and given the numbers involved there will be instances in the future. However, this is not the norm and I am confident Mr Landa would agree. The very large majority of investigations conducted by Police are done quickly and efficiently and these days the Ombudsman rarely has occasion to criticise to me particular investigations conducted by my officers.

Moreover, if my own proposals are adopted the resources of the Police Internal Affairs Branch will be freed from much of its present commitment in the investigation of complaints. These resources will then be utilised in the monitoring and supervision of investigations being conducted in the Command line. As a result of this and the reduced number of investigations which would

result from my proposals would be, as I indicated to the Committee, to halve the existing investigation time, with a target completion date of 90 days (as against the existing statutory period of 180 days) for those complaints of a nature less than 'class or kind'.

I believe that the increased monitoring from experienced Internal Affairs personnel, coupled with a much reduced investigation period would largely negate any argument advanced by the Ombudsman in support of this particular proposal.

I am opposed to this particular recommendation which I do not believe reflects modern day trends and attitudes within the Police Service."

In his letter dated 30 December, 1991 to the Committee Chairman, the Commissioner was at pains to point out that there was no inconsistency between his acceptance of the Ombudsman having "own motion" rights of inquiry under the PRAM Act and his reluctance to agree to the Ombudsman's Office becoming directly involved in the actual investigation process. In that regard, the Commissioner made the following comments:

"The former I felt was a major concession on my part in an area where we would be quite prepared to trust and co-operate with the Ombudsman. On the other hand, if Police are to carry out investigations, then it is my strong view that they have the will and capacity to do so thoroughly and should be left to do so, with the Ombudsman retaining his independent oversight and review role.

The question of delays in finalisation of investigations I suggest should not be seen as one of major moment in the Committee's deliberations. The Police Service proposals for attempted conciliation of a far greater range of complaints will inevitably result in those matters being finalised much speedier than is now possible.

Further, the commitment has been given, in respect of lesser number remaining for investigation, that a target completion and turn around date of 90 days will be set rather than the 180 days now provided by statute."

The Commissioner further clarified his reluctance to have the Ombudsman's Office directly involved in the investigation process in comments about proposals for the closer involvement of the Ombudsman in the initial investigation process. In the Committee's view these two issues are closely linked.

The Commissioner expressed his specific concerns about the initial investigation process in his letter to the Committee Chairman of 30 December, 1991:

"The Ombudsman states that he does not seek "to direct, control and order police investigators about how they should do their job" adding that he wishes "to be closely advised about what they are doing and, where appropriate, suggest things they might do to address my concerns during investigation.

He then goes on to propose a system based on the South Australian legislation which would allow the Ombudsman to indicate the matters to be investigated and the methods to be employed with any dispute on these points being adjudicated upon by the Police Tribunal.

To me these two points are in conflict.

I suspect the Ombudsman and the Police Service are approaching this question from two different perspectives. The Police attitude is that we are charged with an investigation, we will carry this out to the best of our ability and are then happy to accept the independent reviewing role of the Ombudsman. We wish to be accountable for our investigations and will accept any subsequent criticism if we fail in the instance. On the other hand, the Ombudsman seems to be looking at the "worst case scenario" and wishes some controlling influence from the outset. I do not believe this is justified or called for in the present climate. Put another way, the purpose of the Act is not for Police to investigate <u>for</u> the Ombudsman - it is for Police to investigate in the first instance with the Ombudsman having his independent role of oversight, review and, if thought appropriate, reinvestigation.

I have no difficulty if the Ombudsman, if forwarding a complaint to the Police Service investigation, wishes to indicate what he sees as the major issues involved - it would be rare for us to see things differently. However, I would be reluctant to have a system imposed where, in practice, the Ombudsman could indicate the methods to be employed in investigating a particular matter. Again, I have no objection to any suggestions being made, but with all due respect, I have seen suggestions and post investigation criticisms from the Ombudsman's Office in the past which indicate little experience in actual investigation and practicalities of some situations. On the other hand my Officers in Internal Affairs are experienced investigators with a proper understanding of both their duties and the methods most appropriate to be employed.

As I have said, the Ombudsman is at liberty to make any suggestion he wishes regarding complaint issues and methods of investigation. Any reservations which may then be held could be discussed by the Assistant Commissioner (Professional Responsibility) during his regular meetings with staff at the Ombudsman's Office. Further, if desired by Mr Landa, I could arrange for Police to submit a progress report to the Ombudsman indicating the issues being investigated in each instance.

I would not like to see us go beyond this however. To do so would add further legalities and complexities to the process for no good reason yet advanced especially keeping in mind the commitment given for speedier turn around of complaint investigations.

Elsewhere in his submission, the Ombudsman suggests the Commissioner must trust the Ombudsman in his operations. This is one area where I suggest that the reverse must apply."

As far as the Committee was concerned it was not surprising that the Ombudsman and the Police Commissioner had completely different opinions about the desirability of participation in investigations. Indeed, there was a significant public interest component supporting each point of view.

From the Ombudsman's point of view, it was clear that there would be occasions in which early intervention would be of assistance to his Office and to other concerned parties in terms of giving everyone a better perspective on a matter which may not be readily apparent to those closely involved with the Police investigation. Thus a better perspective might allay the Ombudsman's concerns about a matter or, alternatively, alert the Police to problems with an investigation such as Operation Raindrop discussed below.

From the Commissioner's point of view, there was a strong reluctance to allow the Ombudsman to indicate methods to be employed in investigating a particular matter where, in his opinion, the Ombudsman's Office had little experience in actual investigations and the practicalities of some situations. From the Committee's perspective, there was a further issue which was that there were very important and delicate procedures put in place in the investigation of any serious matter especially where criminal charges were likely. Mr Waller's comments about the tainting of evidence have already been considered in relation to Section 51.

In answer to some questions from Mr Scully, Judge Thorley said:

> **JUDGE THORLEY:** "The Ombudsman may have his own agenda in an investigation, and properly so. He might be concerned about the fact - let us assume a Policeman was being charged with stealing a drug exhibit. He might be concerned to ask questions about systems which would allow him then to make recommendations to the Commissioner about some change in the systems of the drug registry - I just pose that sort of thing - but that would not be the agenda of the investigating police in respect of the charge of supplying drugs. If you are going to ask these questions at a formal interview, everything that is said has to be recorded. I just do not quite know how you work having the Ombudsman's person there at this formal interview with the prospective accused who, in a criminal context, is warned to begin with that he need not answer any questions."

When these comments about problems with evidence generally were considered the Committee reached the strong provisional view that there were problems with the proposals to supervise and participate in initial investigations.

Nevertheless, the Ombudsman's argument that the power to supervise and participate would enhance his capacity to investigate matters and reduce delay, received some support from important quarters.

In that regard, the evidence of New South Wales Inspector-General of Mr Wilson, was instructive. The following exchange took place between the Chairman and Mr Wilson as follows:

MR TINK: "A proposal has been put forward by the Ombudsman to this inquiry that he be given more latitude to enter into the investigative process while it is underway to, as he would see it, assist the Police to clarify issues, to look at documents and, to that end, to also interview witnesses with a view to shortcutting, as he would see it, the procedure of completing an inquiry then having the matter referred to him, then having him refer back questions that he has got to the police, then having the police come forward again, thus setting conditions precedent to putting in train his own independent Section 19 inquiry. In other words, he sees the proposition that he should get involved in the investigation as appropriate as aiding him to short circuit a very formalised procedure. Have you any comment on the pros and cons of that, what the pluses and minuses of that might be from your perspective?

MR WILSON: I have read the Ombudsman's submissions to you and I have significant sympathy with all that he has attempted to cure. The Canadian experience is that these formalised processes, together with at least three phases of a process, can extend to the point where no one is satisfied, no public interest is served, and you end up with everyone having lost confidence in the process. Not only now but for some time I have been puzzling with concepts of how the process might be shortened and all interests served, including the public interest. I doubt that the police service generally, would agree with me, but if a mechanism could be devised whereby an investigation is undertaken jointly, that is to say by the police, probably with primary jurisdiction but in the company with a person with authority from the Ombudsman's Office, then that team approach is about the only concept I have been able to come up with in my own mind which would help shorten the process and expedite the whole exercise."

This evidence was particularly instructive in light of the great concerns expressed earlier by the Police Association about the nature of delay with paperwork going back and forwards between the Police and the Ombudsman in many matters. Obviously, if the Police conciliation procedures are put in place, this is likely to be of less concern in many matters. However, in relation to matters which are to be investigated on a more serious level, it is of concern to weigh the competing issues of speeding up the process and preserving evidence. This was of concern to Mr Wilson who, shortly after giving the above evidence told Mr Scully:

MR WILSON: "There is a danger in that and it is this, that in some of these investigations, I do not think we can afford to lose sight of the fact that we may be leading through a criminal process and therefore the investigator must be aware of the quality of the information and evidence he is gathering and must ensure that that evidence is not tainted for criminal purposes. So it would have to be done rather carefully and you would have to consider whether the Ombudsman's representative is a person of authority whose presence, demeanour, attitude and conduct could taint that evidence of its value as evidence in the criminal process, that kind of thing."

Thus, the public interest dilemma for the Committee was that, whilst there is a great public interest benefit in speeding up and short cutting proceedings, the end result could be that a charge in a very serious matter might fail as a result of some evidentiary problem.

On balance, the Committee was reluctant to recommend that the Ombudsman's Office "supervise and participate in initial investigations" but remained concerned that, in suggesting this, it was shutting off something that may, in particular instances, be a very effective tool. In that regard, the Committee was mindful of evidence which Mr Phem gave to Mr Scully to the following effect:

> **MR SCULLY:** "If I understand your earlier comments, it is unlikely that you would be involved in direct questioning of witnesses on all that many occasions. What would mostly happen is that there would be early contact with investigating officers and you would say, 'This is how I understand the complaint, I think this is what you should be extracting from these witnesses and you had better make sure you talk to so and so.' Is that the sort of thing?
>
> **MR LANDA:** Yes.
>
> **MR PEHM:** I mean we are doing exactly that.
>
> **MR LANDA:** It is happening now informally.
>
> **MR PEHM:** We are doing it through direct contact with the Police investigators.
>
> **MR SCULLY:** Pre-empting problems that may arise?
>
> **MR PEHM:**Yes, and I mean looking at it to record initial assessment of the complaint, one thing we find with police investigation is that again they go by the book. They get the complaint and the manual says, you interview the complainant and every witness present and they are. Police Investigators I think are finding it a help to say, you do not have to interview all these people you just get these two or three pieces of evidence and if at that stage you do not think it is worth going on with it, then apply to us to discontinue." They have been quite responsive to that."

Further on in his evidence, Mr Pehm clarified matters in the following exchange with Mr Scully. Although these were directed to section 51, similar issues were raised and the question was put in the following context:

> **MR PEHM:** ". . . In that case we would talk to the other witness to see whether it was worth investigating.
>
> **MR SCULLY:** Not the truthfulness of the complaint?

MR PEHM: No, it is not to make the determination. It is just to assist whether it should be investigated or not. Once that decision was made, it would go to the police and they would do an investigation and those witnesses would have to give formal statements.

MR SCULLY: There must be a line through where it becomes investigatory rather than just a preliminary inquiry. I think that is their concern, is it not that you would use it as a vehicle to -

MR LANDA: I think probably you could say it would become a direction - "investigate this - but in effect that's what we're doing now. By tacit agreement in many instances they are happy to receive that type of guidance".

Whilst the Committee did have strong overall reservations about the Ombudsman being involved and conducting parallel investigations with the Police because of concerns about evidentiary problems, it did nevertheless feel that there was an important but limited role for the Ombudsman's Office to be playing at the preliminary level. Indeed, there was some support for this from Judge Thorley who in evidence differentiated between preliminary enquires and matters further down the track.

Weighing all these matters up, the Committee came to the provisional view that the Ombudsman's proposal to supervise and participate in police investigations be limited to preliminary investigations and that the Ombudsman not be involved in such situations when it becomes apparent that there is a strong chance a charge will be laid.

Not surprisingly this proposal met with a spirited response from both the Ombudsman and the Police Commissioner.

The Ombudsman pointed out that the Police do not have a monopoly on investigative competence as evidenced by the Operation Raindrop fiasco. The Ombudsman also provided examples of complaints found to be "not sustained" by the Police where reinvestigations by the Ombudsman's Office resulted in charges being preferred.

At the Round Table Conference held on 18 March 1992 between the Police Commissioner, the Ombudsman and the Committee a lengthy and lively discussion took place about the monitoring of police internal investigations. Arising out of this discussion and supplementary written responses the following proposal was, in effect, agreed to between the Ombudsman and the Police Commissioner:

> The Ombudsman should be able on a discretionary basis, for appropriate cases, in the public interest, to monitor the progress of police internal investigations by being empowered to:
>
> i) be present as an observer during selected internal investigations; and
>
> ii) consult with police investigators during the course of an

investigation.

The Committee is pleased to recommend accordingly.

When considering the Ombudsman's role in the direct or paralleled investigation of complaints, it should not be forgotten that the Police do get investigations wrong even in relation to so called "internals". In the recent Court of Appeal decisions of Regina v O'Donnell and Regina v Seery delivered on 17th February, 1992 Lee A J with whom Gleeson C J & Samuels J A concurred said:

> "In preparing his brief of evidence against the appellants, Slade and O'Donnell, Inspector Dickinson....ensured corroboration by leading, prompting and dictating the statements of witnesses....
>
> ...As Counsel for the appellants put it:
>
> > 'Once Dickinson had 'created' corroboration for Frank Walters' allegations by this inappropriate and improper method, it only remained for the witnesses Frank Walters, Denise Walters and Valda Collins (Swain) to read, memorise and regurgitate their written statements to the Court. The appellants' right to a fair, impartial and competent investigation of the allegations against them by the criminal Frank Walters and his wife have been denied them. The need for extreme caution and independence of corroboration in the circumstances had been ignored.'
>
> One can only ponder as to what might have been the evidence of Walters, his wife and Valda Swain if each had been left to make a statement, unprompted in any way."

Operation Raindrop which gave rise to this result, was referred to by Police Association representatives in their opening comments. The Committee feels the matter is significant because it illustrates that internal investigators can themselves taint evidence and police, who may normally consider the Ombudsman a "bogeyman", may themselves have reason to call on his services in a case such as this and be disappointed to learn that his powers are limited.

The matter is also significant because it revealed serious systemic problems including the setting up in 1984 of the Internal Police Security Unit which, at that time, was not staffed by appropriately trained investigators and inappropriately used informers.

The Committee notes that the Independent Commission Against Corruption is looking at the question of informers and notes also that the IPSU has been disbanded in favour of a more preventive approach to corruption to be adopted by the newly created Professional Integrity Branch.

However, what is important for present purposes, is the notion that police officers may

need the Ombudsman's help when they themselves are being investigated and therefore a role for the Ombudsman in preliminary inquiries may need by looked upon from their perspective, in a different light.

OTHER ISSUES

7.1 REASONS FOR THE INCREASE IN LEVEL OF COMPLAINTS

In his report to Parliament tabled on the 2nd July, 1991 the Ombudsman indicated that the number of Police complaints had increased significantly over recent years. In that regard he provided the following figures:

	87 - 88	88 - 89	89 - 90	90 - 91
POLICE COMPLAINTS	2138	2231	2352	3161
TOTAL COMPLAINTS	4639	4499	4777	5713

Commenting on a comparison between the level of Police complaints and complaints made in relation to other public authorities he has jurisdiction over, the Ombudsman said that, while the level of complaints concerning departments and local government authorities had remained fairly static over the last four years, the number of complaints about members of the Police Service had risen steadily since 1987-1988 culminating in a huge increase of 34.4% in the 1991 financial year. In addition, since 1987-1988 police complaints had increased by 47.85%.

The Ombudsman's report of the 2nd July 1991 also made the following comment which helped to determine the Parliamentary Committee on a course of reviewing the Police complaints procedure:

> "The increase in the number of police complaints is only partly explained by the fact that the Commissioner now notifies the Ombudsman of all complaints made by members of the Police Service about the conduct of other members ("internal complaints"), as required by the decision of Lee J in Ombudsman v Commissioner of Police 1987 11 NSWLR 386. The reasons for the greater part of the increase in police complaints however remain matters of speculation".

In his written submission to the Committee, the Ombudsman made the point that the increases in police complaints over the years have not been consistent every year. For example, in 1981-1982, there was an increase of approximately 35% which coincided with the first year in the Office of Mr Masterman QC who greatly increased public awareness of the Police complaints system. From this and other comments made in his written submission, it appears that the Ombudsman sees the rate of increase in Police complaints as having a direct relationship to public awareness of the complaint system. This often arises from the notoriety of particular police investigations which may receive

intense media coverage from time to time. In that regard, the Ombudsman made the following comments in his written submission:

> "Anecdotal evidence and statements in letters of complaint suggest that publicity about police conduct has a marked effect on the level of complaints received. Incidents which complainants might otherwise accept become heightened when there is constant public focus on Police misconduct. The past two years have seen spectacular and widely publicised episodes where the N.S.W. Police have come under searching public scrutiny. The inquiries into the death of David Gundy and the Royal Commission into black deaths in custody generally; the Harry Blackburn saga; the shooting of Darren Brennan; the raid on Redfern by 135 police including TRG; the ongoing inquiries by the Independent Commission Against Corruption concerning Police misconduct including harassment of Eddie Azzopardi by Mt Druitt Police are the more widely known matters. The fact that such matters are opened up for public debate generally encourages confidence in the mechanisms to deal with complaints and appears to have an influence on increasing numbers."

The Ombudsman indicated that the increase in the number of complaints included an increase in the number of internal complaints about police conduct. As a result of the administrative delay experienced by the Ombudsman and the Police in determining which complaints should be notified to the Ombudsman as a result of Justice Lee's decision, the only figures the Ombudsman was able to provide to the Committee in relation to internal complaints, cover the years 1989/90 and 1990/1991. During this time, the number of internal complaints notified to the Ombudsman rose from 185 to 564: an increase of 10% as a proportion of the total number of complaints received.

In oral evidence, the Ombudsman raised the issue of the stress associated with law enforcement work as being another possible cause for Police misconduct. In that regard, the Ombudsman gave the following evidence:

> **MR LANDA:** "Police see themselves as enforcers of the law, in many cases let down by lawyers and a court system which they see as overly technical and often too lenient. They can feel that they stand alone against the tide of lawlessness and that no one understands, or is capable of judging, their situation. Police tend to rely on one another in life threatening situations and are subject to a great deal of stress. Over my period as Ombudsman, a significant number of complaints against police revealed evidence that the officers under complaint were cracking up under the strain of policing and that the complaints arose from their erratic behaviour. The Police Service has very little support in place for such officers and I spend a great deal of time and effort trying to improve the services available in such cases. Although there are signs that things may be improving within the police administration, there is still the general perception among police at the grass roots that it is somehow weak to admit stress and to seek proper attention."

No doubt, some of this stress is created by the delays inherent in the police complaints system. It therefore follows that the streamlining of the complaints process may have a

positive impact on stress problems.

The submission to the Committee from the N.S.W Police Service also noted that complaints were increasing significantly not only in specific categories but also in absolute terms and offered a number of factors which could have contributed to the increase:

a) the average age and experience of Police Officers - at 30 June 1991 38.9% of the officers in the Service had less than five years service and 27.8% of officers were under 25 years of age;

b) community policing - increased police presence on the streets as a result of community based policing presents greater opportunities for conflict and misunderstanding resulting in the potential for increased number of complaints against Police;

c) greater publicity about misconduct and corruption means that people no longer accept in silence what is unacceptable to them;

d) increased public awareness of the rights and entitlements afforded to individuals using the police complaints system;

e) The 1987 decision of Mr Justice Lee which had the effect of requiring all internal correspondence dealing with actual or possible misconduct by a police officer being viewed as a complaint.

f) greater employment of female officers now totally 11% of the Service and a corresponding increase in the reporting of misconduct and sexual harassment;

g) greater willingness among Police officers to address domestic violence situations involving other officers, where previously there was a tendency to hide them;

h) improved ethical attitudes of Police - greater preparedness, due to emphasis on integrity, and legislative protection and requirements, of police officers to report misconduct;

i) increased reporting mechanisms and Intelligence arrangements - shared intelligence between law enforcement and related agencies and increased reporting mechanisms for complainants have widened the avenues for the receipt and investigation of police complaints;

j) supervisory attitudes - insufficient use of conciliation and informal resolution by supervisors at the local level due to current emphasis on integrity and accountability and the resultant trend among supervisors to

report rather than resolve complaints at a local level;

k) Inappropriate use of complaint process - for example, vexatious complaints made by offenders against arresting officers.

The Police Service submission indicated that strategies to contain and address this increase are being developed. The submission stated that, although the above mentioned factors have contributed to an increase in the reporting of misconduct, the increase in complaints does not necessarily reflect an increase in the actual incidents of misconduct.

The Committee's overall view of the submissions and evidence was that the level of increase in complaints against police probably had a lot to do with the increased public awareness of complaints processes. In that regard, the Committee believes the Ombudsman best summarised the matter as follows in his written submission:

> "The fact that such matters are opened up for public debate generally encourages confidence in the mechanisms to deal with complaints and appears to have an influence on increasing numbers".

In addition to the proposition that public perception of the complaints process arising from notorious cases increases the number of complaints, the Committee is also mindful of the Ombudsman's comments about the effects of Mr Justice Lee's decision in 1987 concerning Internal complaints. In that regard, whilst Mr Justice Lee's decision was brought down in December 1987, there was a significant administrative lag while the Police and the Ombudsman set about finding which complaints should be notified. Thus the only available figures cover the years 1989-1990 and 1990-91 and show a very strong rise in the number of internal complaints notified to the Ombudsman over this period. In the first year, 185 internal complaints were received but in the second year, this increased to 564. Accordingly the Committee feels that the impact of the reporting of internal complaints has an important factor in the increase in police complaints in the last two years.

7.2 SEXUAL HARASSMENT COMPLAINTS

The Committee appreciated the frank admission by the Police Service in its written submission that sexual harassment, arising from the greater employment of female police officers, may have been a significant factor in the increase in complaints recorded recently.

By way of particularisation, the Police Service submission indicated that some 11% of officers in the Police Service are now female. They are employed throughout the Service and many are in operational roles at Police establishments across the State. As a result of this greater deployment of female personnel, there are now more incidents of misconduct and sexual harassment being reported.

The Police Service's submission claimed that:

> "The Service takes the most serious view of complaints of this nature. The EEO unit plays an active role, a peer support program is in place and all complaints of sexual harassment are referred to the Assistant Commissioner (Professional Responsibility) for investigation and appropriate action. Every support and assistance is given to victims".

In evidence to the Committee the Assistant Commissioner gave the following explanation of the current procedures for handling sexual harassment complaints.

> **DR BURGMANN:** "Would a sexual harassment complaint from a member of the public or from another police officer which involved physical contact be considered to be of a lesser kind and would a domestic violent situation which did not involve actual assault but which had the police officer threatening the wife with the fact that he had his gun in the bedroom be considered of a lesser status than class or kind?
>
> **MR COLE:** They would be considered to be of a class or kind particularly the last one you mentioned and they would be matters where we would normally be charging the officer right at the start so they would be dealt with as class or kind."

The serious view which the Police Service takes of sexual harassment matters was corroborated by the evidence of Inspector Stanton as follows:

> **MR STANTON:**"There are some fairly good guidelines as to some of the areas that you cannot conciliate - sexual harassment and equal opportunity matters. . .
>
> **MR KERR:** They are not susceptible to conciliation?
>
> **MR STANTON:** No. So you have a fairly strict course of action you have to take which restricts quite a lot of the complaints (from being able to be conciliated)."

On the basis of this evidence, the Committee originally proposed that sexual harassment complaints continue to be considered as a "class or kind" to be handled by the Internal Affairs Branch and subject to formal investigation. However, this view was modified due to information provided by the Commissioner and the President of the Anti-Discrimination Board.

During the course of the Round Table Conference held by the Committee on 18 March 1992 the Commissioner referred to recent discussions between the President of the Anti-Discrimination Board, Mr Steven Mark, and senior levels of the Police Service on the subject of sexual harassment complaints.

Mr Lauer indicated that Mr Mark was critical of the way in which the Police go about investigations of sexual harassment complaints, and the need for the Police to rid

themselves of rigid formality in the investigation process, in order to protect the interests of the victim as well as to act in relation to the offender in the appropriate way.

The Commissioner indicated that he did not believe sexual harassment complaints were matters for Internal Affairs. He felt that as Commissioner he ought to require command officers to be responsible for the conduct of their officers and that many of these issues ought to be settled by way of conciliation rather than exposing the victim to the rigidity and formality of the police complaints investigation.

These views were supported by Mr Mark in a letter to the Chairman dated 27 March, 1992. Mr Mark wrote:

> "Put briefly, my understanding of the current system is that under the former Commissioner of Police, Mr Avery, directions were given that complaints of sexual harassment by a police officer were to be handled as disciplinary matters. This was largely a response to several complaints which apparently were handled rather badly in a process termed "conciliation" by Police but which bore little resemblance to the conciliation process with which I am familiar.
>
> Mr Avery wished to deter the behaviour leading to such complaints by publicly disciplining any officer responsible as a lesson to other officers that such conduct was unacceptable.
>
> As I have explained to the Commissioner and other senior officers such disciplinary action, at the exclusion of any attempt at conciliation, is counterproductive and fails to achieve the desired goal. In the context of a complaint relating to sexual harassment by a male police officer against a female colleague, disciplining the responsible officer only results in further victimisation for the complainant.
>
> Within the existing police culture the complainant is regarded as a "traitor" responsible for the disciplining of a fellow officer and victimised further. This was conceded by the seminar participants as an accurate portrayal of the current situation.
>
> The direct results of this approach to sexual harassment are that, firstly, women do not complain because it is too damaging for them to do so and, secondly, that the onus of proof in a disciplinary matter is different to that involved in a conciliation.
>
> The concern in disciplinary handling of such complaints is that the onus of proof is almost equivalent to that which applies in a criminal matter. In any investigation conducted by Internal Affairs witnesses are sought and a record of interview is taken in an endeavour to gather evidence of the conduct subject to complaint. The onus of proof is high and it is my experience that the resulting disciplinary rate is low. This gives the misleading impression that either sexual harassment does not occur within the Police Service or that the conduct complained of does not actually

constitute sexual harassment. This suppresses the entire issue. Moreover, the investigation process denies the rights of the complainant.

It is my view that a more constructive and positive approach to such complaints would be through conciliation. It should be determined at the outset what the complainant is seeking to achieve by making a complaint. Invariably when asked this question complainants respond that they want the behaviour to stop; that they don't want others to be subjected to the same behaviour; and, that they want the person responsible to recognise and understand that their behaviour was wrong.

If appropriate, disciplinary action could follow on from conciliation and the two processes should not be considered as mutually exclusive.

The overriding principles in the handling of any such complaint should be protection of the victim's rights, maintenance of confidentiality, appropriate action against the responsible officer, or if the behaviour is indicative of a systemic problem within the Police Service, measures should be taken to remedy the problem.

For these reasons I support the approach outlined by Mr Lauer at the Committee meeting and recommend to the Committee that sexual harassment matters should be conciliated and, if necessary, disciplinary action taken."

In view of the background details provided by Mr Mark, his comments on the deficiencies of the current approach by the Police Service and the benefits to be gained from conciliation of such complaints the Committee believes that changes should be made in this area and welcomes the Police Service's initiative in holding discussions with the Anti-Discrimination Board.

The Committee agrees with Mr Mark that conciliation should not be excluded from the processes for handling sexual harassment complaints and that they should not in all cases be considered as being of a class or kind to be dealt with by Internal Affairs. An attempt should be made where appropriate to conciliate such complaints in the first instance before a formal investigation of the complaint is conducted so that the victim of such conduct is spared further harassment and the complaint is handled in a constructive manner.

However, it is concerned to ensure that investigation of complaints is continued in those cases requiring it and that disciplinary action should be taken where necessary.

It is recognised that some cases of sexual harassment may be the result of a more systemic mode of conduct within the Police Service and the Committee feels that in these cases the service should consult with an independent body such as the Anti-Discrimination Board in order to develop an appropriate strategy to remedy such problems.

The Committee is concerned to ensure that the serious view taken by the Police Service

of sexual harassment matters continues.

7.3 CORONER'S JURISDICTION

In a written submission to the Committee Chairman dated 22nd July 1991 , the State Coroner, Mr Kevin Waller, expressed concern that, where there is a death in police custody, the interests of the Coroner and the Ombudsman seem to overlap to the detriment of proper investigation. In that regard, the Coroner referred to various sections of the Coroner's Act 1980 giving him jurisdiction to examine circumstances relating to the death of persons whilst in the custody of a member of the Police Force. Mr Waller indicated that, in such cases, an Inquest is mandatory. Further, the Coroner indicated that the Act empowers him to give any member of the Police Service directions concerning investigations to be carried out for the purposes of an Inquest.

The Coroner referred to the David Gundy case in the following terms:

> "In the David Gundy case, conflict and confusion arose when both the Royal Commissioner into Aboriginal Deaths in Custody and the Ombudsman sought to pursue their inquiries at the same time that Police were investigating the case on behalf of myself as the State Coroner. Both the Royal Commissioner and the Ombudsman used seconded Police to conduct their inquiries. I objected to the Attorney General that a multiplicity of investigations was both wasteful of resources (resulting in a plethora of material) and confusing and intrusive to witnesses. In the event, the Government decided the Coroner's Inquiry should have precedence."

The Coroner gave a further example of a prisoner who was found hanged in a cell at Chatswood Police Station in early 1991 which was reported to the Coroner and is being investigated by Police on his behalf. In that case, the Coroner said it had come to his attention that the Ombudsman's Office had been in contact with the Police giving directions as to who should carry out the investigation. The Police had indicated that they had difficulty in serving two masters.

The Coroner then referred to Schedule 1 of the Ombudsman Act 1974 which excludes certain activity from the scrutiny of the Ombudsman. In that regard, Clause 8 of Schedule 1 of the Ombudsman Act provides the following exclusion to the Ombudsman's jurisdiction:

> "Conduct of a public authority relating to the carrying on of any proceedings -
>
> a) before any court, including a coronial inquiry..."

In all these circumstances, the Coroner put to the Committee that the law should be made clear that the Ombudsman has no jurisdiction to conduct a collateral inquiry into a matter which falls in the jurisdiction of a Coroner. The Coroner suggested an alternative

proposition that any jurisdiction the Ombudsman may have should await the finality of the Coroner's inquest or inquiry. However the Coroner indicated that he didn't favour this. Finally, Mr Waller indicated that he had not had the benefit of examining a copy of the Police Regulation (Allegations of Misconduct) Act.

In oral evidence already referred to, the Coroner made out a very strong case that witnesses are precious people and should not be interviewed by a multiplicity of investigative agencies lest their testimony be unwittingly tainted in some fashion. In particular, the following comments are worth repeating:

> **MR WALLER:** "From the Courts' point of view the more statements a witness makes the worse it becomes. Have you ever been to the Courts and seen lawyers in action? They love that. The more statements a witness makes the better they are able to say, "You said one thing in this statement - something different in another." There might only be a few words different . . . That leads to lengthy hearings."

On a different but not totally unrelated point, the Coroner gave the Committee a hypothetical example of what could happen if two parallel investigations were running, where one was completed and then the second investigation came up with something different:

> **MR WALLER:** "We fought very hard to get every possible piece of evidence we could before the Jury in the Gundy inquest. It horrifies me to think that someone else might have the result of some other investigation kept hidden away until perhaps the right moment to throw doubt on what had gone on in court in front of five Queen's Counsel and the State Coroner. I am concerned about all those things. I really feel that the Ombudsman should not have jurisdiction in relation to deaths which are the subject of a Coronial Inquiry. That is fundamentally what I am saying."

The Coroner's understanding of the police complaints system was taken up by Mr Kerr as follows:

> **MR KERR:** "In relation to the matter of police officers that you were surprised at the involvement of the Ombudsman, could you elaborate on that?
>
> **MR WALLER:** It seemed rather simple to me. The Police had been told to get their brief in and to interview the witnesses and they had not done it. It seemed to be a straight out disciplinary matter.
>
> **MR KERR:** I think probably the legislation required the intervention of the Ombudsman?
>
> **MR WALLER:** That is the view that was taken, I am not an expert in it."

Further on in his evidence, Mr Waller was involved in some discussions with Mr Scully as follows:

> **MR SCULLY:** "Police investigating Police is obviously the reason for the Ombudsman existing. Do you have any problems in that regard, that Police have not been as thorough in their coronial investigations as they might be in other areas, such as hospitals?
>
> **MR WALLER:** Yes we all know there is a problem with police investigating police, as there is with lawyers investigating lawyers and doctors investigating doctors . . . This is an old chestnut and I have always countered when people say that by saying, "Who should investigate the Police? You nominate a body and there is just no one . . There is no body with the resources of the Police Force that can adequately investigate either themselves or anyone else, in my opinion. They have a huge host of personnel, expert investigators and you have to use them."

Slightly further on in his evidence, and again in discussion with Mr Scully the following exchange took place:

> **MR SCULLY:** "What I have in mind is that it may be that if you were given exclusive jurisdiction, and there might be some merit in that it would have to be expanded a little so that if as a result of your inquiries you found this other conduct while not directly impinging on the death or any offences causing death, certain action would have to be taken against the officers for that conduct?
>
> **MR WALLER:** There is nothing to stop the Coroner from notifying the Commissioner of Police about those matters. I take it from the law that would then become a complaint which the Commissioner would have to refer to the Ombudsman. So he would get that complaint anyway."

The issues referred to by the Coroner were taken up by the Ombudsman and the Assistant Ombudsman (Police Complaints) in their oral evidence to the Committee. In that regard, in a discussion with the Committee Chairman about difficulties with parallel investigations and the possibility of unwittingly tainting a witness's evidence, the following points were made:

> **MR LANDA:** "We do not have the resources or the will to run a parallel investigation and that is not what happened. The Coroner got it pretty wrong, unfortunately.
>
> **MR PEHM:** The Coroner raised that. He actually was not aware of what went on when he was sitting in the Coroner's office while it was happening. He raised this idea that we would be doing ours and the shooting team would be doing theirs and [it was] established very early on that we would accept the shooting team's investigation, despite some real problems with that, as the investigation for the

purpose of the Police Regulation (Allegations of Misconduct) Act, so we are very careful to preserve that difference.

MR TINK: Just on that, am I right in assuming this. The Coroner has Police acting under him on a regular basis, seconded there for a period. If there is anything particularly controversial, for example, the Gundy matter, they get in people to assist on a more professional basis. In other words, they set up a squad - I think it was Superintendent Harding as distinct from the Senior Sergeant in the Coroner's office. Do I understand this: that if one of those Police has a complaint about another Police Officer - if one of Superintendent Harding's team has a complaint about the way in which another member that team is doing something, such that an internal complaint is generated, that is a matter for you as a matter of course is it not?

MR PEHM: Yes

MR TINK: If the internal complaint is such that a note is written to the Commissioner saying that detective X does not think that detective Y is doing the right thing, that's a matter notified to you?

MR LANDA: Yes

DR BURGMANN: But the Coroner said it was not.

MR LANDA: But the Coroner got it wrong. The Coroner really doesn't understand the system. This is what I said at the outset. We asked for some transcripts and we got this attack we were encroaching on his jurisdiction. All we wanted to know was to have the information fed as it went. The Coroner mistook that - the mistake was that we had the power to investigate when clearly we do not have the power to investigate until after the police investigation has been completed. He got it totally wrong from start to finish.

MR TINK: I think what he had in mind is that you are running some sort of parallel investigation into the shooting itself. He said he does that with the jury, and so on.

MR LANDA: That shows you how wrong he is."

Further on in the evidence, the following exchange took place:

MR TINK: "In relation to the Gundy matter it seems to me that the Coroner with a jury and police assistance, is best able to deal with a matter like that?

MR PEHM: We were not trying to deal with it.

MR LANDA: No we were not trying to deal with it. We never thought it was

appropriate for us to deal with it...."

The Committee carefully considered all the matters raised by the Coroner, the Ombudsman and Mr Pehm in relation to this dispute and it would appear that there is some confusion about the respective jurisdictions of the parties involved.

Whilst it is clearly the case that clause 8(a) of Schedule 1 of the Ombudsman Act 1974 excludes the Ombudsman from dealing with any proceedings before a court including a Coronial inquiry, it must be borne in mind that this part of the Ombudsman Act was enacted before the passage of the Police Regulation (Allegations of Misconduct) Act 1978. As has been indicated earlier in this Report, in 1978 a policy decision was taken to give the Ombudsman a significant oversight role in relation to complaints against police generally. Thus the Committee's view is that the exclusion clause in the Ombudsman Act cannot be construed in isolation from these later events which expanded the Ombudsman's powers for dealing with police complaints.

Whilst no doubt as a matter of practice, the Coroner does have extensive powers to direct Police assisting him in the carrying out of investigations, the Coroner's Act does not give him any oversight role in the handling of Police conduct in any way remotely similar, if at all, to that contemplated for the Ombudsman under the Police Regulation (Allegations of Misconduct) Act.

In the Committee's view, the question thus becomes one of whether or not it was contemplated in 1978 that police who assist the Coroner would be excluded from the Ombudsman's jurisdiction under the PRAM Act. Given that the Police are dealing with extremely sensitive matters in virtually every case before the Coroner, it seems to the Committee that their conduct is, or certainly should be subject to someone's jurisdiction under the PRAM Act. As Mr Waller says:

> **MR WALLER:** "We all know there is a problem with police investigating police as there is with lawyers investigating lawyers and doctors investigating doctors. Sometimes one can sense a certain sympathy of the Police with their fellows."

As far as the Committee is concerned it follows that the conduct of and complaints about police working for the Coroner must be subject to some independent oversight. The question then is whether or not the Coroner himself should be the one to deal with such matters.

The Committee has given this very careful thought and has come to the view that it is not advisable because such matters are not part of the Coroner's primary function and not ones in which he has any real expertise. In that regard, it is the Ombudsman who is the expert in looking at such matters. As the Ombudsman said in a supplementary submission, if it were otherwise, there would be no independent oversight of complaints about the suppression of evidence, corrupting of witnesses, submission of false records or conspiracy to pervert the course of justice.

Accordingly, the Committee is of the view that the Ombudsman should continue to have a role in investigating complaints against police arising out of their employment within the Coroner's Office in the same way as such complaints are dealt with elsewhere. Thus police seconded to the Ombudsman's Office should be subject to the same complaints scheme as applies elsewhere in relation to both the consideration of internal complaints and complaints from third parties.

However, there is a critically important distinction to be made between such complaints and complaints of police conduct relating to a death which is a key part of the Ombudsman's jurisdiction.

To illustrate the distinction, the Committee feels that the Gundy matter is significant.

On the one hand, the Committee feels that the Coronial process is best able to get to the heart of critical issues involved in a controversial death in that the systems and powers available to a Coroner are best able to deal with them. In that regard, the Coroner outlined the situation with the Gundy matter as follows:

> **MR WALLER:** "In the Gundy matter, the State Coroner has the power to direct a jury and I did that because there was demand for an independent inquiry. I really thought that was a very big job for one man to be able to try to satisfy the community that he was able to bring a fair and unbiased mind to it and I said: "Well we will get an independent group in if that's what is wanted", and I ordered a jury."

Later in his evidence, the Coroner had the following discussion with Mr Scully:

> **MR SCULLY:** "Are the relatives entitled to Counsel, to cross-examine them?
>
> **MR WALLER:** The Aboriginal Legal Service appears for Aboriginal families. Everyone else can get their own legal representation if they want it."

Clearly, the Coroner should conduct investigations into deaths including those caused by police or which occur in police custody because of the special powers that he has to do this.

On the other hand, the investigation of police conduct in relation to an Inquiry is another matter as the following exchange between Mr Waller and Mr Kerr indicates:

> **MR KERR:** "In relation to the matters of the police officers, that you were surprised at the involvement of the Ombudsman, could you elaborate on that?
>
> **MR WALLER:** It seemed rather simple to me. The police had been told to get their brief in and to interview the witnesses and they had not done it. It seemed to me to be a straight out disciplinary matter.

MR KERR: I think probably the legislation required the intervention of the Ombudsman?

MR WALLER: That is the view that was taken. I am not an expert on it."

It seems to the Committee that if Police are slow in getting a brief together and if a complaint is made by a civilian such as one of the Gundy relatives, then that would be an appropriate matter for the Ombudsman to look at. By contrast the cause and circumstances of Mr Gundy's death are for the Coroner.

In a supplementary submission to the Committee on this issue, the Ombudsman wrote:

> "The point is that the Coroner investigates the cause of death and not the alleged misconduct of police."

The Ombudsman then gave an example of a case where the Coroner's decision not to hold an inquest was based on a grossly misleading report by a police officer. Following an investigation by the Ombudsman under the PRAM Act, the Coroner held an inquest after which the deceased's parents said "....The Coroner's decision to hold an inquest went some way to helping us have the truth told."

By reason of the foregoing, the Committee's view is that the Coroner should have the jurisdiction to deal with deaths involving Police. However, it should not be beyond the Ombudsman's jurisdiction to entertain complaints about the Police conduct of such inquiries. The Committee's view is that no legislative change is required because the Ombudsman Act should be read, in this respect, subject to the PRAM Act. If this statutory interpretation is wrong or in doubt, then amendments should be made to ensure that the Ombudsman has power to look at misconduct of police seconded to the Coroner's Office.

7.4 COMPLAINTS REGARDING CONDUCT OF OFF DUTY POLICE

The general question of the way in which Police complaints are handled where the Police concerned are off duty was raised during the course of the hearing. In that regard, the Commissioner indicated to the Committee that an off duty complaint is recorded and notified to the Ombudsman in the same way as an on duty complaint.

The attitude of the Police Service is evidenced by the following comments of the Commissioner and Assistant Commissioner:

> **MR LAUER:** "If a complaint is made when an officer is on or off duty, it is taken to be a complaint and the Ombudsman is notified. If the complainant withdraws that complaint the Ombudsman is still notified. As you would be aware, we can still take action in relation to that sort of complaint.

MR COLE: But there is still a thought in the mind of the Police Officer who has been discriminated against because his private life is always subject to the formality of complaint. There are times when, because of his actions in private, he could bring discredit upon the police force. Under those circumstances we, as the police force, seek to discipline that officer.

The Assistant Commissioner indicated in evidence that the reason why off duty complaints were dealt with in this way was that it was considered that such conduct, notwithstanding it was off duty had the potential to discredit the force and therefore disciplinary action would in appropriate circumstances occur.

In considering this matter, the Committee gave significant weight to the Police Association's views and the evidence given by Mr Green in the following exchange with Dr Burgmann:

DR BURGMANN: "You believe that a Police officer, when he is off duty, should not be the subject of a complaint to the Ombudsman?

MR GREEN: There are some instances where off duty behaviour or conduct is such that it would be difficult for anyone to suggest that that should not happen. Equally there are some instances that I am aware of - such as disputes between neighbours - which become complaints. If a neighbour happens to write in about his police officer neighbour that becomes a complaint and away we go."

If the Police Service feels that off duty complaints should be reported to the Ombudsman because the off duty behaviour might bring discredit on the Service, then the Committee will not suggest any alteration to that approach given the Police heirachy's commitment to ethical values. At the same time the Committee feels that, with the new conciliation system now proposed, minor "off duty" matters will be dealt with in a more appropriate fashion all round.

Nevertheless, the Committee would like to see a clear distinction drawn between two types of "off duty" complaints. Thus where off duty conduct is such that a police officer is using his or her position as a police officer to do or not do something which causes a complaint, then such matters should be dealt with in the same manner as any other allegation of misconduct. However, the Ombudsman should take no action where off duty conduct bears no relationship to an Officer's status as a member of the Police Service.

In a nutshell, police officers should gain no private advantage by virtue of their job in off duty situations. However, they should not be at any disadvantage either.

7.5 INTERNAL COMPLAINTS

The Committee considers the question of internal complaints to be sufficiently important to deal with as a separate matter. The issue first arose in the case of The Ombudsman v

Commissioner of Police 1987 11 NSWLR 386; a decision of Mr Justice Lee in the Administrative Law Division of the NSW Supreme Court.

The matter for consideration before the Court was the interpretation of section 5(1) of the Police Regulation (Allegations of Misconduct) Act which provides:

> "Where a person complains in accordance with this Part about the conduct of the member of the Police Force, the complaint shall be dealt with as provided by this Act".

The question for decision was whether or not "a person complaining" was limited to private citizens or whether it included Police. In that regard, Mr Justice Lee decided that "a person complaining" included a Police Officer complaining about another Police Officer.

His Honour said:

> "At the outset it is to be observed that there is nothing in the Act which even vaguely suggests that the Act is limited to complaints by private citizens and that it is not applicable to complaints from members of the Police Force acting as such."

His Honour then considered the Parliamentary Debates on the Bill which resulted in the PRAM Act and came to, what in the Committee's view, is the heart of the matter as follows:

> "To disregard the generality of the terms of the Act and confine it merely to complaints by private citizens, would keep from the Ombudsman, the Parliament and the public that source of information as to Police misconduct which is likely to be the most reliable source. The Act on any view is intended to be for the benefit of the public not just the benefit of persons who complain of Police misconduct and it operates on any complaint of misconduct which is in writing and which comes in to the hand of a Police officer or the Ombudsman in the circumstances set out in section 6(1B) and whether the complaint is by a Police officer or a private citizen."

The written and oral evidence on internal complaints suggests that the Police Commissioner and the Ombudsman are a long way apart on the issue when the reality may in fact be otherwise. In that regard, there did appear to be some confusion as to whether or not the Police wanted all internal investigations taken out of the Ombudsman's jurisdiction.

In a supplementary written submission to the Committee the Ombudsman said:

> "Police have never accepted Justice Lee's decision that allegations of misconduct generated from within the Police Department are complaints within the meaning of the Police Regulation (Allegations of Misconduct) Act and notifiable to the

Ombudsman."

If there was any doubt about the Police Service's attitude to Justice Lee's decision at any stage during the hearing, the Police Commissioner laid the matter to rest in his letter of the 30th December 1991 to the Committee Chairman as follows:

> "In case there should be any doubt, let me state very clearly that the Police Service has no quarrel with the concept of an internally generated report constituting a complaint for the purposes of the Act. Appropriate cases of allegations of misconduct raised internally are and will continue to be notified to the Ombudsman and dealt with in accordance with the provisions of the Act.
>
> Our concern is the that terms of the Justice Lee decision have simply cast the net too wide. From genuine grievances and complaints, we now find that all manner of in house supervisory and managerial reports have to be classified as complaints and notified to the Ombudsman. Even when the Ombudsman declines further action under the Act, as he often does with many of these matters, the inevitable paper work is involved both in his office and mine, the incident in question is recorded as a "complaint" for statistical purposes and both organisations are involved in the processes which serve no useful purpose."

The issue was also raised early in the oral evidence of Mr Green from the Police Association who gave the following evidence:

> **MR GREEN:** "One of the major problems that occur these days is as a result of Mr Justice Lee's decision. We need to see changes through the Parliament through the legislation to have those trivial matters removed from investigation by the Ombudsman. Let them be dealt with in house; let them be investigated by all means. But if it is at all possible take it away from the Ombudsman's Office and therefore remove the delay that goes on for so long. That is the same as the managerial matters that we have spoken about before. Matters of managerial prerogative are taken before the Ombudsman because under Justice Lee's submission people are of the opinion that they must report in writing to the Ombudsman. It ties the Ombudsman up and it ties the Police Department up and takes ages to get a response from it."

Further on in the evidence, the following exchange took place between the Chairman and Mr Green:

> **MR TINK:** "As I understand the Commissioner's evidence the other day and the Police Service submission it was this, that there was no suggestion that all internal complaints no longer go to the Ombudsman. I think Mr Justice Lee said himself that there are some internal complaints which are very serious where it may well be an officer within the Service is the best one to know what is going wrong vis a vis somebody else in the Service. What I understood the Commissioner to be saying was if you accept what he is suggesting about minor matters, then there

would be internal matters that are minor which might be dealt with in the same way and there will be internal matters that could be potentially the most serious matters of all in respect of which you would want to have outside involvement. Is that a fair series of propositions?

MR GREEN: That is how we understand it certainly. I think the example that they give of somebody who is habitually late for work is a matter now that has to go to the Ombudsman once somebody gets put on report, if you like, for it. I would think everyone would accept that they are matters that should be resolved internally. If the Ombudsman's Office is as stretched as it would appear it is, or as it certainly informs people, and we have copies of documentation where they write to complainants and tell them that but for lack of resources they would have a further investigation of matters, and that is a most unsatisfactory situation because it raises immediately in the mind of the complainant that they probably had a fair and just complaint against the Police but it is not going to see the light of day because of lack of resources, so there is more to that than one would see I think at first blush. If you accept what the Ombudsman says about his resources, then surely it is time that he and the Commissioner got some agreement between them as to how these minor matters can be resolved without clogging down the already over clogged and the soon to be completely clogged, if one reads projected figures for the next year, system."

The Ombudsman's supplementary submission to the Committee on internal complaints, indicated that a quick computer check of internal complaints received in the last three months by his Office revealed the following serious allegations:

> "Soliciting a prisoner to give false evidence, sexual assault, drug offences, theft of property from a gaol inmate, officers receiving payoffs from illegal gambling dens, forgery, involvement in an illegal motor vehicle racket, cultivation of cannabis and protection of drug dealers."

Lest there be any doubt about it, the Committee sees each of those matters as being serious allegations against Police Officers where Mr Justice Lee's comments about Police being the best witnesses and best informants about such matters are clearly true. Accordingly, in relation to such matters, the Committee emphatically believes that they should be reported to the Ombudsman and dealt with as serious matters by Internal Affairs in the public interest.

However, the Committee also notes that the Ombudsman's submission goes on to say:

> "It is true that there are a significant number of internal complaints which are notified to the Ombudsman. These are routinely declined because they are minor and should be dealt with by Police Management. Although the impact on the resources of the Office is not great there is no objection to such complaints not being notified to the Ombudsman.

The trouble again is with the definition of 'minor complaints' in this area and notification of all complaints is preferable until this can be worked out. The proposal of the Police Service submission is not being thought through to any extent and on consideration is unacceptable."

Bearing all these matters in mind, the Committee feels strongly that Mr Justice Lee's interpretation of the PRAM Act so far as Police Internal Complaints is concerned should, in general terms, stand. Having said that, the key question becomes whether or not there is scope for some internals of a lesser class and kind to be dealt with by the Police without the involvement of the Ombudsman's Office.

The Committee's view is that there are a number of minor internal management matters which clearly should not involve the resources of the Ombudsman's Office. Indeed the above evidence indicates that there is some common ground on this in that the Ombudsman, the Police Service and the Police Association all agree that some of those matters should not be notifiable to the Ombudsman.

Thus the question becomes one of defining what matters should or should not be notified as Internals. At this stage, the Committee is minded to look for a flexible definition of Internals which would be similar to the Police proposals for the conciliation of minor complaints from civilians.

The Committee is very much aware that there is strong rank and file discontent with the reporting of internals. What is perhaps lost sight of is that police may wish to complain about other police in the context of an internal investigation against them where the Ombudsman is a check and balance, not only for private citizens, but also for the Police themselves. In that regard, the role of the Internal Police Security Unit in Operation Raindrop is a good example.

7.6 SECTION 26 (CERTAIN INFORMATION TO BE CONFIDENTIAL)

Section 26(1) of the PRAM Act provides in effect that, where the Commissioner of Police is required to provide information to the Ombudsman, he may inform the Ombudsman that in his opinion the publication of the material given to the Ombudsman could prejudice the investigation or prevention of a crime or otherwise be contrary to the public interest and give reasons for his opinion. The position then is that the Ombudsman may not disseminate the information but may after following certain procedures present a Report to Parliament.

Concerns were expressed about the effect of this Section by Mr Eddie Azzopardi and, on his behalf, Mr Mutch asked the Police Commissioner the following questions:

MR MUTCH: "Mr Azzopardi complains that section 26(1) of the PRAM Act could be used by the Commissioner to prevent the Ombudsman from publishing material from the complainant in order to ascertain the veracity of the Police

information. Is Mr Azzopardi correct and if so why should the Ombudsman not be trusted to make his own decision?

MR LAUER: There are many issues involved from confidentiality to safety. I think the community safeguard is that the Ombudsman gets the documents. I can recall one that centred upon an assault in a hospital where the nursing staff gave evidence that supported the Police but gave it on the basis of confidence. It transpired that the complaint was totally false and I withdrew from even prosecuting for public mischief because of the privacy concerns of other witnesses that supported the Police investigation. It will often arise, and may need to be protected.

MR MUTCH: What about in a matter where it is just Police information?

MR LAUER: Section 26(1) would not be applied. It is only where there is special consideration and it is only applied at consideration of a very high level. Assistant Commissioner and above can apply those provisions. They cannot be applied at patrol level.

MR MYERS: The Ombudsman does have the option, if an unreasonable direction under Section 26(1) was applied, to talk to the Minister and the Parliament. Therefore, if he thought the Commissioner was being unreasonable, he would have a fallback. It just has not happened."

Referring to Section 26(1) Mr Azzopardi referred in his evidence to a matter involving the former Ombudsman, Mr George Masterman QC, and a complaint relating to the Parramatta Police Boys Club as follows:

MR AZZOPARDI: "They did everything in their power to stop the truth coming out and when the Ombudsman, then George Masterman, ordered an inquiry remember the Assistant Commissioner was Mr Perrin, has put section 26 (1) to prevent it and I kept asking George Masterman because I was very interested to know as the complainant how the inquiry was going on. He said "The Commissioner and the Assistant Commissioner put section 26 (1) and that is it I can't do nothing."

. . . my submission here today I ask that section 26 (1)(A) ought to be looked at and in my view that section ought to be amended and a new section should be inserted to give the Ombudsman the power to decide what is in the public interest, which is not in the public interest, what ought to be negotiated with the complainer and I am positively sure that the Ombudsman will not release anything which would jeopardise any court proceedings.

I think it is dangerous for the Commissioner to have it in his hands, it should be given away from him."

Whilst being mindful of Mr Azzopardi's experiences with section 26 (1)(A), the Committee is not certain at this stage whether or not there is a real problem here. In that regard, the Committee is mindful of the evidence given by Mr Myers and of the powers and options available to Ombudsman under section 26(2) of the PRAM Act. It might be thought that if the Ombudsman's only recourse is to report to Parliament, this is a cumbersome and time consuming procedure for dealing with such matters and that a more immediate circuit breaker is required. Mr Azzopardi has suggested that the Ombudsman would be well able to determine whether or not it is in the public interest to release information. However, the Committee feels that the Ombudsman may have a very different view of the public interest to the Police Commissioner arising from the Ombudsman's interest in the systemic side of matters and the Police Commissioner's interest in ensuring that evidence and confidential information is not tainted. In these circumstances, a public deadlock could be broken on application to the Police Tribunal. However, the Committee is loath to go down this track unless it is demonstrated that there is a widespread concern with the operation of Section 26(1)(A) which cannot dealt with by arrangement between the Commissioner and the Ombudsman through the mechanism of reporting to Parliament.

The issue was taken up by Judge Thorley whose view on the matter carries great weight with the Committee:

> **MR MUTCH:** "Does section 26 (1) give the Commissioner power to decide what matters should be disclosed and what matters should not be disclosed?
>
> **JUDGE THORLEY:**. . . I understand Mr Azzopardi's point of view. I do not wish members of the Committee to think I am denigrating him. I have some respect for him but that needs to be qualified. . . . When you are investigating a complaint which has as its central core the possible commission of a criminal offence either by Police concerned or by someone else, frequently counter allegations are launched against investigating Police. However, in that context it would be completely inappropriate for anyone to have a discretion to release documents that might have a possible bearing on a criminal prosecution. It is not that I distrust the Ombudsman, but common law protects criminal procedures with great enthusiasm.
>
> Certainly the N.S.W. Police Service takes great care in avoiding situations where there is a possibility of being accused of conduct which can be regarded as a contempt of court, or conduct which can be used as a vehicle to abort criminal trials which may or may not be pending. There is a recent example of that - the sad case of a young Policeman who died last weekend. I understand there are about two years between the allegations and the conclusion of the criminal trial. It would be completely inappropriate for the Police Service to announce to the public that Senior Constable X has been cleared of these wicked allegations when really that was an issue which the accused wanted to litigate before a jury. If the Ombudsman did that sort of thing, even assuming he had the parliamentary authority to do it, trials would be aborted and allegations of unfair play would be

hurled around. Though I understand Mr Azzopardi's point of view, a wider interest is at stake. The balance is in favour of the retention of the right of the Commissioner ....."

By reason of the foregoing, the Committee does not feel any amendment to Section 26(1)(A) is desirable in the public interest.

FINDINGS AND RECOMMENDATIONS

FINDINGS AND RECOMMENDATIONS

It is clear to the Committee from the oral and written evidence presented during this Inquiry that the current police complaints system is cumbersome and time consuming as suggested by the Ombudsman in his Report to Parliament of 2 July, 1991. The challenge for the Committee as the Ombudsman puts it is in:

> "Making a system that is workable as opposed to one that is now becoming unworkable."

The Committee believes that there is an urgent need to create a statutory framework which will help to refocus existing resources to the areas of greatest need rather than spread these resources thinly across all inquiries such that very few are adequately dealt with.

At the same time, it is important, in relation to any scheme which reorders resources and priorities, to ensure that there are effective checks and fail safe mechanisms in place.

There is significant friction between individual Police Officers and the Ombudsman's Office which can to some extent be alleviated by changes to the existing system. Whilst it is inevitable that there will be strong differences of opinion between Police Officers and the Ombudsman no matter what complaints system is operative, there is room for a substantial improvement in existing procedures which in turn will improve relationships between the two bodies to the benefit of all.

At present, both police perceptions of the Ombudsman and the adversarial culture in which police operate hinder the effective use of resources in the resolution of complaints against police generally.

These perceptions and ingrained attitudes are exacerbated by existing police records procedures which fuel the siege mentality and carry over the adversarial approach into dealing with police complaints such that the approach of all parties becomes formalised and legalistic when in many cases the best result would be achieved by talk and apology.

One feature of the present system is that many complaints are given prominence and use up resources when they really don't warrant it. In many instances complainants are well able to deal with the police and achieve their own results with minimal intervention. Indeed many express surprise when the Ombudsman is formally brought into matters. At the same time as resources are used for such matters, groups that really warrant special attention because of their disadvantaged status, do not get sufficient attention. Again, to quote the Ombudsman:

"The illiterate, juveniles, aborigines and the uneducated and ethnic non-English speaking groups become more disadvantaged as the system clogs up with more complaints."

Clearly one way in which substantial resources could be saved and redirected is by the better use of conciliation. It is therefore of great concern to the Committee that conciliation has remained static at 6% although recent evidence suggests an increase to 10% since the Inquiry began. In the Ombudsman's words:

"I do not think anything less than a 25% conciliation figure should be considered satisfactory."

Evidence from a wide variety of sources clearly pointed to conciliation as being the best tool available for dealing with the large majority of police complaints. In that regard, Mr Landa indicated that citizens would accept conciliation and would end up admiring rather than denigrating the police as a result. Similar sentiments were expressed by the Director of the Centre for Conflict Resolution, Dr Tillett, and by the Victorian Deputy Ombudsman, Dr Perry.

Moreover the Committee noted that conciliation and mediation were now being widely promoted as dispute resolution techniques in many areas of day to day activity, especially in the law.

In these circumstances, the conciliation model proposed by the Police Service obviously warrants the closest consideration. In so doing, the Committee is mindful that any devolution of responsibility for conciliation to the police as suggested by them requires that the closest attention be given to appropriate checks and balances being put in place to ensure that the system maintains its integrity.

One means of ensuring the integrity of a complaints system where responsibility is devolved to police conciliators was first suggested by Mr Hatton and involves the concept of the Ombudsman's audit. In that regard, a number of witnesses gave evidence about "spot checking proposals" and there was general consensus by witnesses from the Ombudsman's Office, the Police Service and the Police Association that such audits were a proper and appropriate way of ensuring the integrity of any conciliation system.

Another key safeguard was to ensure that any complainant who was not entirely satisfied with having a matter dealt with by conciliation would understand that they had a right to approach the Ombudsman without subjecting themselves to the conciliation process.

In addition, it was plain to the Committee that any significantly devolved conciliation scheme would require ongoing education for police officers who were involved in it. Indeed, as conciliation progressively covered more and more matters, there would be an increasing need for greater education of extra police officers.

Whilst many police may be excellent negotiators, the Committee believes that the police

system is essentially an adversarial one. Moreover, notwithstanding the Bignold Committee's recommendations, the Service is only now moving towards a thoroughgoing education process in conciliation. In that regard, the circular put out last year by Assistant Commissioner Cole is merely a start. What the police also need is guidance, education and case study at a practical level to be sufficiently confident to ensure that the guidelines work in a meaningful fashion.

In an attempt to get the ball rolling and at the same time provide incentives and guidelines for further development of police education in conciliation techniques, the Committee proposes that a flexible definition of matters, which can be conciliated from time to time, be adopted.

This flexible definition when taken in conjunction with the Ombudsman's audit power would also provide powerful incentives for police to move away from the negative aspects of police culture.

In addition, in the consideration of any definition of conciliable complaints the Committee feels it is important that reference be made to conciliation in Part 2 of the PRAM Act to ensure that conciliation is considered as an integral step in the handling of all police complaints. It is hoped that this will obviate the problem that currently exists where conciliation as referred to in Part 3 stands outside the key operational provisions of the Act for the processing of complaints at Patrol Command level.

By reason of the foregoing the Committee makes the following recommendations:

Recommendation - 1

That the conciliation of complaints against police be encouraged to ensure the most effective use of scarce resources in the areas of greatest need.

Recommendation - 2

The Police Regulation (Allegations of Misconduct) Act (PRAM Act) be amended to ensure that conciliation is considered as an integral step in the processing of every complaint pursuant to the procedures set out in Part 2 of the Act.

Recommendation - 3

That the definition of matters which are capable of being conciliated remain as defined in Part 3 of the PRAM Act.

Recommendation - 4

That within the Part 3 definition, a flexible class and kind mechanism of the type now found in Section 19 of the PRAM Act, providing for agreement from time to time between the Ombudsman and the Police Commissioner about classes of matters which can be conciliated, be added with a view to allowing the conciliation of all matters so agreed between a civilian complainant and police.

Recommendation - 5

That such conciliations be effected with the assistance of an independent police conciliator who would be a Senior NCO or a Patrol Commander within the Patrol.

Recommendation - 6

That at the time of attempting any such conciliation the police officer conciliating be required to notify the complainant that the complainant is not obliged to submit to the conciliation process and can elect to have his matter referred direct to the Ombudsman.

Recommendation - 7

7(a) In relation to any matters proposed to be conciliated under the proposed scheme the Ombudsman should be notified of each such complaint at the outset.

(b) That full records of all conciliations be kept in the police station for three years for auditing purposes.

(c) There should be severe penalties imposed on anyone who deliberately tampers with or alters audit records especially in anticipation of or in conjunction with an audit.

(d) Evidence of a statement made by a police officer or an answer given by a police officer to a question asked of the police officer in the course of an attempt to resolve a complaint by conciliation should not be admissible against the police officer except in disciplinary proceedings forming part of the proposed conciliation package in a particular case.

Recommendation - 8

That the Ombudsman have power to conduct random audits of conciliation records by attending by himself or by his officers at police stations to examine records and by otherwise calling up and making contact with any parties to conciliation or third party witnesses to satisfy himself that procedures are being properly carried out and proper records are being kept.

Recommendation - 9

9(a) That in framing the Ombudsman's audit powers due regard be had to the auditing powers of the Australian Tax Office currently in force pursuant to the provisions of the Income Tax Assessment Act.

(b) In relation to complaints which are referred for conciliation within the Police Service, the Ombudsman have the power to interview people other than complainants as part of his auditing function.

Recommendation - 10

A substantial education program be introduced for those police officers who are nominated as conciliators involving not only the issuing of written guidelines but also lectures, practical training and guidance in the use of the guidelines by reference to the Ombudsman's Office and incorporating such training at the Police Academy.

Recommendation - 11

Recognising the merit of secondment to the Ombudsman's Office, the Committee requests the Police Board to advise how that merit could be recognised within the Police promotion system.

Recommendation - 12

That the conciliation option currently available under Part 3 be maintained in the event that the Ombudsman decides that a matter which a complainant does not wish to have conciliated should be conciliated through the offices of an independent conciliator from the Ombudsman's Office or elsewhere and where, in the first instance, some compulsion is required to bring the parties together.

Recommendation - 13

13(a) That Section 35(A) of the PRAM Act be amended to include only records of those police complaints which are found to be sustained or which are unfinalised as at the time of preparation of a promotion report.

(b) That other records be kept for statistical and management purposes but not included on promotion records.

Recommendation - 14

14(a) Records of complaints should contain sufficient particulars to enable the Ombudsman to conduct an effective audit, including copies of the complaint document, details of the conciliation and the report by the police officer responsible for dealing with the complaint.

(b) The Office of the Ombudsman and the Police Service should consult on the most appropriate records system for producing informative data on conciliations and complaints, for example, statistics on the numbers and types of complaints received, percentage of conciliations successfully resolved in each district and trends in complaints within each district.

(c) The Commissioner present to Parliament such figures and statistics on conciliation as part of his annual report to Parliament.

Recommendation - 15

That a new disciplinary procedure of admonishment be introduced to provide more flexibility in the options available for disciplining police officers.

As an integral part of the rejigging of the police complaints system, the Committee feels

that there are a number of other matters which need to be addressed to ensure that appropriate checks and balances involving an increase in the Ombudsman's powers in a number of areas are in place. As far as direct investigations are concerned, police complaints authorities in a number of other jurisdictions have the power to conduct direct investigations in the public interest. In that regard, the Committee feels that the NSW Ombudsman's reinvestigation powers are far too limited and extremely time consuming. This results in extensive delays which frustrate both the accurate and proper resolution of complaints and the personal affairs of complainants and police alike. To that end, the Committee feels that the Ombudsman in NSW should have the power to directly investigate matters in the public interest.

Recommendation - 16

That the PRAM Act be amended to allow the Ombudsman a discretion, having regard to the public interest to conduct direct investigations into complaints.

Recommendation - 17

That the Committee notes that Section 35B of the Ombudsman Act would give the Commissioner power to apply to the Supreme Court if he feels the Ombudsman is acting outside his jurisdiction.

The Ombudsman requested that two "housekeeping" amendments be made to the PRAM Act. These amendments relate to the discontinuance of investigations and to sustained complaints. In each case, the Police Service has no objection and each change will save valuable time and resources. Accordingly, the Committee makes the following recommendations:

Recommendation - 18

That section 20 of the PRAM Act be amended to permit the Ombudsman to discontinue investigations when he considers it desirable to do so in the public interest.

Recommendation - 19

That the PRAM Act be amended to permit the Ombudsman when he agrees with a sustained determination and consequent action by police to take no further action other than to advise the interested parties of his decision.

To better carry out his role under the PRAM Act and better utilise his powers of spot checking under any new police conciliation scheme the Ombudsman has sought an expansion of his powers to obtain documents and information and to make inquiries of interested parties and witnesses to a particular complaint.

The first amendment proposed by the Ombudsman is one to permit him to require production from the police of wider information including documents and records of interview for the purpose of determining whether a complaint should be formally investigated. This is a proposal which is broadly supported by the police.

Accordingly, the Committee makes the following recommendation:

Recommendation - 20

20(a) That Section 52 of the PRAM Act be amended to require the production by the police of wider information including documents and records of interview for the purpose of determining whether a complaint should be formally investigated.

(b) Section 26(1) of the PRAM Act operate in relation to the production of any such documents or records.

As an incidence of this power, the Ombudsman then proposed that he or his officers should be able to telephone individual police officers to ascertain background information in simple matters. The Police Commissioner did not have any problem with this proposal although he queried how simple matters would be defined. In agreeing with the Ombudsman's proposal, the Committee feels that simple matters would be defined as any complaints which on the face of them were unlikely to be investigated where a brief explanation of the Police conduct would decide the matter. Accordingly, the Committee makes the following recommendation:

Recommendation - 21

21(a) Section 52 of the PRAM Act be amended to empower the Ombudsman to telephone individual police officers in simple matters in order to obtain brief background information which would assist in determining whether a complaint should be formally investigated.

(b) Simple matters would be defined as any complaints which on the face of them were unlikely to be investigated where a brief explanation of the Police Conduct would decide the matter.

The Ombudsman next proposed that Section 51 of the PRAM Act be amended to enable

him to request further information from persons other than the complainant for the purpose of determining whether a complaint should be formally investigated.

This proposal initially raised some difficulties for the Police Service which took objection to the Ombudsman becoming involved on a day to day basis with matters that the Service saw as being within its province; especially the investigation of serious complaints.

On a slightly different tangent, the Committee was concerned with the possible tainting of evidence which might arise from the Ombudsman becoming involved on a concurrent basis with ongoing investigations. It was felt that this could arise if conflicting written statements were made or if confusion arose from the joint interviewing of suspects.

However, after lengthy consideration of the matter at the Round Table Conference on 18 March 1992 it was acknowledged that the power sought by the Ombudsman would be used for determining whether a complaint should be investigated and not for the purpose of an investigation itself.

In addition the Committee felt it was important to specifically state that, where the Ombudsman was conducting a direct investigation he should be able to obtain information from civilians other than the complainant.

Recommendation - 22

That in relation to matters where the Ombudsman is using his powers to investigate matters directly in the public interest, his Office must be able to obtain information from civilians other than the complainant.

Recommendation - 23

23(a) In order for the Ombudsman to determine pursuant to Section 51 of the PRAM Act whether or not a complaint should be formally investigated the Ombudsman should have the power to talk to people other than the complainant (with the concurrence of the Police Commissioner.)

(b) Statements made to and information gathered by the Ombudsman under this provision should not form part of the evidence in any subsequent formal investigation.

In his evidence to the Committee the Commissioner proposed that the existing investigation time should be halved from 180 days to 90 days for "those complaints of a nature less than 'class or kind'. The Committee approves of the Commissioner's proposal and feels that such a measure would contribute towards reducing the period in which investigations of this level of complaints are completed. Delays experienced in the

processing of complaints were highlighted by the Police Association in its submission and evidence as a significant problem within the current complaints system.

Recommendation - 24

That Section 24 of the PRAM Act be amended to alter the existing time limit for the completion of investigations of complaints dealt with at patrol command level from 180 days to 90 days.

The Ombudsman's request that the PRAM Act be amended to provide discretionary power for the Ombudsman to supervise and participate in initial investigations presently being conducted by police under the Act was also the subject of lengthy discussions at the Round Table Conference.

However, as a result of the discussions and subsequent correspondence the Ombudsman and Police Commissioner settled their differences and the proposal which the Committee is happy to endorse is contained in Recommendation 25 below.

Recommendation - 25

The Ombudsman should be able on a discretionary basis, for appropriate cases in the public interest, to monitor the progress of police internal investigations by being empowered to:

i) be present as an observer during selected internal investigations; and

ii) consult with police investigators during the course of an investigation.

The Committee considered a number of other issues including the question of why there had been an increase in the level of complaints over recent times.

A number of possible reasons for the increase in Police complaints were put forward by various witnesses and the Committee feels that two reasons in particular stand out. The first is the clear link between publicity surrounding police complaints and the increase in public awareness of police complaints procedures leading to an increase in the number of actual complaints. The Committee has no doubt whatsoever that matters such as the shooting of David Gundy, the arrest of Superintendent Blackburn and the Operation Sue matter have all led to an increased awareness of the police complaints process in the last couple of years this has, in turn, lead to an increase in police complaints.

The second matter which has had a major impact on the number of police complaints is the decision of Mr Justice Lee concerning so called internal complaints. In that regard it

is clear, that there has been a delayed reaction to that decision as the Ombudsman and the Police Commissioner have determined upon the appropriate categorisation of matters. Accordingly, the significant flow on effects of the Lee decision are only now becoming apparent in the figures.

Accordingly, the Committee finds as follows:

Finding

That the significant increase in the level of police complaints in recent years is due to a number of factors, chief amongst which are the increase in public awareness of the police complaints system arising from a couple of recent highly publicised incidents in the police complaints area and the delayed flow on effect of Mr Justice Lee's decision requiring all internal police complaints to be notified.

On the issue of sexual harassment, the Committee notes that the Police Service deals with sexual harassment by way of Internal Affairs investigation and originally endorsed this approach. However, the Commissioner has since had discussions with Mr Steven Mark, the President of the New South Wales Anti-Discrimination Board, who has emphasised the importance of conciliation in the handling of such complaints. The recommendations on sexual harassment set out below reflect his views which are endorsed by the Committee.

Accordingly, the Committee recommends:

Recommendation - 26

26(a) Sexual harassment matters should not in all cases continue to be categorised as being of a class or kind that should be dealt with solely by Internal Affairs.

(b) Where appropriate an attempt should be made to conciliate such complaints in the first instance and, if necessary, disciplinary proceedings should follow.

(c) If the behaviour subject to complaint is indicative of a more systemic mode of conduct within the Police Service measures should be taken, with the advice or assistance of an appropriate independent body such as the Anti-Discrimination Board, to remedy such behaviour.

An issue next arose concerning the Coroner's jurisdiction. In that regard, the Coroner, Mr Kevin Waller, gave evidence to the Committee about jurisdictional problems relating

to police working on coronial matters.

After carefully considering the issues involved, the Committee is of the view that the Coroner is best able to look at allegations of Police misconduct leading to a death. However, any police misconduct associated with the actual investigation of the death should be independently oversighted especially because it is some of the most important work done by police officers.

The Committee remains to be convinced that there is a jurisdictional issue here. In that regard, the Committee is inclined to accept the Ombudsman's opinion that there really is no jurisdictional clash and that the legal position has always been quite clear. In any event, the Committee's view is that it is appropriate and proper for the Coroner to investigate the cause of death. In so far as the matter involves determination of allegations of police misconduct which may be incidental to the work of a police officer at the Coroner's Office it should fall within the Ombudsman's jurisdiction. In these circumstances, the Committee does not feel that the PRAM Act needs any amendment. Therefore the Committee's recommendation is:

Recommendation - 27

27(a) That the Coroner is the appropriate person to investigate and make findings into the cause of death of any person including persons who die in police custody.

(b) That the Ombudsman is the appropriate person to investigate allegations of misconduct against police arising incidentally such as, for example, allegations of misconduct about the way in which police seconded to the Coroner's office have carried out an investigation.

(c) That the PRAM Act, Ombudsman Act and the Coroner's Act as presently drafted require no amendments to clarify the respective powers of the Ombudsman and the Coroner.

The Committee gave consideration to the position of off duty police and their responsibilities in relation to complaints being made against them. The Committee agrees with the Police evidence that there will be occasions when a police officer because of his actions in private, will bring discredit upon the Police Force. Under those circumstances the Committee agrees with the Police Service that such conduct should be notified. At the same time the Committee does not see why the police officer should be disadvantaged while off duty in relation to his private affairs simply because he is a member of the Police Force. Thus Police Officers who in any way use the fact that they are police officers in an off duty capacity to obtain advantage or leverage in a situation should be reported for misconduct. However, if they are involved in misconduct or a dispute which has nothing to do with them in their role as police officers, then the Ombudsman

should take no action where that off duty conduct bears no relationship to a Officer's status as a member of the Police Service. By reason of the foregoing the Committee makes the following findings:

Finding

Police Officers should not gain any private advantage by virtue of their job in off duty situations; nor should they be at any disadvantage.

Recommendation - 28

That complaints regarding off duty conduct of police officers should continue to be notified to the Ombudsman and dealt with in the same manner as any other allegation of misconduct provided that the Ombudsman shall take no action where that off duty conduct bears no relationship to an Officer's status as a member of the Police Service.

The Committee gave consideration to the next question of Internal complaints and came to the view that complaints by police about police are quite often the best and indeed only source of information about very serious corruption and problems in the service.
This view accords with Justice Lee's decision.

However, the Committee also acknowledged that many internal complaints are management matters of no real concern to the Ombudsman and the system ought to be d) to reflect this. The key task then becomes to devise a way in which minor internal management matters can be identified and defined so as to ensure that they fall outside the ambit of the Ombudsman's Office whilst ensuring, at the same time, that more serious matters are properly notifiable. In that regard, the Committee is of the view that a flexible definition of internals which would be similar to the Police proposal for conciliation of minor complaints from civilians should be adopted and recommends accordingly:

Recommendation - 29

That the Ombudsman and the Commissioner arrive at a "class or kind" agreement in relation to those internal complaints that they agree should be treated as management issues and, therefore, a Police responsibility and those types of complaints which should be notified to the Ombudsman and investigated.

Mr Azzopardi raised the question of the operation of Section 26(1) of the PRAM Act

which requires that certain information be made confidential in the Ombudsman's hands. The suggestion is that this limits the Ombudsman's power to inform complainants of what is going on.

The Committee carefully considered the evidence on this issue and decided that there is a very strong public interest component in ensuring that some information provided by the Commissioner to the Ombudsman is kept confidential for all sorts of operational reasons.

The Committee also noted that there is an existing mechanism for the Ombudsman to take any concerns he has about the undue stifling of the dissemination of information to the Parliament and is not sure that there is any problem in this area so far as the Ombudsman is concerned.

At this stage, and in the absence of any concerns expressed by the Ombudsman about his limitations in this area, the Committee is not minded to make any changes. Indeed if the Committee were to make any changes, it would be on the basis that there is a concern about whether or not something should be released under Section 26(1) giving rise to a dispute between the Ombudsman and the Police Commissioner about the efficacy of doing so, which would require consideration of whether such disputes should be placed before the Police Tribunal for adjudication.

Recommendation - 30

That on the available evidence, no change is recommended to the wording of Section 26(1) of the PRAM Act.

Finally, in relation to all of the above recommendations, the Committee recognises that there are some significant changes to existing procedures now proposed. Given the very difficult balance which is always sought to be achieved between the respective rights of the Police Service, individual police officers, the Ombudsman and his officers, and last, but by no means least, members of the general public, it may be that the proposals, if adopted, cause teething problems. Accordingly, the Committee recommends that the proposals, if implemented be subject to review after 12 months to ensure that there are not any major problems or, if there are, that they be remedied.

Recommendation - 31

That a review by the Committee of the impact of any changes to the existing police complaints system should be undertaken after an appropriate period of time, estimated at twelve months.

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Police and Criminal Evidence Act 1984

APPENDICES

APPENDIX A MINUTES OF PROCEEDINGS

MINUTES OF PROCEEDINGS
OF THE
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

THURSDAY 28 FEBRUARY 1991
PARLIAMENT HOUSE, SYDNEY, AT 5.00 P.M.

MEMBERS PRESENT

LEGISLATIVE COUNCIL	LEGISLATIVE ASSEMBLY
The Hon. R.D. Dyer	The Hon. P.T. Anderson
The Hon. D.J. Gay	Mr M.J. Kerr
The Hon. S.B. Mutch	Mr P.C. Scully
	Mr A.A. Tink
	Mr J. H. Turner

Mr Grove (Clerk of the Legislative Assembly) and Ms Miller (Clerk-Assistant (Committees)) were also in attendance.

Apologies were received from Mr J Hatton, M.P.

Mr Grove opened the meeting by informing Members of the provisions of the Ombudsman Act 1974 relating to the constitution, procedures, functions and powers of the Committee.

Mr Grove then read the following entries in the Minutes and the Proceedings of the Legislative Council and the Votes and Proceedings of the Legislative Assembly:

Entry No. 9 Minutes of Proceedings No. 5 of Thursday 28 February 1991;

Entry No. 12 Votes and Proceedings No. 5 of Thursday 28 February 1991.

Mr Grove informed the Committee that section 31E of the Act provides that there shall be a Chairman and Vice-Chairman of the Committee, who shall be elected by and from Members of the Committee.

Mr Grove then called for nominations for the Office of Chairman.

Resolved on the motion of Mr Turner, seconded by Mr Mutch:
That Mr Tink be elected Chairman of the Committee on the Office of the Ombudsman.

Mr Grove then called for nominations for the Office of Vice-Chairman.

Resolved on the motion of Mr Kerr, seconded by Mr Gay:

That Mr Turner be elected Vice-Chairman of the Committee on the Office of the Ombudsman.

Mr Grove then informed the Committee that Ms Miller would be the Clerk to the Committee.

Mr Grove further informed the Committee that Section 31(I) of the Act provides for the appointment to be deemed to have originated in the Legislative Assembly. Mr Grove also informed the Committee that according to the practice of the Parliament the operations of a Committee are governed by the Standing Rules and Orders and the practice of the House in which the Committee originated.

The following procedural motions were Resolved on the motion of Mr Anderson, seconded by Mr Kerr:

That arrangements for the calling of witnesses and visits of inspection be left in the hands of the Chairman and the Clerk to the Committee.

That, unless otherwise ordered, parties appearing before the Committee shall not be represented by any member of the legal profession.

That, unless otherwise ordered, the press and public (including witnesses after examination) be admitted to the hearings of the Committee.

That persons having special knowledge of the matters under consideration by the Committee may be invited to assist the Committee.

That press statements concerning the Committee be made only by the Chairman after approval in principle by the Committee or after consultation with Committee members.

That, unless otherwise ordered, transcripts of evidence taken by the Committee be not made available to any person, body or organisation: provided that witnesses previously examined shall be given a copy of their evidence; and that any evidence taken in camera or treated as confidential shall be checked by the witness in the presence of the Clerk to the Committee or an Officer of that Committee.

That the Chairman and the Clerk to the Committee be empowered to negotiate with the Presiding Officers for the provision of funds to meet expenses in connection with travel, accommodation, advertising, operating and approved incidental expenses of the Committee.

That the Chairman and the Clerk be empowered to advertise and/or write to interested parties requesting written submissions.

That upon the calling of a division or quorum in either House during a meeting of the Committee, the proceedings of the Committee shall be suspended until the Committee again has a quorum.

That the Chairman and the Clerk make arrangements for visits of inspection by the Committee as a whole and that individual members wishing to depart from these arrangements be required to make their own arrangements.

Mr Grove then called upon the Chairman to take the Chair. Whereupon Mr Tink took the Chair and made his acknowledgements to the Committee.

The Chairman proposed that the first task of the Committee be to review the functions of the Ombudsman as recorded in his Annual Report. The Committee agreed that an informal meeting with the Ombudsman should be arranged at an early date, to be followed by a meeting with heads of relevant Agencies and Departments who had frequent dealings with the Ombudsman's office, as identified by reference to previous Annual Reports.

The Committee deliberated.

The Committee agreed to the Chairman's suggestion that a Press Release be issued on the membership and functions of the Committee.

The Committee then deliberated about general administrative and financial arrangements.

The meeting adjourned at 5.35 p.m. sine die.

.....
Chairman

.....
Clerk to the Committee

MINUTES OF PROCEEDINGS OF THE
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

Tuesday 16 July, 1991
Parliament House, Sydney at 11am

Members present:

LEGISLATIVE COUNCIL

The Hon. Dr. M. Burgmann, The Hon. D. Gay, The Hon. S. Mutch

LEGISLATIVE ASSEMBLY

Mr M. Kerr, Mr J. Hatton, Mr K. Moss, Mr P. Scully, Mr A. Tink, Mr J. Turner

Mr Grove (Clerk of the Legislative Assembly), Ms Miller, (Clerk-Assistant (Committees)) and Ms Burgess (Assistant Committee Officer) were also in attendance.

Mr Grove opened the meeting by informing Members of the provisions of the Ombudsman Act 1974 relating to the constitution, procedures, functions and powers of the Committee.

Mr Grove then read the following entries in the Minutes and Proceedings of the Legislative Council and the Votes and Proceedings of the Legislative Assembly:

Entry No 33 Votes and Proceedings of 2 July, 1991
Entry No 33 (6) Minutes of Proceedings 2 July, 1991

Mr Grove informed the Committee that s31E of the Act provides that there shall be a Chairman and Vice-Chairman of the Committee, who shall be elected by and from Members of the Committee.

Mr Grove then called for nominations for the Office of Chairman.

Resolved on the motion of Mr Kerr, seconded by Mr Mutch; that Mr Tink be elected Chairman of the Committee on the Office of the Ombudsman.

Mr Grove then called for nominations for the Office of Vice-Chairman.

Resolved on the motion of Mr Gay, seconded by Mr Tink; that Mr Turner be elected Vice-Chairman of the Committee on the Office of the Ombudsman.

Mr Grove then introduced Ms Miller, Clerk to the Committee, and Ms Burgess, Assistant Committee Officer to the Committee,

and advised that advertisements had been placed for the vacant position of Project Officer to the Committee.

Mr Grove further informed the Committee that Section 31 (I) of the Act provides for the appointment to be deemed to have originated in the Legislative Assembly. Mr Grove also informed the Committee that according to the practice of the Parliament the operations of a Committee are governed by the Standing Rules and Orders and the practice of the House in which the Committee originated.

The following procedural motions, as amended, were Resolved on the motion of Mr Kerr, seconded by Mr Turner:

1. That arrangements for the calling of witnesses and visits of inspection be left in the hands of the Chairman and the Clerk to the Committee.

2. That, unless otherwise ordered, parties appearing before the Committee shall not be represented by any member of the legal profession.

3. That, unless otherwise ordered, when the Committee is examining witnesses, the press and public (including witnesses after examination) be admitted to the sitting of the Committee.

4. That persons having special knowledge of the matters under consideration by the Committee may be invited to assist the Committee.

5. That press statements on behalf of the Committee be made only by the Chairman after approval in principle by the Committee or after consultation with Committee members.

6. That, unless otherwise order, access by other than Committee Members to transcripts of evidence taken by the Committee be determined by the Chairman and not otherwise made available to any person, body or organisation: provided that witnesses previously examined shall be given a copy of their evidence; and that any evidence taken in camera or treated as confidential shall be checked by the witness in the presence of the Clerk to the Committee or an officer of that Committee.

7. That the Chairman and the Clerk to the Committee be empowered to negotiate with the Presiding Officers through the Clerk of the Legislative Assembly for the provision of funds to meet expenses in connection with travel, accommodation, advertising, operating and approved incidental expenses of the Committee.

8. That the Clerk be empowered to advertise and/or write to interested parties requesting written submissions.

9. That upon the calling of a division or quorum in either House during a meeting of the Committee, the proceedings of the Committee shall be suspended until the Committee again has a quorum.

10. That the Chairman and Clerk make arrangements for visits of inspection by the Committee as a whole and that individual members wishing to depart from these arrangements be required to make their own arrangements.

Mr Hatton moved, seconded by Dr Burgmann, that it be noted that the Committee's opinion was that the phrase "Chairman" whereever mentioned in the above procedural motions, be taken to mean "Chairperson".

The Committee divided.

Ayes, 7

Dr Burgmann, Mr Mutch, Mr Kerr, Mr Hatton, Mr Moss, Mr Scully, Mr Tink

Noes, 2

Mr Gay, Mr Turner

And so it was resolved in the affirmative.

Mr Grove then called upon the Chairman to take the Chair, whereupon Mr Tink took the Chair.

Outstanding Business from the Former Committee

Mr Tink outlined the contents of the material which had been distributed and referred to the transcripts of the hearings held with heads of Police agencies, and matters raised in the Ombudsman's Special Report to Parliament which was tabled in the Legislative Assembly on 2nd July, 1991.

Potential Areas of Inquiry

The Chairman proposed that, in view of the matters raised during discussions with heads of Police agencies, the Ombudsman's concern with his Office's increasing workload arising from Police complaints, and the development of case law in this area, the Committee consider some form of review of the Ombudsman's jurisdiction in this area.

The Committee deliberated.

The Committee RESOLVED, on the motion of Mr Kerr, seconded by Mr Scully; that the Committee's first area of inquiry be a review of the procedures of the Office of the Ombudsman in relation to investigating complaints against Police.

The Chairman proposed that the Ombudsman also be requested to attend before the Committee to answer questions that the Committee might wish to put.

Future Meetings

The Committee agreed to note the following dates for meetings commencing at 6.30 pm:

Wednesday 21 August, Wednesday 11 September, Wednesday 16th October, Wednesday 13th November

Correspondence

It was granted that the Chairman should write to the Treasury and seek clarification regarding the references to the Office of Public Management and accommodation options contained in the Treasury's response to the Ombudsman's Special Report which was tabled in the Parliament on 2nd July, 1991.

Correspondence received from Miss Machin, MP concerning a constituent, Mr Knight was tabled. The Committee deliberated and agreed that the matter was not one which could properly be considered by the Committee under it statutory terms of reference, and that the Chairman should respond accordingly.

The Chairman tabled correspondence received from the Director General, Cabinet Office, and gave notice that copies would be circulated for consideration at the next meeting.

The meeting closed 12.30 pm.

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Chairman

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Clerk to the Committee

MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

Wednesday, 21st August, 1991
Parliament House, Sydney at 6.30 pm.

Members present:

LEGISLATIVE COUNCIL

The Hon. Dr. M. Burgmann, The Hon. D. Gay, The Hon. S. Mutch

LEGISLATIVE ASSEMBLY

Mr M. Kerr, Mr J. Hatton, Mr K. Moss, Mr P. Scully, Mr A. Tink, Mr J. Turner.

Ronda Miller (Clerk-Assistant (Committees)) and Peita Burgess (Assistant Committee Officer) were also in attendance.

1 No Apologies were received.

2 The Minutes of the meeting held 16 July, 1991 were confirmed on the motion of Mr Kerr, seconded by Mr Gay.

3 The Committee noted correspondence arising from the Minutes.

4 The Committee discussed correspondence received.

5A Inquiry on the Ombudsman's investigation of Police complaints

The Committee considered the correspondence received from the Ombudsman and the Chairman's interim response and deliberated on the terms of a final response. It was resolved on the motion of Mr Kerr, seconded by Mr Moss, that a reply be sent to the Ombudsman, and the Committee approved the draft letter as circulated for dispatch.

5C Submissions to Inquiry received to date

Members noted the submissions received to date and an interim response from the Law Society circulated at the meeting.

The Committee agreed that Inspector General Donald Wilson be forwarded a copy of the Ombudsman's Special Report on Police Complaints and be invited to make a submission.

5D The Committee noted the Ombudsman's Special Report to Parliament tabled on 20 August, 1991 concerning the role

of the Ombudsman in the management of Police complaints.

6A Reforms proposed by Independent Members of the Legislative Assembly.

The Committee noted the extract from a document forwarded by the Premier which outlined the proposals put forward by the Independents so far as they related to the Ombudsman.

Mr Hatton informed the Committee of the proposals. The Committee agreed that the Premier be advised that the inquiry announced into Police Complaints covered a substantial area of the Ombudsman's workload and that the Committee would give consideration to the Ombudsman Act shortly after the conclusion of the current inquiry.

It was resolved on the motion of Mr Gay, seconded by Mr Mutch, that the proposed reforms be referred to the Project Officer for preparation of a briefing paper and identification of options.

6B Project Officer

The Clerk to the Committee informed the Committee of the interviews that had taken place. The Committee resolved that the Chairman and Dr Burgmann should meet with the candidate at 10.00 am on Thursday 22 August, 1991.

7 Mr Gay announced that he would be resigning from the Committee.

8 The next meeting of the Committee is scheduled for 11 September, 1991

The meeting closed 7.05 pm.

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Chairman Clerk

MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

Wednesday, 25 September, 1991
Parliament House, Sydney at 6.30 p.m.

Members present:

LEGISLATIVE COUNCIL
The Hon. Dr. M. Burgmann, The Hon. L. Coleman, The Hon. S. Mutch.

LEGISLATIVE ASSEMBLY
Mr A. Tink (Chairman), Mr J. Turner (Vice-Chairman), Mr J. Hatton, Mr M. Kerr, Mr K. Moss, Mr P. Scully.

Ronda Miller (Clerk-Assistant (Committees)), Helen Minnican (Project Officer) and Pieta Burgess (Assistant Committee Officer) were also in attendance.

1. No Apologies were received.

2. The Minutes of the meeting held 11 September, 1991 were confirmed on the motion of Mr Kerr, seconded by Mr Mutch.

3. The Committee noted correspondence arising from the Minutes.

4. Business arising from the Minutes.

   Decision of the Ombudsman's Office to discontinue regular visits by one of its investigative officers to Wollongong.

The Project Officer outlined the reasons for this decision as explained by the Deputy Ombudsman, Mr Pinnock. Mr Pinnock had advised that the Office previously sent investigative officers to both Newcastle (once a month) and Wollongong (initially once a month and later once every two months) on a regular basis to take complaints in person.

Due to the Office's need to reduce expenditure such visits which involved travel outside the metropolitan district, and in the case of Newcastle overnight accommodation, had been discontinued.

The Committee noted the matter as one for possible consideration at a later date as the Ombudsman has stated that he intends making a further report on the funding issues facing his Office.

5. The Committee noted correspondence received.

6. Inquiry upon the role of the Ombudsman's Office in investigating complaints against police.

a) Late submissions - The Committee noted a late submission received from the **Advance Australia Party** (Burwood). Inquiries made to the Federal Electoral Commission revealed that this party was registered on July, 1986 and de-registered on 21 October, 1988. The State Electoral Office has advised that the party is not registered in New South Wales and is not certain that it contested the last election.

The Committee agreed that the Party should not be called upon to give evidence in view of the fact that it is not a registered political party in New South Wales.

Other jurisdictions - It was resolved upon the motion of Mr Kerr, seconded Mr Scully, that:

a) the Project Officer should obtain further information upon the methods used to handle complaints against police in Victoria and South Australia; and

b) if the experience of the Offices or Authorities in these jurisdictions was considered relevant to the Committee's inquiry representatives were to be invited to give evidence at the public hearings.

Selection of Witnesses

It was confirmed that the following witnesses would be giving evidence at the public hearings scheduled for 4, 8 and 10 October, 1991:

Mr D. Landa, New South Wales Ombudsman.

Mr A Lauer, Commissioner, New South Wales Polices Service.
(to be accompanied by Assistant Commissioner Professional Responsibility, Mr C.R. Cole.)

Mr D. Wilson, Inspector General, N.S.W. Police Service.

Judge B. Thorley, Chairman, Police Board of New South Wales.

Sir Maurice Byers QC.

Mr W Atkinson, Secretary, Commissioned Police Officers Association.
(to be accompanied by Mr Chris Standaloft and Mr Warren Stanton)

Mr T. Day, President, New South Wales Police Association.

Mr K. Waller, State Coroner.

The Project Officer reported that:

1) the Council of Civil Liberties had advised that it would be making a submission but would be unable to give evidence;

2) the Aboriginal Legal Service would be providing a late submission to the Committee and giving evidence;

3) the Law Society of New South Wales advised that it was unlikely that it would make a submission but the Chairman of the Criminal Law Committee, Mr D. Brezniak said he would inform the Project Officer of his decision on Thursday, 3 October.

4) the Public Interest Advocacy Centre indicated it would not be making a submission as it would not be working in this area although it is generally interested in the issues involved;

5) the Human Rights Commission was unable to make a submission but referred to its 1991 report on National Inquiry into Racial Violence for comments pertinent to the Committee's inquiry.

It was resolved upon the motion of Mr Hatton, seconded by Mr Kerr, not to circulate the submissions from Mr Hague, Ms Rue and Ms Whitton but to invite them to submit new submissions focusing on the terms of reference of the inquiry. Such submissions could be circulated prior to hearings, however, if no new submissions were made by these individuals they would not be called upon to give evidence.

Additional Inquiries

Select Committee on the Police Regulation Allegations of Misconduct Bill (Bignold Inquiry) 1988 - The Project Officer was requested to approach Mr R. Dyer, MLC and another former Committee member (who supported the proposed legislation) to ask if they would like to give evidence to the Committee.

Tim Anderson - Dr M. Burgmann suggested that the organisation which gave support to Mr Tim Anderson should be approached to see if any of its representatives were interested in making a submission to the Committee.

COMMONWEALTH INQUIRY

The Committee requested the Project Officer obtain further information on the current inquiry by the Senate Standing

Committee on Finance and Public Administration into the Ombudsman's powers. The Secretary to that Committee had indicated that the transcripts contain a substantial amount of evidence relating to the investigation of complaints against police under Commonwealth legislation.

7. General Business

8. The Committee's next meeting was scheduled for Wednesday, 16 October,1991 at 6.30 p.m.

The meeting closed at 7.30 p.m.

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Chairman

.....
Clerk

MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

Friday, 4 October, 1991
Parliament House, Sydney at 9.50 a.m.

Members present:

LEGISLATIVE COUNCIL
The Hon. Dr. M. Burgmann, The Hon. L. Coleman, The Hon. S. Mutch.

LEGISLATIVE ASSEMBLY
Mr A. Tink (Chairman), Mr M. Kerr, Mr K. Moss, Mr P. Scully.

Ronda Miller (Clerk-Assistant (Committees)), Helen Minnican (Project Officer) and Peita Burgess (Assistant Committee Officer) were also in attendance.

1. **Inquiry upon the Ombudsman's role in investigating complaints against Police**

   It was resolved upon the motion of Mr Kerr, seconded by Mr Coleman, that the Committee note for information a brief report on the latest arrangements for the inquiry which outlined that:

   a) the Deputy Ombudsman (Police Complaints) Victoria would be giving evidence to the Committee on 8 October, 1991;

   b) a representative from the Aboriginal Legal Service would be giving evidence on 8 October, 1991;

   c) a late submission had been received from Mr Azzopardi (copies enclosed);

   d) Mr Tim Anderson had sent the Chairman a letter briefly outlining several issues upon which he would like to give evidence;

   e) Mr Landa had written to the Chairman advising that he would not be responding in writing to the other submissions prior to the public hearings due to the time frame and the broad nature of the proposals in the Police Service submission;

   f) background information was being provided by the South Australian Police Complaints Authority;

   g) Ms Rebecca Whitton, who is the N.S.W. Fundraising Co-ordinator for Amnesty International, had formally advised that she is not the author of the submission made in her name.

It was resolved upon the motion of Dr M. Burgmann, seconded by Mr Scully, that Mr T. Anderson be invited to give evidence to the Committee.

The meeting closed at 10.05 a.m.

.....
Chairman

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Clerk

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

PROCEEDINGS OF THE HEARING ON FRIDAY 4, OCTOBER, 1991 PARLIAMENT HOUSE, SYDNEY

Present:

Mr A. Tink, (Chairman)

Legislative Council	Legislative Assembly
The Hon. L.D.W. Coleman	Mr M.J. Kerr
The Hon. Dr M. Burgmann	Mr K.J. Moss
The Hon. S.B. Mutch	Mr J.H. Turner
	Mr P.C. Scully

The Committee met at 10.10 a.m.

The Clerk read the Legislative Assembly Standing Order No. 362 relating to the examination of witnesses.

Anthony Raymond Lauer, Commissioner of Police; Peter Terrence Myers, Director of the Office of Professional Responsibility, NSW Police Service; and Colin Richard Cole, Assistant Commissioner of the Office of Professional Responsibility, sworn and examined.

The witnesses acknowledged receipt of summons.

Evidence concluded and the witnesses withdrew.

Mr Donald Keith Wilson, Inspector General, NSW Police Board, sworn and examined.

Evidence concluded and the witness withdrew.

Mr Barry Ronald Thorley, Chairman, Police Board of NSW, sworn and examined.

Evidence concluded and the witness withdrew.

Committee adjourned at 4.33 p.m.

Chairman

Clerk

MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

Friday, 4 October, 1991
Parliament House, Sydney at 1.15 p.m.

Members present:

LEGISLATIVE COUNCIL
The Hon. Dr. M. Burgmann, The Hon. L. Coleman, The Hon. S. Mutch.

LEGISLATIVE ASSEMBLY
Mr A. Tink (Chairman), Mr J. Turner (Vice-Chairman), Mr M. Kerr, Mr K. Moss, Mr P. Scully.

Ronda Miller (Clerk-Assistant (Committees)), Helen Minnican (Project Officer) and Peita Burgess (Assistant Committee Officer) were also in attendance.

1. **Inquiry upon the Ombudsman's role in investigating complaints against Police**

   It was resolved upon the motion of Mr Kerr, seconded by Dr M Burgmann, that subject to the Ombudsman's approval his Office's submission be released for circulation to the public. This submission, like the one received from the Police Service (which had been tabled earlier that day) was considered seminal and its release essential to the inquiry's proceedings.

   Permission was sought from the Ombudsman who indicated that he was more than happy for the Office's submission to be made public at this stage.

The meeting closed at 1.25 p.m.

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Chairman

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Clerk

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

PROCEEDINGS OF THE HEARING ON TUESDAY 8, OCTOBER, 1991 PARLIAMENT HOUSE, SYDNEY

Present:

Mr A. Tink, (Chairman)

Legislative Council	Legislative Assembly
The Hon. Dr M. Burgmann	Mr M.J. Kerr
The Hon. L.D.W. Coleman	Mr K.J. Moss
	Mr P.C. Scully

The Committee met at 10.10 a.m.

Mr Kevin Morris Waller, State Coroner, sworn and examined.

Evidence concluded and the witness withdrew.

Dr Barry William Perry, Deputy Ombudsman, Victoria, sworn and examined.

Evidence concluded and the witness withdrew.

Mr Anthony Lawrence Day, Mr Geoffrey Richard Green, Mr Gregory Thomas Chilvers, Legal Secretary, NSW Police Association, sworn and examined.

Evidence concluded and the witnesses withdrew.

Mr Cecil Patten, Executive Officer, and Mr Lyall Munro, Director of the Board, Aboriginal Legal Service, sworn and examined.

Evidence concluded, the witnesses withdrew.

Committee adjourned at 5.00 p.m.

Chairman

Clerk

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

PROCEEDINGS OF THE HEARING ON THURSDAY 10, OCTOBER, 1991 PARLIAMENT HOUSE, SYDNEY

Present:

Mr A. Tink, (Chairman)

Legislative Council	Legislative Assembly
The Hon. Dr M. Burgmann	Mr M.J. Kerr Mr K.J. Moss Mr P.C. Scully

The Committee met at 10.00 a.m.

Warren Sydney Stanton, Inspector of Police, President of the Commissioned Police Officers' Association of NSW; Warren Robert Atkinson, Secretary, Commissioned Police Officers' Association of NSW; and Christopher John Standaloft, Inspector of Police, Junior Vice President of the Commissioned Police Officers' Association of NSW, sworn and examined.

Evidence concluded and the witness withdrew.

Tim Anderson, research student, sworn and examined.

Evidence concluded and the witness withdrew.

Sir Maurice Byers, Barrister, sworn and examined.

Evidence concluded and the witness withdrew.

Daniel James Brezniak, Solicitor, Chairman of the Criminal Law Committee of the Law Society of NSW, sworn and examined.

Evidence concluded and the witness withdrew.

Committee adjourned at 4.20 p.m.

Chairman

Clerk

MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

Wednesday, 16 October, 1991
Parliament House, Sydney at 6.30 p.m.

Members present:

LEGISLATIVE COUNCIL
The Hon. Dr. M. Burgmann, The Hon. L. Coleman, The Hon. S. Mutch.

LEGISLATIVE ASSEMBLY
Mr A. Tink (Chairman), Mr M. Kerr, Mr K. Moss, Mr P. Scully.

Ronda Miller ((Clerk-Assistant (Committees)), Helen Minnican (Project Officer) and Peita Burgess (Assistant Committee Officer) were also in attendance.

1. No Apologies were received.

2. The Minutes of the previous meetings held on 25 September and 4 October, 1991 were confirmed on the motion of Mr Moss, seconded by Mr Scully.

3. Inquiry upon the role of the Office of the Ombudsman in investigating complaints against police

   a) Late submissions were received by the Committee from Mr E. Azzopardi, Miss N. Rue, Mrs Joan May, Mr G. Tillett (Director, Centre for Conflict Resolution, Macquarie University), Mr Paul Lynch and Mr S. Pilley.

   b) Additional public hearings - The Committee resolved to hold another day of public hearings on 1 November, 1991 at which Mr G. Tillett, Mr Paul Lynch, and representatives from the Police Internal Affairs Branch would be interviewed. The Committee agreed that Mr Eddie Azzopardi should give evidence at a closed hearing.

4. The Committee noted correspondence received and discussed:

   a) a letter from the Police Commissioner, Mr Lauer to the Chairman outlining the Service's position on the recommendations contained in the Ombudsman's submission; and

b) a letter from the Assistant Commissioner (Professional Responsibility), Mr Cole, to the Chairman dated 14 October clarifying certain evidence given to the Committee by representatives of the Police Service.

5. The Committee's next meeting was scheduled for Wednesday, 13 November, 1991 at 6.30 p.m.

The meeting closed at 7.05 p.m.

Chairman

Clerk

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

PROCEEDINGS OF THE HEARING ON FRIDAY 1, NOVEMBER, 1991 PARLIAMENT HOUSE, SYDNEY

Present:

Mr A. Tink, (Chairman)

Legislative Council	Legislative Assembly
The Hon. L.D.W. Coleman	Mr M.J. Kerr
The Hon. Dr M. Burgmann	Mr K.J. Moss
	Mr P.C. Scully

The Committee met at 9.00 a.m.

The Clerk read the Legislative Assembly Standing Order No. 362 relating to the examination of witnesses.

Dr Gregory John Tillet, Director of Centre for Conflict Resolution, Macquarie University, affirmed and examined by the Committee.

Evidence concluded, and the witness withdrew.

Francis Brian McGoldrick, Chief Inspector of Police, Police Internal Affairs Branch; Peter Terrence Myers, Director, Office of Professional Responsibility and Police Service; and Martin William Mulhall, Manager, Internal Affairs Branch, sworn and examined by the Committee.

Evidence concluded and the witnesses withdrew.

Paul Kunino Lynch, Journalist, sworn and examined by the Committee.

Evidence concluded and the witness withdrew.

Chris Cunneen, Lecturer, affirmed and examined by the Committee.

Evidence concluded and the witness withdrew.

The Committee went in camera and deliberated.

Mr Leonard H. Ainsworth sworn and examined in camera.

Evidence concluded and the witness withdrew.

Mr Edgar John Azzopardi sworn and examined in camera.

Evidence concluded, the witness withdrew.

Meeting closed 3.20 p.m.

Committee adjourned at 4.33 p.m.

Chairman

Clerk

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

PROCEEDINGS OF THE HEARING ON 4, NOVEMBER, 1991 IN ROOM 740 PARLIAMENT HOUSE

Present:

Mr A. Tink, M.P. (Chairman)

Mr P.C. Scully, M.P.
Mr K. Moss, M.P.
Mr J. Turner, M.P.
Mr M. Kerr, M.P.

The Hon. L. Coleman, M.L.C.
The Hon. Dr M. Burgmann, M.L.C.
The Hon. S. Mutch, M.L.C.

Apologies:

Mr J. Hatton, M.P.

Meeting commenced at 10.10 a.m.

By direction of the Chairman, the Clerk read the Legislative Assembly Standing Order No. 362 relating to the examination of witnesses.

David Evatt Landa, Ombudsman, and Kieran Pehm, Assistant Ombudsman were each sworn in and acknowledged receipt of summons.

Mr Landa asked that his earlier submission be included as part of the record, and then tabled a copy of his "Opening Address".

The witnesses addressed the Committee and answered question.

The Committee adjourned at 4.15 p.m.

Chairman

Clerk

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

Minutes of the Eighth meeting of the Committee held on 13 November, 1991 at Parliament House, Sydney

Members Present:

Mr A Tink, MP (Chairman)
Mr K Moss, MP
Mr P Scully, MP
Mr M Kerr, MP

The Hon Dr M Burgmann, MLC
The Hon S Mutch, MLC

Helen Minnican (Project Officer), Peita Burgess (Assistant Committee Officer) and Ronda Miller (Clerk to the Committee) were also in attendance.

Apologies: Mr J Hatton, MP

1. The minutes of the previous meeting held on 7th October were confirmed on the motion of Mr Scully, seconded by Mr Moss.

2. There was no business arising from the Minutes.

3. *Inquiry upon the role of the Office of the Ombudsman in investigating complaints against Police*

(a) A late sumission was received from the Rev Ballard of Goulburn. It was resolved, on the motion of Mr Scully, seconded by Mr Kerr, that the Project Officer would raise this matter with Mr Pehm at the Ombudsman's Office, and query whether it had been referred to the ICAC.

A letter from G Reading of Castle Hill was noted.

(b) The information circulated regarding transcripts and press clippings was noted.

4. Correspondence received:

The Committee noted the following correspondence:
(a) letter from the NSW Council of Civil Liberties
(b) letter from the State Coroner, Mr K Waller.

5. The Committee noted the material on the Senate Standing Committee on Finance and Public Administration Inquiry into the Operations

6. General Business

A letter to the Chairman from the Ombudsman dated 13 November was circulated and considered by the Committee.

It was resolved on the motion of Mr Kerr, seconded by Mr Scully, THAT the Committee should conclude its current inquiry before it gave consideration to its next terms of reference.

The Committee agreed that it would meet at 1.00pm on 2nd December, 1991 in the Museum Room for the purpose of hearing further evidence from Mr Azzopardi.
Meeting closed 7.30pm.

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Chairman
Committee

.....
Clerk to the
Committee

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

PROCEEDINGS OF THE HEARING ON MONDAY, 2 DECEMBER, 1991
PARLIAMENT HOUSE, SYDNEY

Present:

Mr A. Tink, (Chairman)

Legislative Council	Legislative Assembly
The Hon. Dr M. Burgmann	Mr J. Hatton
The Hon. L.D.W. Coleman	Mr K.J. Moss
The Hon. S. Mutch	Mr P.C. Scully

Apologies:

Mr M.J. Kerr.

The Committee met at 1.00 p.m.

The witness having been previously sworn, Mr Edgar John Azzopardi, continued to give evidence to the Committee in Camera, and tabled an article entitled "magistrate on attack over police" from the Blacktown Star (27/11/91).

The Committee examined the witness.

Evidence concluded.

The witness withdrew.

Committee adjourned at 2.10 p.m.

Chairman

Clerk

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

Minutes of the meeting of the Committee held on 4 March, 1992, at Parliament House, Sydney

Members Present:

Mr A Tink, MP (Chairman)
Mr K Moss, MP
Mr J Hatton, MP
Mr P C Scully, MP
Mr M Kerr, MP

The Hon Dr M Burgmann, MLC
The Hon L Coleman, MLC
The Hon S Mutch, MLC

Helen Minnican (Project Officer), Peita Burgess (Assistant Committee Officer) and Ronda Miller (Clerk to the Committee) were also in attendance.

Apologies: Mr J Turner, MP

1. The minutes of the previous meeting held on 13th November were confirmed on the motion of Dr Burgmann, seconded by Mr Mutch.

2. Business arising from the Minutes
The committee noted the correspondence between the Chairman and Mr Marsden-Ballard.

3. The committee noted correspondence received.

4. Correpondence arising from the Minutes.
The committee noted the correspondence between the Chairman and the Ombudsman relating to the Ombudsman's request that the committee consider the rent review matters raised in the Ombudsman's report to Parliament of June 1991.

5. Committee Inquiry

The committee resolved, on the motion of Mr Kerr, seconded by Mr Scully, that the Chairman's draft report be circulated to the Commissioner of Police and the Ombudsman on a confidential basis and that their written response be sought to the recommendations contained in the report; further, that the Commissioner and Ombudsman be invited to appear before the committee together in an in camera round table conference to discuss the report with the committee at a time and place to be determined.

The committee agreed that the in camera session should be recorded, and that prior to the attendance of the Commissioner and the Ombudsman time should be allocated for the committee to deliberate on the report.

The committee noted the following items of correspondence relating to the inquiry: from The Hon S Mutch, dated 18th November, 1991; from the Ombudsman dated 13 November 1991; from the Police Commissioner dated 30 December, 1991; from the Ombudsman dated 4 February, 1992; and from Inspector General Wilson dated 2 January, 1992.

6. Fifth International Ombudsman Conference
The committee considered a letter from the Ombudsman dated 7 January, 1992 and agreed that the Ombudsman be advised that no representative of the committee would be attending.

7. Senate Committee Review of Commonwealth Ombudsman
The committee noted the extracts from the Senate Report.

8. The committee noted various newspaper clippings, the Premier's memoranda regarding tabling of reports, and the transcript of the Chairman's interview with Ms G Gelman, post-graduate student.

9. Next meeting to be scheduled during the Address in Reply debate, on a Legislative Council sitting day.

Meeting closed 7.10pm.

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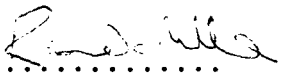
Chairman



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Clerk to the Committee

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

Minutes of Meeting held in Room 740, Parliament House Tuesday 17 March 1992

Present:

Mr A.A. Tink (Chairman)

The Hon. Dr M.A. Burgman, M.L.C.
The Hon. L. Coleman, M.L.C.
The Hon. S. Mutch, M.L.C.

Mr J. Hatton, M.P.
Mr C. Scully, M.P.
Mr M. Kerr, M.P.

Meeting opened 7.30 p.m.

The Committee discussed correspondence received from the Ombudsman dated 16 March 1992.

The Committee discussed the format and procedures for the round table conference to be held on 18 March 1992.

The meeting closed at 8.55 p.m.

Chairman

Clerk to the Committee

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

Minutes of Meeting held in Room 740, Parliament House

Wednesday 18 March 1992

Present:

Mr A.A. Tink (Chairman)

The Hon. Dr M.A. Burgman, M.L.C.
The Hon. L. Coleman, M.L.C.
The Hon. S. Mutch, M.L.C.

Mr J. Turner, M.P.
Mr J. Hatton, M.P.
Mr M. Kerr, M.P.
Mr K. Moss, M.P.

In Attendance:

Mr D.Landa, N.S.W. Ombudsman
Mr K. Pehm, Assistant Ombudsman (Police)

Mr Lauer, Commissioner of Police
Mr C. Cole, Assistant Commissioner of Police (Professional Responsibilty)

Ronda Miller, Clerk to the Committee
Helen Minnican, Project Officer
Peita Burgess, Assistant Committee Officer

The Chairman opened the meeeting at 7.30 pm and welcomed the Ombudsman, the Commissioner, Mr Pehm and Mr Cole.

The Chairman invited the Ombudsman and the Commissioner to speak, in turn, on the Chairman's draft report.

Mr Landa addressed the Committee.
Mr Lauer addressed the Committee.

Discussion ensued on the recommendations contained in the draft report.

The Committee questioned Mr Landa, Mr Lauer, Mr Pehm and Mr Cole to attempt to discern areas of common agreement between the Ombudsman and the Police

Commissioner.

The Committee discussed the recommendations contained in the Report with the Ombudsman and the Police Commissioner, focussing in particular on the Ombudsman's role in relation to direct investigations, participation in investigations and complaints of sexual harassment.

The Ombudsman and theCommissioner undertook to hold further discussions on the Ombudsman's role in Police investigation and to advise the Committee in writing of their comments on the recommendations contained in the report.

The meeting closed at 9.33 p.m.

Chairman

Clerk to the Committee

MINUTES OF PROCEEDINGS OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN

Wednesday, 8 April, 1992
Parliament House, Sydney at 7.30 p.m.

Members present:

LEGISLATIVE COUNCIL
The Hon. Dr. M. Burgmann, The Hon. S. Mutch.

LEGISLATIVE ASSEMBLY
Mr A. Tink (Chairman), Mr J. Turner, Mr J. Hatton, Mr M. Kerr, Mr K. Moss, Mr P. Scully.

Apologies: The Hon. L. Coleman.

Ronda Miller (Clerk-Assistant (Committees)), Helen Minnican (Project Officer) and Peita Burgess (Assistant Committee Officer) were also in attendance.

1. The Minutes of the meetings held on 17 and 18 March, 1992 were confirmed on the motion of Mr Kerr, seconded by Mr Mutch.

2. The Committee noted correspondence arising from the Minutes.

3. Inquiry upon the role of the Office of the Ombudsman in investigating complaints against police

   The Committee noted the correspondence relating to its current inquiry.

COMMITTEE REPORT

A copy of the Chairman's final draft report, having been previously circulated to each member of the Committee, was accepted by the Committee as having been read.

The Committee discussed the recommendations contained in the Chairman's draft and noted those sections which had been included or amended to encompass areas of agreement arising from the round table conference of 18 March, 1992 and subsequent correspondence between the Committee, the Ombudsman and the Commissioner.

The Committee proceeded to further consider the draft report.

Recommendations 1-24 inclusive read and agreed to.

The Committee discussed Recommendation 25.

Recommendation 25, as amended read and agreed to.
Recommendation 26(a), 26(b) and 26(c) as amended read and agreed to.
Recommendation 27 as amended read and agreed to.
Recommendation 28 read and agreed to.
Recommendation 29 read and agreed to.
Recommendation 30 as amended read and agreed to.
Recommendation 31 as amended read and agreed to.
Findings 1 and 2 read and agreed to.

The Committee resolved to insert a new recommendation concerning secondment of police officers to the Ombudsman's Office the form of which was agreed to at the meeting.

The Committee discussed the matter of posters in Police Stations and noted the Report already recommended at page 43 of the draft that a balanced brochure should be made available in police stations, the Ombudsman's Office and other relevant locations informing the public of the services provided to the community by the Police and the grievance mechanisms available in the event that a member of the public may wish to express dissatisfaction about any matter relating to the delivery of those services.

The Committee resolved upon the motion of Mr Hatton, seconded by Mr Mutch, that it should make a statement at the time the report is tabled in Parliament that it recognises the increase in the Ombudsman's workload and will be examining the relationship between the Report and the resources of his Office as the Committee's next matter for inquiry.

The Committee resolved that the draft Report as amended be the report of the Committee and that, subject to minor stylistic and grammatical changes by the Chairman, it be signed by the Chairman and presented to the House.

Mr Hatton moved a vote of thanks, seconded by Mr Mutch, to the Chairman for his work on the Report.

The meeting closed at 9.25 p.m.

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Chairman

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Clerk

APPENDIX B

POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT 1978

POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT 1978 No. 84

[Reprinted as at 3 June 1991]

NEW SOUTH WALES

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8. Police to notify complaints
9. Commissioner to notify Ombudsman
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PART 3—CONCILIATION

13. Application of Part
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17. Commissioner to cause complaints to be investigated
18. Determination by Ombudsman
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POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT 1978 No. 84

Reprinted under the Reprints Act 1972

[Reprinted as at 3 June 1991]

NEW SOUTH WALES

An Act to confer and impose on the Ombudsman and the Commissioner of Police certain powers, authorities, duties and functions with respect to the investigation of, and adjudication upon, allegations of misconduct made against members of the Police Force and to constitute a Police Tribunal of New South Wales.

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the Police Regulation (Allegations of Misconduct) Act 1978.

Commencement

2. (1) Section 1 and this section shall commence on the date of assent to this Act.

(2) Except as provided in subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

(3) * * * * *

Definitions

4. In this Act, except to the extent that the context or subject-matter otherwise indicates or requires:

"Commissioner" means the Commissioner of Police;

"complaint" means a complaint made in accordance with Part 2;

"conduct" means, in relation to a member of the Police Force, any action or inaction, or alleged action or inaction, of the member of the Police Force that occurs after the day appointed and notified under section 2 (2) and may not be made the subject of a complaint under section 12 of the Ombudsman Act 1974;

"Deputy Commissioner" means a Deputy Commissioner of Police;

"Internal Affairs Branch" means the Internal Affairs Branch of the Police Service constituted in accordance with this Act;

"investigation" means investigation under Part 4;

"member of the Police Force" means a member of the Police Service who is a police officer within the meaning of the Police Service Act 1990;

"Ombudsman" means the Ombudsman for the time being holding office under the Ombudsman Act 1974;

"Police Service" means the Police Service of New South Wales established by the Police Service Act 1990;

"President" means the President of the Tribunal;

"Registrar" means a person appointed under section 40 and designated, in his or her instrument of appointment, as Registrar of the Tribunal;

"Tribunal" means the Police Tribunal of New South Wales constituted under this Act.

PART 2—COMPLAINTS

Complaints

5. (1) Where a person complains in accordance with this Part about the conduct of a member of the Police Force, the complaint shall be dealt with as provided by this Act.

(2) Subsection (1) does not prejudice or affect any right a person has to complain otherwise than in accordance with this Part about the conduct of a member of the Police Force.

(3) A complaint by a person about the conduct of a member of the Police Force is not a complaint made in accordance with this Part if:

(a) the person has already made another complaint (whether in accordance with this Part or otherwise) about the same conduct and that other complaint:

(i) is under consideration prior to a determination as to whether it should be the subject of an investigation;

(ii) is the subject of an investigation; or

(iii) has been adjudicated upon after investigation,

whether the investigation is, or is to be, under Part 4 or otherwise;

(b) the person has already made another complaint in accordance with this Part about the same conduct and:

(i) further consideration of that other complaint is in abeyance under section 54 (1);

(ii) the Ombudsman has informed the Commissioner that he has dealt with that other complaint in a manner acceptable to the complainant or that, under section 54 (2), he has treated the complaint as having been so dealt with; or

(iii) the Commissioner or other member of the Police Force has dealt with the complaint in a manner acceptable to the complainant; or

(c) the person is not identified in the complaint, the complaint is made in relation to a particular incident and another complaint has already been made in accordance with this Part in relation to that incident about the same conduct of the member of the Police Force.

(4) Subsection (3) (a) does not apply to a complaint that is being examined by the Commissioner of Public Complaints.

(5) Subsection (3) (a) does not apply to a complaint that:

(a) is being considered by the State Drug Crime Commission Management Committee for referral to the State Drug Crime Commission for investigation; or

(b) is being, or has been, investigated by the State Drug Crime Commission.

Making of complaints

6. (1) Except as provided by section 5 (3), a complaint is made in accordance with this Part if it complies with subsections (1A) and (1B).

(1A) A complaint complies with this subsection if it is in writing and:

(a) where the complaint:

(i) was made before the date of assent to the Police Regulation (Allegations of Misconduct) Amendment Act 1983; or

(ii) is made on or after that date and the terms of the complaint provide reasonable grounds to believe that the complaint relates to conduct which occurred wholly before that date,

only if the complainant is identified in the complaint; or

(b) in any other case, except as provided by section 5 (3) (c), whether or not the complainant is identified in the complaint.

(1B) A complaint complies with this subsection if:

(a) it is delivered to a member of the Police Force personally or by post;

(b) it is lodged at the office of the Ombudsman while that office is open for business or it is delivered to that office by post;

(c) it is addressed to the Ombudsman and lodged at the office of a court of petty sessions while that office is open for business;

(d) it is referred to the Ombudsman by the Minister; or

(e) it is referred to the Ombudsman by the Commissioner of Public Complaints.

(2) Where a person wishes to make a complaint in accordance with this Part, the complaint may, with the written consent of the person, be made on his behalf by a member of Parliament.

(3) Where a person is in lawful detention or custody and informs the person by whom he is detained or in whose custody he is, or a person in superintendence over him, that he wishes to make a complaint to a member of the Police Force, or to the Ombudsman, the person so informed shall:

(a) take all steps necessary to facilitate the making of the complaint; and

(b) send immediately to the addressee, unopened, any written matter addressed to a member of the Police Force (whether by name or by reference to an office held by him) or the Ombudsman.

(4) Where the Minister refers a complaint under subsection (1B) (d) or a member of Parliament acts for a person under subsection (2), neither the Minister nor the member becomes the complainant except for the purposes of sections 15, 18 (2) and (4), 27, 29 (3), 31, 44 (2) (d) and 54 (2).

(4A) Where the Commissioner of Public Complaints refers a complaint under subsection (1B) (e), that Commissioner does not become the complainant.

(5) Where the Minister publishes to a person whose complaint has been referred under subsection (1B) (d), or a member of Parliament publishes to a person for whom he acted under subsection (2), any matter with respect to the complaint published to him by a member of the Police Force, or the Ombudsman, the publication has, for all purposes, the same effect as if it had been published to that person by the member of the Police Force, or the Ombudsman, as the case may be.

Mixed and linked complaints

7. (1) This section applies where:

(a) a complaint relates partly to conduct of a member of the Police Force that is conduct within the meaning of this Act and partly to conduct of that or another member of the Police Force that, while it is not conduct within the meaning of this Act, is conduct that may be made the subject of a complaint under section 12 of the Ombudsman Act 1974; or

(b) a complaint is made in respect of conduct of a member of the Police Force that is conduct within the meaning of this Act and, in the opinion of the Ombudsman, that conduct is directly linked to conduct of that or another member of the Police Force in respect of which the Ombudsman has already received, or later receives, a complaint under section 12 of the Ombudsman Act 1974.

(2) Where this section applies, the complaint or complaints shall be dealt with in accordance with the directions of the Ombudsman.

(3) For the purposes of subsection (2), the Ombudsman may direct, in the case referred to in subsection (1) (a), that the complaint be dealt with:

(a) under this Act in so far as it relates to conduct of a member of the Police Force within the meaning of this Act and under the Ombudsman Act 1974, in so far as it relates to conduct of a member of the Police Force that may be made the subject of a complaint under section 12 of that Act;

(b) notwithstanding anything in the Ombudsman Act 1974—as if the whole of the conduct complained of were conduct of a member of the Police Force that may be made the subject of a complaint under section 12 of that Act; or

(c) notwithstanding anything in this Act—as if the whole of the conduct complained of were conduct of a member of the Police Force that is conduct within the meaning of this Act.

(4) For the purposes of subsection (2), the Ombudsman may direct, in the case referred to in subsection (1) (b):

(a) that the complaint that relates to conduct of a member of the Police Force that is conduct within the meaning of this Act shall be dealt with under this Act and that the linked complaint shall be dealt with, or continue to be dealt with, under the Ombudsman Act 1974;

(b) that both complaints shall, notwithstanding anything in the Ombudsman Act 1974, be dealt with in conjunction as if they both related to conduct of a member of the Police Force that may be made the subject of a complaint under section 12 of that Act; or

(c) that both complaints shall, notwithstanding anything in this Act, be dealt with in conjunction as if they both related to conduct of a member of the Police Force within the meaning of this Act.

(5) Where it appears to the Ombudsman:

(a) that he is dealing under the Ombudsman Act 1974 with a complaint that relates to conduct of a member of the Police Force that is conduct within the meaning of this Act; or

(b) that he is dealing under this Act with a complaint relating to conduct of a member of the Police Force that is not conduct within the meaning of this Act,

he shall not discontinue action on the complaint but subject to this section shall, as soon as practicable, continue action thereon in accordance with the provisions of the appropriate Act.

Police to notify complaints

8. (1) A member of the Police Force who receives a complaint that has not already been sent to the Commissioner shall:

(a) unless he is a member of the Internal Affairs Branch, forthwith by telephone notify the Internal Affairs Branch of particulars of the complaint; and

(b) send the document incorporating the complaint to the Commissioner.

(2) The senior officer who is on duty at the Internal Affairs Branch at the time the Branch is notified of or receives a complaint shall, as soon as practicable, cause the Ombudsman to be notified of brief details of the complaint.

Commissioner to notify Ombudsman

9. The Commissioner shall, as soon as practicable after receiving a complaint:

(a) where he receives the complaint pursuant to section 8 (1) (b)—cause a copy of the document incorporating the complaint to be sent to the Ombudsman; or

(b) except where he receives the complaint pursuant to section 8 (1) (b) or from the Ombudsman—cause the Ombudsman to be notified by telephone of brief details of the complaint.

Clerks of petty sessions to notify complaints

10. (1) Where a complaint is lodged at the office of a court of petty sessions, the clerk of the court shall, by telephone, notify the Ombudsman as soon as practicable of brief details of the complaint and:

(a) if so directed by the Ombudsman:

(i) give the document incorporating the complaint to a member of the Police Force specified by the Ombudsman;

(ii) obtain a receipt for that document from that member of the Police Force;

(iii) retain a copy of that document in his records; and

(iv) send a copy of that document to the Ombudsman together with the receipt referred to in subparagraph (ii) and a report of the action taken by him; or

(b) if not directed as specified in paragraph (a), forthwith send the document incorporating the complaint to the Ombudsman.

(2) The Ombudsman shall not give the direction referred to in subsection (1) (a) unless he is requested so to do by a member of the Police Force responsible for investigating any aspect of the complaint that may relate to a possible criminal offence.

(3) For the purposes of this Act, the clerk of a court of petty sessions shall be deemed to be an officer of the Ombudsman.

Notification of possible criminal offence

11. Where a person who receives a complaint made in accordance with this Part is of the opinion that any aspect of the complaint relates to a possible criminal offence and that an investigation of that aspect would be prejudiced by any delay in its commencement, he shall forthwith by telephone so notify the Commissioner, a Deputy Commissioner or the senior officer who is at the time on duty at the Internal Affairs Branch.

Ombudsman to register complaints

12. The Ombudsman shall establish and maintain, in such form as he thinks fit, a register of complaints received by him and complaints of which he is notified.

PART 3—CONCILIATION

Application of Part

13. This Part does not apply to or in respect of a complaint of conduct by a member of the Police Force where:

(a) that conduct appears to have involved the commission of an indictable offence;

(b) the Commissioner has informed the Ombudsman that he has directed that the complaint be investigated under Part 4; or

(c) the complainant is not identified.

Conciliation of complainant

14. (1) Where the Ombudsman or a member of the Police Force is satisfied that, without an investigation under Part 4, he may be able to deal, in a manner acceptable to the complainant, with a complaint about the conduct of a member of the Police Force, he may proceed to deal with the complaint in that manner.

(2) A member of the Police Force who is considering whether he should deal with a complaint under subsection (1) shall forthwith so inform the Ombudsman and (unless he is a member of the Internal Affairs Branch) the Internal Affairs Branch.

(3) A member of the Police Force who deals with a complaint under subsection (1) shall inform the Ombudsman of the outcome and (unless he is a member of the Internal Affairs Branch) the Internal Affairs Branch.

(4) Where the Ombudsman deals with a complaint under subsection (1) in a manner acceptable to the complainant, he shall inform the Commissioner accordingly.

Ombudsman may make recommendations

15. For the purposes of this Part, the Ombudsman may make such recommendations to the Commissioner or a complainant, or to both of them, as he thinks fit.

Procedure where conciliation fails

16. Where an attempt made under this Part to deal with a complaint in a manner acceptable to the complainant is unsuccessful, the complaint shall thereafter be dealt with as if this Part had not been enacted.

PART 4—INVESTIGATIONS

Commissioner to cause complaints to be investigated

17. (1) The Commissioner may cause a complaint to be investigated under this Part if:

(a) the complaint was received by him or another member of the Police Force; or

(b) he or a Deputy Commissioner or a member of the Internal Affairs Branch was notified of the complaint under section 11.

(2) The Commissioner shall cause a complaint to be investigated under this Part if the Ombudsman determines that the complaint should be investigated and notifies the Commissioner accordingly as provided by section 18 (3).

(3) Where, under subsection (1), the Commissioner causes a complaint to be investigated he shall, as soon as practicable, notify the Ombudsman that he has done so.

(4) The Ombudsman shall not make a determination referred to in subsection (2) with respect to a complaint that is the subject of a notification under subsection (3).

Determination by Ombudsman

18. (1) In determining whether a complaint should be investigated, the Ombudsman may have regard to such matters as he thinks fit, including whether, in his opinion:

(a) the complaint is frivolous, vexatious or not in good faith;

(b) the subject-matter of the complaint is trivial;

(c) the conduct complained of occurred at too remote a time to justify investigation;

(d) in relation to the conduct complained of there is or was available to the complainant an alternative and satisfactory means of redress; or

(e) the complainant does not or, where the complainant is not identified, the complainant could not have an interest, or a sufficient interest, in the conduct complained of.

(1A) Without affecting the generality of subsection (1), the Ombudsman shall not determine that a complaint, in which the complainant is not identified, should be investigated, unless the Ombudsman is of the opinion:

(a) that the complaint appears to contain sufficient information to enable an investigation to be carried out; and

(b) that the conduct the subject of the complaint would:

(i) if the conduct had occurred, provide reasonable grounds to believe that a criminal offence had been committed by a member of the Police Force; or

(ii) if a departmental charge were proved against a member of the Police Force in relation to the conduct, warrant the imposition of a substantial punishment upon the member.

(2) Where the Ombudsman determines that a complaint should be investigated, he shall notify the complainant, if the complainant is identified, and the Commissioner accordingly and may, if he thinks fit, also notify the member of the Police Force whose conduct is the subject of the complaint.

(3) A notification to the Commissioner under subsection (2):

(a) shall be in writing;

(b) as far as practicable, shall identify the member of the Police Force whose conduct is the subject of the complaint to which the notification relates; and

(c) shall be accompanied by a copy of the document that incorporates the complaint.

(4) Where the Ombudsman determines that a complaint should not be investigated, he shall, if the complainant is identified, notify the complainant accordingly, giving his reasons, and shall send to the Commissioner a copy of the notification and of the document incorporating the complaint to which it relates.

Conduct of investigation

19. (1) Where a complaint is to be investigated, the investigation shall be conducted:

(a) by investigative staff of the Internal Affairs Branch unless:

(i) the conduct the subject of the complaint is conduct of a member of the Police Force who is, or at the time the conduct occurred was, a member of the Internal Affairs Branch;

(ii) the conduct the subject of the complaint is conduct of a member of the Police Force who, at the time the investigation is directed, is senior to all the investigative staff of the Internal Affairs Branch; or

(iii) the complaint is to be investigated as provided by paragraph (b) or (c);

(b) where the conduct the subject of the complaint is conduct referred to in paragraph (a) (i) or (ii)—by such members of the Police Force as the Commissioner directs; or

(c) where the conduct to which the complaint relates is of a class or kind that the Ombudsman and the Commissioner have agreed should not be the subject of an investigation by the Internal Affairs Branch—by such members of the Police Force as the Commissioner directs.

(2) While investigating a complaint, a member of the Police Force shall not, without the consent:

(a) of the Officer-in-Charge of the Internal Affairs Branch; or

(b) of any other member of the Police Force serving for the time being on the staff of the Internal Affairs Branch and nominated for the purpose of granting consents under this subsection by that Officer-in-Charge either generally or in the particular case,

disclose to any person, other than that Officer-in-Charge or a member of the Police Force so nominated, the identity of the complainant, except for the purposes of a report under section 23.

(3) A person shall not grant a consent under subsection (2) unless the person considers that the disclosure of the identity of the complainant is necessary for the effective conduct of the investigation of the complaint.

Deferral or discontinuance

20. (1) The Commissioner may apply to the Ombudsman for consent:

(a) to defer the commencement or continuation of the investigation of a complaint; or

(b) to discontinue the investigation of a complaint.

(2) The Ombudsman may:

(a) consent to deferring the commencement or continuation of the investigation of a complaint pending the conclusion of criminal proceedings which have been instituted and in which the subject of the complaint is, or may be, in issue; or

(b) consent to the discontinuance of the investigation of a complaint if continuation of the investigation would be, in the circumstances of the case, unreasonable or impracticable.

(3) Where the Ombudsman grants a consent under subsection (2), the Ombudsman shall, if the complainant is identified, notify the complainant in writing accordingly, giving the reasons for granting the consent, and shall send to the Commissioner a copy of the notification.

(4) Where the Ombudsman does not, within the prescribed time, grant a consent applied for under subsection (1), the Commissioner may appeal to the Tribunal in accordance with the regulations.

(5) The Tribunal shall determine an appeal under subsection (4):

(a) by granting the consent applied for under subsection (1) subject to such conditions, if any, as are specified by the Tribunal; or

(b) by refusing to grant the consent,

and by causing a copy of its determination to be sent to the Commissioner, the Ombudsman and, if the complainant is identified, the complainant.

(6) In exercising the jurisdiction conferred by this section, the Tribunal shall be constituted by one member, not being the President.

(7) The commencement or continuation of the investigation of a complaint under this Part may not be deferred, and the investigation of a complaint under this Part may not be discontinued, except in accordance with a consent granted under subsection (2) or (5).

Commissioner to provide certain information

21. The Commissioner shall provide the Ombudsman with such documentary and other information as the Ombudsman may from time to time request with respect to an investigation proceeding under this Part.

Proceedings to be instituted if warranted

22. (1) Where it appears to a member of the Police Force conducting an investigation that sufficient evidence exists to warrant the prosecution of any person for an offence, he shall, subject to the Police Service Act 1990 and the regulations under that Act, cause appropriate proceedings to be instituted against that person.

(2) Where a member of the Police Force referred to in subsection (1) causes proceedings to be instituted as provided by that subsection:

(a) he shall inform the Commissioner; and

(b) the Commissioner shall inform the Ombudsman,

of the institution of the proceedings and of the particulars thereof.

Result of investigation to be reported

23. A member of the Police Force conducting an investigation shall:

(a) at such times as the Commissioner may direct while the investigation is proceeding; and

(b) at the conclusion of his investigation,

report to the Commissioner the progress or result of his investigation, as the case may require, and provide the Commissioner with copies of all statements taken by him in the course of the investigation and of all other documents upon which the report is based.

Report etc. to be sent to Ombudsman

24. (1) As soon as practicable after he is satisfied that an investigation has been concluded, the Commissioner shall:

(a) send to the Ombudsman a copy of the report provided under section 23 at the conclusion of the investigation and copies of all statements taken in the course of the investigation and of all other documents upon which the report is based;

(b) provide the Ombudsman with such comments on the report and statements as the Commissioner thinks fit; and

(c) specify what action should, in the opinion of the Commissioner, be taken with respect to the complaint to which the investigation related.

(2) The Commissioner and any member of the Police Force who investigated a complaint shall, upon being required by the Ombudsman so to do after he receives the information referred to in subsection (1), provide such additional information as the Ombudsman considers is necessary to enable him to determine whether the complaint was properly investigated.

Investigation under the Ombudsman Act 1974 where complaint not dealt with in time

24A. (1) If the Ombudsman has not, in relation to a complaint, received from the Commissioner the information referred to in section 24 (1) within the relevant period referred to in this section, the Ombudsman may make the conduct to which the complaint relates the subject of an investigation under the Ombudsman Act 1974.

(2) The Ombudsman shall notify the Commissioner in writing when the Ombudsman commences such an investigation.

(3) The relevant period is the period of 180 days after:

(a) the Commissioner notifies the Ombudsman pursuant to section 17 (3) that the complaint is being investigated; or

(b) the Ombudsman notifies the Commissioner pursuant to section 18 (3) of the Ombudsman's determination that the complaint should be investigated,

or that period as extended under section 24B or 24C.

Extension of time where complaint not dealt with

24B. (1) The Commissioner may apply to the Ombudsman for an extension of the relevant period referred to in section 24A, and the Ombudsman may grant the extension.

(2) More than one such application may be made, but no such application may be made after the relevant period has expired.

(3) If the Ombudsman grants the extension, the Ombudsman shall, if the complainant is identified, notify the complainant in writing, giving the reasons for granting the extension, and shall send to the Commissioner a copy of the notification.

(4) If the Ombudsman does not, within the prescribed time, grant the extension, the Commissioner may appeal to the Tribunal in accordance with the regulations.

(5) The Tribunal shall determine an appeal under this section:

(a) by granting the extension applied for subject to such conditions, if any, as are specified by the Tribunal; or

(b) by refusing to grant the extension,

and by causing a copy of its determination to be sent to the Commissioner, the Ombudsman and, if the complainant is identified, the complainant.

(6) In exercising the jurisdiction conferred by this section the Tribunal shall be constituted by one member, not being the President.

(7) If an application for an extension is made in accordance with this section, the relevant period is extended until:

(a) the application is granted by the Ombudsman;

(b) the application is withdrawn; or

(c) if the application is not granted by the Ombudsman:

(i) the time specified in the regulations for the making of an appeal to the Tribunal expires; or

(ii) if an appeal is made within that time to the Tribunal—the appeal is determined by the Tribunal or withdrawn.

(8) If an extension is granted by the Ombudsman or the Tribunal, the relevant period is extended by the period specified by the Ombudsman or the Tribunal when granting the extension.

Extension of time where application for deferral etc.

24C. (1) If an application for consent is made under section 20, the relevant period referred to in section 24A is extended until:

(a) the application is granted by the Ombudsman;

(b) the application is withdrawn; or

(c) if the application is not granted by the Ombudsman:

(i) the time specified in the regulations for the making of an appeal to the Tribunal expires; or

(ii) if an appeal is made within that time to the Tribunal—the appeal is determined by the Tribunal or withdrawn.

(2) If an application for consent under section 20 to the deferral of the commencement or continuation of an investigation is granted by the Ombudsman or the Tribunal, the relevant period shall be deemed:

(a) to have ceased to run on the day the application was made; and

(b) to recommence to run from the day to which the commencement or continuation is deferred.

Further investigation

25. (1) Where, after receiving the information referred to in section 24, the Ombudsman is not satisfied that the complaint to which the information relates was properly investigated under this Part, he shall report to the Commissioner accordingly, specifying what are, in his opinion, the deficiencies in the investigation.

(2) Upon receipt of a report under subsection (1), the Commissioner shall cause a further investigation to be conducted in order to remedy the deficiencies referred to in the report.

(3) This Part (including this section) applies to and in respect of a further investigation under this section in the same way as it applies to an initial investigation.

Investigation under the Ombudsman Act 1974

25A. (1) Where, after considering all the material and information provided for the Ombudsman under this Part, the Ombudsman is not satisfied that a complaint has not been sustained and is not satisfied that the complaint has been sustained, the Ombudsman may:

(a) make the conduct to which the complaint relates the subject of an investigation under the Ombudsman Act 1974; or

(b) having regard to the public interest, determine that no further investigation of the complaint should be carried out.

(2) Where the Ombudsman determines under subsection (1) (b) that no further investigation of a complaint should be carried out:

(a) the Ombudsman shall, if the complainant is identified, notify the complainant accordingly, giving the reasons for the determination, and shall send a copy of the notification to:

(i) the Commissioner; and

(ii) the member of the Police Force whose conduct was the subject of the complaint; and

(b) the complaint shall be deemed not to have been sustained.

Certain information to be confidential

26. (1) Where the Commissioner is of the opinion that publication of any material or information:

(a) which, under this Part, the Commissioner is required to provide for the Ombudsman; or

(b) which, under the Ombudsman Act 1974, the Commissioner or any other member of the Police Force is required, in the course of an investigation under that Act of the conduct to which a complaint relates, to provide for the Ombudsman,

might prejudice the investigation or prevention of crime, or otherwise be contrary to the public interest, the Commissioner shall inform the Ombudsman accordingly, giving the reasons for his opinion.

(1A) Where the Ombudsman, pursuant to a requirement made under the Ombudsman Act 1974 in the course of an investigation under that Act of the conduct to which a complaint relates, receives material or information from a member of the Police Force, the Ombudsman may not, except as provided in subsection (2) (b) or with the consent of the

Commissioner, publish that material or information, otherwise than to the Commissioner, until the expiration of 21 days after that receipt.

(2) Where the Ombudsman is provided with material or information in respect of which the Commissioner has given the opinion referred to in subsection (1), the Ombudsman:

(a) may not, except as provided in paragraph (b), publish that material or information; and

(b) may, if in his opinion the circumstances so warrant, make in relation to that material or information a report to the Minister for presentation to Parliament.

PART 5—REPORTS

Unjustified complaints

27. (1) Where, after considering all the material and information provided for him under Part 4 with respect to a complaint or after an investigation, under the Ombudsman Act 1974, of the conduct to which a complaint relates, the Ombudsman is satisfied that the complaint has not been sustained, he shall so report to:

(a) the complainant, if the complainant is identified;

(b) the Commissioner; and

(c) the member of the Police Force whose conduct was the subject of the complaint.

(2) Where, after an investigation under the Ombudsman Act 1974 of the conduct to which a complaint relates, the Ombudsman is not satisfied that a complaint has not been sustained and is not satisfied that the complaint has been sustained, he shall so report to:

(a) the complainant, if the complainant is identified;

(b) the Commissioner; and

(c) the member of the Police Force whose conduct was the subject of the complaint,

and the complaint shall be deemed not to have been sustained.

Justified complaints

28. (1) Where, after considering all the material and information provided for him under Part 4 with respect to a complaint or after an investigation, under the Ombudsman Act 1974, of the conduct to which a complaint relates, the Ombudsman is satisfied that the conduct to which the complaint relates:

(a) was contrary to law;

(b) was unreasonable, unjust, oppressive or improperly discriminatory;

(c) was in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory;

(d) was based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations;

(e) was based wholly or partly on a mistake of law or fact; or

(f) was conduct for which reasons should have been given but were not given,

or that the complaint has been otherwise sustained, the Ombudsman shall compile a report relating to the complaint and the conduct to which it relates, giving reasons for his conclusions.

(2) In a report under subsection (1), the Ombudsman may recommend:

(a) that the conduct to which it relates be considered or reconsidered by the member of the Police Force whose conduct it was, or by any person in a position to supervise or direct that member of the Police Force in relation to the conduct or to review, rectify, mitigate or change the conduct or its consequences;

(b) that action be taken to rectify, mitigate or change the conduct or its consequences;

(c) that reasons be given for the conduct;

(d) that any law or practice relating to the conduct be changed; or

(e) that any other action be taken.

Distribution of report

29. (1) When the Ombudsman has compiled a report under section 28 he shall, before acting under subsection (2) or (3):

(a) inform the Minister administering the Police Regulation Act 1899 of the compilation of the report; and

(b) on request by that Minister, consult him.

(2) The Ombudsman shall give a copy of his report under section 28 to the Minister administering the Police Service Act 1990 and to the Commissioner and, as soon as practicable after receiving the report, the Commissioner shall give a copy of the report to the member of the Police Force whose conduct is the subject of the report.

(3) The Ombudsman may, if he thinks fit, give to a complainant, if the complainant is identified, a copy of a report under section 28 that relates to his complaint.

Notification of proposed action on report

30. (1) The Commissioner shall, as soon as is practicable after receiving a report under section 28, notify the Ombudsman of the nature of the action, if any, proposed to be taken by the Commissioner in consequence of the report.

(2) A notification under subsection (1) shall not contain particulars of the quantum of any penalty proposed to be imposed.

(3) Where the Ombudsman has given a copy of a report under section 28 to the Commissioner and the Ombudsman is of the opinion:

(a) that the Commissioner has unreasonably delayed notifying the Ombudsman under subsection (1) with respect to the report;

(b) that the nature of the action, as notified under subsection (1), proposed to be taken by the Commissioner in consequence of the report is, in the circumstances of the case, unreasonable or inadequate; or

(c) that the Commissioner has unreasonably delayed taking action in consequence of the report,

the Ombudsman shall advise the Commissioner accordingly by notice in writing served on the Commissioner.

(4) Where the Ombudsman and the Commissioner do not, within the prescribed time, resolve any issue the subject of a notice under subsection (3), either or both of them may appeal to the Tribunal in accordance with the regulations.

(5) The Tribunal shall determine an appeal under subsection (4):

(a) by directing:

(i) that a notification be made under subsection (1) forthwith or within a period specified in the direction;

(ii) that the Commissioner take action of a nature described in the direction; or

(iii) that action of a nature described in the direction be taken by the Commissioner forthwith or within a period specified in the direction; or

(b) by refusing to give any such direction,

and by causing a copy of its determination to be sent to the Commissioner and the Ombudsman.

(6) Any direction given by the Tribunal under subsection (5) (a) shall be carried into effect by the Commissioner in so far as the Commissioner is capable of carrying the direction into effect.

(7) In exercising the jurisdiction conferred by this section, the Tribunal shall be constituted by one member, not being the President.

(8) Nothing in this section:

(a) permits an appeal to be made to the Tribunal against a determination made by the Ombudsman that a complaint has been sustained; or

(b) affects the exercise by the Tribunal of its jurisdiction under section 41 or 43.

Notification of action taken on report

30A. (1) The Commissioner shall, forthwith after taking action in consequence of a report under section 28, being action with respect to a member of the Police Force whose conduct is the subject of a complaint, notify the Ombudsman of the nature of the action so taken.

(2) A notification under subsection (1) shall, where the action to which the notification relates consists of or includes the imposition of a penalty, contain particulars of the nature and quantum of the penalty imposed.

(3) The Ombudsman shall determine whether, in the circumstances of the case, action notified under subsection (1) was, in the opinion of the Ombudsman:

(a) appropriate; and

(b) taken within a reasonable time.

Report to complainant

31. Where a complaint made by a complainant who is identified is investigated under Part 4, the Ombudsman:

(a) may from time to time report to the complainant on the progress of the investigation;

(b) shall report to the complainant on the results of the investigation; and

(c) may make to the complainant such comments on the investigation and its consequences as he thinks fit.

Special report to Parliament

32. (1) The Ombudsman may, at any time, make a special report to the Minister for presentation to Parliament on any matter arising in connection with the discharge of his functions under this Act.

(2) The Ombudsman may include in a report under subsection (1) a recommendation that the report be made public forthwith.

(3) Where a report under subsection (1) contains a recommendation referred to in subsection (2), the Minister may make it public before it is presented to Parliament.

Serious misconduct

33. Where the Ombudsman is of the opinion that a member of the Police Force is or may be guilty of such misconduct as may warrant dismissal, removal or punishment, he shall report his opinion:

(a) to the Minister administering the Police Service Act 1990; and

(b) to the Commissioner,

giving his reasons.

PART 6—INTERNAL AFFAIRS BRANCH

Constitution of Internal Affairs Branch

34. (1) There is hereby constituted within the Police Service the Internal Affairs Branch.

(2) The Internal Affairs Branch shall consist of:

(a) the Officer-in-Charge;

(b) investigative staff; and

(c) other staff.

(3) The Officer-in-Charge shall be a police officer who is a member of the Police Service Senior Executive Service appointed by the Commissioner with the approval of the Minister.

(3A) The prescribed officer, being a member of the Police Force appointed by the Governor and serving for the time being on the staff of the Internal Affairs Branch, may exercise the powers and authorities, and shall perform the duties and functions, of the Officer-in-Charge during:

(a) any absence of the Officer-in-Charge; or

(b) any vacancy, not exceeding 6 months, in the office of the Officer-in-Charge.

(3B) Any act, matter or thing done under subsection (3A) by the prescribed officer referred to in that subsection shall be deemed to have been done by the Officer-in-Charge.

(4) The Officer-in-Charge shall be responsible to the Commissioner for the operation of the Internal Affairs Branch.

(5) The investigative and other staff of the Internal Affairs Branch shall be such specially selected members of the Police Force as the Commissioner, with the approval of the Minister, from time to time determines.

(6) A member of the investigative staff of the Internal Affairs Branch:

(a) is to be appointed to the Branch for a term not exceeding 5 years; and

(b) may not be appointed for terms of office totalling more than 10 years.

This subsection does not apply to a secondment under subsection (8).

(6A) A person shall not be appointed as the Officer-in-Charge of, or as a member of the investigative or other staff of, or be seconded under subsection (8) to, the Internal Affairs Branch unless the Minister has considered a report upon the person submitted under section 35A (1) (c).

(6B) Subsection (6) does not apply to a member of the Police Force of or above the rank of Chief Inspector.

(6C) For the purposes of subsection (6), any period during which the services of a member of the investigative staff of the Internal Affairs Branch are made use of under section 32 (2) of the Ombudsman Act 1974 shall be disregarded.

(7) Where the Commissioner is satisfied that there are special reasons for so doing, he may, with the approval of the Minister:

(a) terminate the appointment of a member of the investigative staff of the Internal Affairs Branch before the expiration of the member's term of office; or

(b) extend the term of office of such a member subject to his terms of office totalling not more than 10 years.

(8) For the purpose of investigating a particular matter, the Commissioner may, from time to time, second to the Internal Affairs Branch members of the Police Force having special knowledge or skills in relation to that matter and he may, at any time, terminate such a secondment.

Duties of Internal Affairs Branch

35. (1) It is the duty of the Internal Affairs Branch:

(a) to investigate, and report upon, complaints referred to it for investigation under Part 4;

(b) to investigate, and report upon, any conduct or alleged conduct of a member of the Police Force referred to it by the Commissioner for investigation otherwise than under Part 4;

(c) to investigate, and report upon, any matter arising out of, or incidental to, an investigation under paragraph (a) or (b);

(c1) to identify, and report upon, practices and procedures followed by members of the Police Force as a consequence of the following of which corruption may occur within the Police Service and to investigate, and report upon, whether corruption is occurring within the Police Service as a consequence of the following of those practices or procedures;

(d) to perform any other duty imposed by or under this or any other Act on the Internal Affairs Branch; and

(e) to perform such other functions arising out of or incidental to the general government and discipline of members of the Police Force as the Commissioner may direct.

(2) Subject to section 34 (8), an investigation referred to in paragraph (a), (b) or (c) shall be carried out, and a report consequent thereon shall be made, only by members of the investigative staff of the Internal Affairs Branch.

Reports

35A. (1) The Officer-in-Charge of the Internal Affairs Branch sh

(a) not later than on 1st March in each year, submit a report to Minister setting out details of the work and activities of Internal Affairs Branch during the year concluding with 3 December immediately preceding that 1st March;

(b) not later than 30 days after the end of each of the periods of months concluding with the last day of March, June, Septembe and December in each year, submit a report to the Minister setting out details of the work and activities of the Internal Affairs Branch during that period of 3 months; and

(c) where the Officer-in-Charge is notified by a prescribed authority that a person is being considered for appointment:

(i) as the Commissioner, a member of the Police Service Senior Executive Service or a police officer (other than of the rank of constable of any grade); or

(ii) as the Officer-in-Charge of, or to the investigative or other staff of, or for secondment under section 34 (8) to, the Internal Affairs Branch,

submit a report upon the person to the prescribed authority, as soon as practicable after the Officer-in-Charge has been so notified, being a report setting out the details required to be inserted in it by subsection (2).

(2) The details required by this subsection to be inserted in a report upon a person are as follows:

(a) particulars of the previous employment of the person, including particulars of the names of previous employers of the person, the offices or positions in which the person has been employed (whether or not in the Police Service of New South Wales) and the dates between which the person has been employed in those offices or positions;

(b) particulars of any criminal proceedings commenced against the person in New South Wales and, in so far as the Officer-in-Charge of the Internal Affairs Branch can reasonably ascertain, elsewhere, and the results of those proceedings;

(c) particulars of any complaint which has been made against the person;

(d) where the person has been referred to:

(i) in an investigation commenced under Part 4;

(ii) in any proceedings commenced before the Tribunal;

(iii) at an inquiry or commission held under any other Act (including an Act of the Commonwealth or of another State or a Territory); or

(iv) at an inquiry authorised by any Minister,

particulars of that investigation or of those proceedings, or of the findings of that inquiry or commission, as the case may be, in so far as they relate to the person;

(e) particulars relating to such matters or things, if any, as:

(i) the Commissioner requires to be included in the report; or

(ii) the Officer-in-Charge of the Internal Affairs Branch considers appropriate to include in the report;

(f) particulars relating to such other matters or things as are prescribed.

(3) A report under subsection (1) (a) shall be presented to Parliament.

(4) In subsection (1) (c), **"prescribed authority"** means the Minister, the Police Board or the Commissioner.

PART 7—POLICE TRIBUNAL

Constitution of Tribunal

36. (1) There is hereby constituted the Police Tribunal of New South Wales which shall consist of a President, a Deputy President and other members prescribed by this Part.

(2) The Tribunal is a court of record and its seal shall be judicially noticed.

(3) * * * * *

President of Tribunal

37. (1) The President shall be appointed by the Governor and shall be:

(a) a Judge of the Supreme Court of New South Wales who shall be appointed on the nomination of the Chief Justice;

(b) a member of the Industrial Commission of New South Wales who shall be appointed on the nomination of the President of that Commission;

(c) a person appointed as Senior Chairman of the Government and Related Employees Appeal Tribunal under section 7 (1) of the Government and Related Employees Appeal Tribunal Act 1980; or

(d) a Judge of the District Court of New South Wales who shall be appointed on the nomination of the Chief Judge.

(2) The President:

(a) holds office for such term not exceeding 5 years as is specified in the instrument of his appointment;

(b) is eligible for re-appointment; and

(c) vacates his office as President if he ceases to hold the office by virtue of which he was appointed President.

(3) The rank, title, status, precedence, remuneration, powers, authorities, duties, functions, rights and privileges of a Judge of the Supreme Court of New South Wales or the District Court of New South Wales, or pertaining to an office by virtue of which a person has the status of such a Judge, and the continuity of his service as such a Judge or as a holder of that office, are not affected by the exercise of the powers, authorities, duties and functions conferred or imposed on him by or under this Act.

(4) The provisions of the Public Service Act 1902 do not apply to or in respect of the appointment by the Governor of the President and the

President is not, in that capacity, subject to that Act during his term of office.

(5) Nothing in this Act prevents the Chief Justice of the Supreme Court of New South Wales or the Chief Judge of the District Court of New South Wales from being nominated and appointed as President.

Deputy President of Tribunal

38. (1) The Governor may appoint as Deputy President of the Tribunal for a term not exceeding 5 years a person eligible for appointment as President.

(2) Section 37 (2), (3) and (4) applies to and in respect of the Deputy President of the Tribunal in the same way as it applies to and in respect of the President.

(3) The Deputy President is to act in the place of the President during the illness or absence of the President and on other occasions as and when required by the President to do so.

(4) While acting as the President in accordance with subsection (3), the Deputy President is to be taken, for the purposes of section 43 or 45 and for all other purposes, to be the President.

Members of Tribunal

39. Each Judge of the District Court of New South Wales is a member of the Tribunal.

Staff of Tribunal

40. The Governor may, under and subject to the Public Service Act 1902, appoint and employ such officers and employees as are necessary to enable the Tribunal to exercise and perform its powers, authorities, duties and functions.

Hearing of disciplinary charges

41. (1) Subject to this Part, the Tribunal has exclusive jurisdiction to hear and determine a departmental charge preferred against a member of the Police Force, being a charge which that member does not admit, where:

(a) the charge relates to conduct the subject of a complaint investigated under Part 4; or

(b) the charge relates to other conduct and the member of the Police Force charged elects to have the charge heard and determined by the Tribunal.

(2) In exercising the jurisdiction conferred by subsection (1), the Tribunal shall be constituted by a member sitting alone.

(3) For the purposes of this section, there may be contemporaneous sittings of the Tribunal constituted by different members and those sittings may be in different places.

Original jurisdiction of Tribunal

42. Where the Tribunal is exercising the jurisdiction conferred by section 41 or 45A:

(a) it has the powers, authorities, protections and immunities of a commissioner appointed under Division 1 of Part 2 of the Royal Commissions Act 1923 and that Act, section 13 and Division 2 of Part 2 excepted, applies to and in respect of proceedings before the Tribunal under section 41 or 45A in the same way as it applies to and in respect of proceedings before a royal commission; and

(b) the complainant is not a party to the proceedings where they arise from a charge referred to in section 41 (1) (a) or arise under section 45A.

Appellate jurisdiction of Tribunal

43. (1) Where the Tribunal exercising its original jurisdiction under section 41 determines that a charge preferred against a member of the Police Force has been proved, that member of the Police Force may appeal against the determination to the Review Division of the Tribunal on any one or more of the following grounds:

(a) that he is not guilty of the charge;

(b) that the evidence disclosed no offence;

(c) that the determination is bad and contrary to law;

(d) that the determination is against the evidence and the weight of evidence.

(2) The Review Division of the Tribunal shall be constituted by the President and 2 members of the Tribunal sitting together.

(3) At a sitting of the Review Division of the Tribunal:

(a) a decision of the President as to:

(i) the jurisdiction of the Tribunal;

(ii) the admissibility of evidence; or

(iii) procedure,

is the decision of the Tribunal; and

(b) subject to paragraph (a), the President has one vote and each of the members present has one vote and a decision supported by a majority in number of those votes is a decision of the Tribunal.

(4) An appeal is to be in the nature of a review of the matter on the evidence given in the relevant proceedings in the Tribunal's original jurisdiction.

(5) New evidence may nevertheless be given and considered in the appeal if the Tribunal is satisfied that it was not reasonably available at the time the original proceedings were heard.

Orders prohibiting publication

43A. In any proceedings before the Tribunal, the Tribunal may by order prohibit or restrict the publication of the name and address:

(a) of any witness or complainant concerned in the proceedings; or

(b) if the proceedings are by way of appeal—of any witness or complainant concerned in the appeal or any antecedent proceedings.

Proceedings generally

44. (1) At any proceedings before the Tribunal, whether under section 41 or 43:

(a) the Commissioner and the member of the Police Force charged are each entitled to be represented by counsel, solicitor or agent;

(b) the public shall not be excluded unless the Tribunal exercising jurisdiction at those proceedings otherwise orders; and

(c) the function of the Tribunal is to determine, upon the true merits and justice of the case and without being bound by strict legal precedent, whether or not the charge that gave rise to the proceedings has been proved.

(2) The Tribunal shall cause a copy of its determination at proceedings before it under section 41 or 43 to be sent to:

(a) the Commissioner;

(b) the member of the Police Force charged;

(c) the Ombudsman; and

(d) where the proceedings arose from a charge referred to in section 41 (1) (a)—the complainant, if the complainant is identified.

Subpoenas

44A. (1) In accordance with a request by a party to any proceedings before the Tribunal, the Registrar is required to issue:

(a) a subpoena to give evidence, requiring the person to whom it is directed to attend and give evidence at the proceedings; or

(b) a subpoena for production, requiring the person to whom it is directed to attend and produce, for the purpose of evidence at the proceedings, any document or thing that is in his or her possession or control and specified in the subpoena.

(2) The regulations may make provision for or with respect to authorising compliance with a subpoena for production issued in respect of a document or thing by the production of the document or thing to the Registrar.

(3) A person is not required to comply with a subpoena unless, not later than a reasonable time before the day on which the person's attendance is required, tender is made of an amount in respect of expenses of complying with the requirements of the subpoena, determined in accordance with the regulations.

(4) A person is not bound, pursuant to a subpoena issued under this section, to produce any document or thing which is not specified or otherwise sufficiently described in the subpoena or which the person would not be bound to produce upon a subpoena for production in the Supreme Court.

Attendance

44B. (1) If the attendance of a peron before the Tribunal is required by a subpoena issued under section 44A for the purpose of giving evidence, or for the production of a document or thing, and the person defaults in attending as required by the subpoena, the Tribunal may, on the application of a party or of its own motion:

(a) issue, or make an order for the issue of, a warrant to a member of the Police Force or to such other person as the Tribunal may appoint, directing that the defaulting person be arrested and brought before the Tribunal and, where appropriate, be kept in custody as provided by subsection (3); or

(b) order the defaulting person to appear before the Tribunal to show cause as to why such a warrant should not be issued against that person,

and in either case may order the defaulting person to pay any costs attributable to the default.

(2) A person arrested pursuant to a warrant issued by or on the order of the Tribunal must be brought before the Tribunal as soon as practicable.

(3) The person is to be kept in custody as directed by the warrant until:

(a) the person is brought before the Tribunal or the person's earlier release is ordered by the Tribunal or the Supreme Court; or

(b) the person gives, in accordance with the regulations, an undertaking to comply with the requirements of the subpoena.

(4) A direction in a warrant for the keeping of a person in custody is sufficient authority for the person's being kept in custody in accordance with the direction.

(5) The regulations may make provision for or with respect to authorising compliance with an undertaking referred to in this section for production given in respect of a document or thing by the production of the document or thing to the Registrar.

(6) This section applies in relation to a subpoena issued under section 44A to the exclusion of sections 13 and 14 of the Evidence Act 1898.

Contempt of the Tribunal

44C. (1) A person who publishes any matter, or causes any publication to be made, in contravention of an order under section 43A is guilty of contempt of the Tribunal.

(2) If a person is brought before the Tribunal pursuant to a warrant for a failure to produce a document or thing as required by a subpoena, the person is guilty of contempt of the Tribunal committed in the face of the Tribunal unless the person produces the document or thing, or gives, in accordance with the regulations, an undertaking to produce it.

(3) Failure to comply with an undertaking referred to in this section or in section 44B is to be taken to constitute a contempt of the Tribunal committed in the face of the Tribunal.

(4) A contempt of the Tribunal referred to in this section or arising from the application, in accordance with this Part, of any provision of the Royal Commissions Act 1923 is punishable by the Supreme Court in the same way as a similar contempt of a royal commission is punishable by that Court.

Inquiries commissioned by Minister

45. (1) At the request of the Minister, the Tribunal is to inquire into and report to the Minister on such of the following matters as may be specified in the request:

(a) any matter relating to discipline of members of the Police Force;

(b) any matter relating to the exercise or performance by members of the Police Force, in a particular case or cases, of their powers, authorities, duties and functions;

(c) any matter which, in the opinion of the Minister, is relevant to or arises out of a matter referred to in paragraph (a) or (b).

(2) For the purposes of this section:

(a) the Tribunal shall be constituted by the President sitting alone; and

(b) the Royal Commissions Act 1923 applies to and in respect of the Tribunal and an inquiry under this section in the same way as it applies to and in respect of a sole commissioner under that Act who is a Judge of the Supreme Court and to and in respect of an inquiry by him as a commissioner under that Act, and so applies as if section 17 (4) of that Act had been repealed.

(3) At any proceedings before the Tribunal under this section, the public shall not be excluded unless the Tribunal so orders.

(4) A report under subsection (1):

(a) shall be presented to Parliament; and

(b) may contain a recommendation that the report be made public forthwith.

(5) Where a report under subsection (1) contains a recommendation referred to in subsection (4) (b), the Minister may make the report public before it is presented to Parliament.

(6) Where a departmental charge recommended in a report under subsection (1) has been preferred against a member of the Police Force and, otherwise than after the Tribunal has commenced to hear the charge under section 41, the charge is admitted by the member:

(a) the Minister, before making a recommendation, if any, to the Governor with respect to the penalty which might be imposed by the Governor on the member; or

(b) the Commissioner, before imposing a penalty, if any, on the member,

as the case may require, shall:

(c) refer, for the consideration of the Tribunal as constituted for the purposes of this section, the matter of an assessment of an appropriate penalty; and

(d) take into consideration the recommendation made under section 45A (1) by the Tribunal with respect to the penalty.

Recommendations as to penalties

45A. (1) Where, under section 45 (6) (c), the Minister or the Commissioner refers to the Tribunal, as constituted for the purposes of section 45, the matter of an assessment of an appropriate penalty which might be imposed on a member of the Police Force in respect of a departmental charge preferred against the member, the Tribunal, as so constituted, shall make an assessment of the penalty, if any, which the Tribunal considers would be appropriate to be imposed upon the member and advise the Minister or the Commissioner, as the case may require, of its recommendations with respect to that penalty.

(2) Where:

(a) while a departmental charge preferred against a member of the Police Force is being heard by the Tribunal exercising its jurisdiction under section 41, the member admits the charge; or

(b) the Tribunal, exercising that jurisdiction, determines that a departmental charge preferred against a member of the Police Force has been proved,

the Tribunal shall make an assessment of the penalty, if any, which the Tribunal considers would be appropriate to be imposed upon the member and advise the Minister or the Commissioner, as the case may require, of its recommendation with respect to that penalty.

(3) Before:

(a) the Minister makes a recommendation, if any, to the Governor with respect to the penalty which might be imposed by the Governor on a member of the Police Force; or

(b) the Commissioner imposes a penalty, if any, on a member of the Police Force,

in relation to a departmental charge preferred against the member and heard or partly heard by the Tribunal exercising its jurisdiction under section 41, the Minister or the Commissioner, as the case may be, shall take into consideration the recommendation made under subsection (2) by the Tribunal with respect to that penalty.

(4) At any proceedings before the Tribunal under this section:

(a) the Commissioner and the member of the Police Force with respect to whom a recommendation under this section is required to be made are each entitled to be represented by counsel, solicitor or agent; and

(b) the public shall not be excluded unless the Tribunal exercising jurisdiction at those proceedings otherwise orders.

(5) For the purposes of this section, but subject to sections 41 (2) and 45 (2) (a), there may be contemporaneous sittings of the Tribunal constituted by the President or different members and those sittings may be in different places.

Sittings etc. of Tribunal

46. (1) The President shall arrange for sittings of the Tribunal and the allocation of its work.

(2) If the President is not the Chief Judge of the District Court of New South Wales, the President shall arrange for sittings and allocate work subject to consultation with the Chief Judge.

Proceedings of Tribunal

47. Subject to this Act and the regulations, the Tribunal has control of its proceedings.

PART 8—GENERAL

Powers etc. of acting Ombudsman, Assistant Ombudsman and special officer

48. (1) This Act applies to and in respect of an acting Ombudsman appointed under section 7 of the Ombudsman Act 1974 in the same way as it applies to and in respect of the Ombudsman.

(2) * * * * *

(3) The powers, authorities, duties and functions of the Ombudsman that may, under section 10 of the Ombudsman Act 1974, be delegated to a special officer of the Ombudsman (other than an Assistant Ombudsman) do not include:

(a) any power or duty to make a report under this Act; or

(b) the power to require additional information referred to in section 24 (2).

(4) The powers, authorities, duties and functions of the Ombudsman that may, under section 10 of the Ombudsman Act 1974, be delegated to

an Assistant Ombudsman do not include any power or duty to make a report under this Act (other than a report under section 27, 28 or 31).

49. * * * * *

Liability to do duty continues

50. This Act does not operate to absolve a member of the Police Force who receives a complaint from liability to perform any duty imposed on him otherwise than by this Act.

Ombudsman may require further information

51. For the purposes of Part 3 or for the purpose of determining whether a complaint should be investigated under Part 4, the Ombudsman may, where the complainant is identified, do any one or more of the following:

(a) request a complainant to attend before him for the purpose of providing further information concerning the complaint;

(b) request the complainant to provide further written particulars concerning the complaint;

(c) request the complainant to verify his complaint, or any particulars given by him concerning his complaint, by statutory declaration.

Commissioner to provide information

52. Where the Ombudsman provides the Commissioner with a copy of a document incorporating a complaint, the Commissioner shall, at the request of the Ombudsman, provide the Ombudsman, for the purposes of Part 3 or for the purpose of determining whether the complaint should be investigated under Part 4:

(a) with an explanation of the policies, procedures and practices of the Police Service relevant to the conduct complained of; and

(b) to the extent to which he is able to do so, with any explanation, comment or information sought by the Ombudsman in connection with the complaint.

Objections to requests

53. (1) If a complainant objects to a request under section 51, or the Commissioner objects to a request under section 52, and the Ombudsman is informed of the objection and the grounds of the objection, the Ombudsman may withdraw the request if he is satisfied that the grounds of the objection are well-founded.

(2) Where a request under section 51 or 52 is withdrawn by the Ombudsman, it shall be deemed never to have been made.

Failure to comply with request

54. (1) Where the Ombudsman makes a request under section 51 he shall, subject to section 53, take no further action in connection with the complaint to which the request relates until the request is complied with or a reasonable time for compliance with the request has elapsed.

(2) If a request under section 51 is not complied with within a reasonable time, the Ombudsman may treat the complaint to which it relates as having been dealt with under Part 3 in a manner acceptable to the complainant and if he so treats the complaint he shall inform the Commissioner and the complainant accordingly.

Certain provisions of Ombudsman Act 1974 to apply

55. Sections 17, 18 and 23 of the Ombudsman Act 1974 apply to and in respect of the exercise and performance by the Ombudsman of the powers, authorities, duties and functions conferred and imposed by this Act in the same way as they apply to and in respect of an investigation by the Ombudsman under the Ombudsman Act 1974.

Annual report

56. The reference in section 30 (1) of the Ombudsman Act 1974 to the work and activities in respect of which the Ombudsman is required to make an annual report for presentation to Parliament includes a reference to his work and activities under this Act.

Information to be confidential

57. Without limiting the operation of section 34 (1) (a) of the Ombudsman Act 1974, in the application of section 34 (1) of that Act to and in respect of information received in the course of the administration or execution of this Act, the reference in that subsection:

(a) to a public authority—shall be construed as a reference to a member of the Police Force;

(b) to the head of that authority—shall be construed as a reference to the Commissioner; and

(c) to the responsible Minister—shall be construed as a reference to the Minister administering the Police Service Act 1990.

Ombudsman or officer as witness

58. (1) The Ombudsman shall not, nor shall an officer or special officer of the Ombudsman who is not a member of the Police Force, be competent or compellable, in any legal proceedings or in any proceedings before the Tribunal, to give evidence or produce documents in respect of any matter in which he is or was involved in the course of the administration or execution of this Act.

(2) Subsection (1) does not apply to or in respect of any proceedings under section 37 of the Ombudsman Act 1974 or under Part 3 of the Royal Commissions Act 1923.

(3) Subsections (1) and (2) do not prejudice or affect the operation of section 35 of the Ombudsman Act 1974 in relation to the administration and execution of this Act.

Certain documents privileged

59. (1) A document brought into existence for the purposes of this Act is not admissible in evidence in any proceedings other than an inquiry under section 45 or proceedings which concern the discipline of members of the Police Force and which are dealt with by:

(a) the Commissioner; or

(b) the Tribunal; or

(c) the Government and Related Employees Appeal Tribunal.

(2) Subsection (1) does not apply to or in respect of:

(a) a document incorporating a complaint;

(b) a document published by order of, or under the authority of, either House, or both Houses, of Parliament;

(c) a document published under section 32 (3) or 45 (5); or

(d) a document that a witness is willing to produce.

(3) Subsections (1) and (2) do not operate to render admissible in evidence in any proceedings any document that would not have been so admissible if this section had not been enacted.

Publicity

60. (1) The Ombudsman shall cause to be prepared pamphlets briefly explaining the rights and duties of members of the Police Force and the public under this Act.

(2) The pamphlets referred to in subsection (1) shall be written in the English language and in such other languages as the Ombudsman considers necessary.

(3) The Ombudsman shall:

(a) supply the Commissioner with sufficient quantities of the pamphlets referred to in subsection (1) to enable a reasonable supply of the pamphlets to be available at each police station in the State, and the Commissioner shall distribute the pamphlets accordingly;

(b) supply the Secretary of the Attorney General's Department with sufficient quantities of the pamphlets referred to in subsection (1) to enable a reasonable supply of the pamphlets to be available at the office of each court of petty sessions in the State, and that permanent head shall distribute the pamphlets accordingly;

(c) make such arrangements as he thinks fit with any Government department or instrumentality or with any other body or organisation for making the pamphlets available, or distributing them, to any interested person; and

(d) take such further or other action as the Ombudsman considers necessary to bring the provisions of this Act to the attention of interested persons.

Regulations

61. (1) The Governor may make regulations for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for the purpose of carrying out or giving effect to this Act.

(2) Without affecting the generality of subsection (1), regulations may be made for and with respect to the institution and conduct of proceedings before the Tribunal.

NOTES

Table of Acts

Police Regulation (Allegations of Misconduct) Act 1978 No. 84. Assented to, 11.9.1978 Date of commencement, secs. 1 and 2 excepted, 19.2.1979, sec. 2 and Gazette No. 27 of 16.2.1979, p. 705. This Act is reprinted as amended by:

Police Regulation (Allegations of Misconduct) Appeal Tribunal (Amendment) Act 1980 No. 48. Assented to, 28.4.1980. Date of commencement of sec. 3, 1.9.1980, sec. 2 (2) and Gazette No. 121 of 29.8.1980, p. 4509.

NOTES—*continued*

Table of Acts—*continued*

Miscellaneous Acts (Deputy Commissioners of Police) Amendment Act 1981 No. 121. Assented to, 22.12.1981. Date of commencement of Sch. 1, 30.12.1981, sec. 2 (2) and Gazette No. 196 of 24.12.1981, p. 6724.

Police Regulation (Allegations of Misconduct) Amendment Act 1983 No. 191 Assented to, 31.12.1983. Date of commencement of Sch. 1 (3), 4.5.1984, sec. 2 (3) and Gazette No. 69 of 4.5.1984, p. 2374; date of commencement of Schs. 3 and 4 (1)–(3), 17.2.1984, sec. 2 (3) and Gazette No. 24 of 17.2.1984, p. 753.

Police Regulation (Allegations of Misconduct) (Commissioner of Public Complaints) Amendment Act 1984 No. 77. Assented to, 27.6.1984. Date of commencement of Sch. 1, 20.8.1984, sec. 2 (2) and Gazette No. 125 of 17.8.1984, p. 4185.

Police Regulation (Allegations of Misconduct) Amendment Act 1984 No. 81. Assented to, 27.6.1984. Date of commencement of Sch. 1, 1.10.1984, sec. 2 (2) and Gazette No. 135 of 14.9.1984, p. 4539.

Miscellaneous Acts (State Drug Crime Commission) Amendment Act 1985 No. 118. Assented to, 1.11.1985.

Police Regulation (Allegations of Misconduct) Amendment Act 1985 No. 212. Assented to, 10.12.1985.

Police Regulation (Allegations of Misconduct) Amendment Act 1987 No. 135. Assented to, 16.6.1987. Date of commencement of Sch. 1, 4.8.1987, sec. 2 (2) and Gazette No. 126 of 31.7.1987, p. 4253.

Police Regulation (Merit Appointments) Amendment Act 1987 No. 291. Assented to, 16.12.1987. Date of commencement of sec. 4 (a), 1.1.1988, sec. 2 (1); date of commencement of sec. 4 (b), 1.4.1989, sec. 2 (2).

Statute Law (Miscellaneous Provisions) Act 1989 No. 89. Assented to, 13.6.1989. Date of commencement of the provisions of Sch. 1 relating to the Police Regulation (Allegations of Misconduct) Act 1978, assent, sec. 2 (1).

Statute Law (Miscellaneous Provisions) Act 1990 No. 46. Assented to, 22.6.1990. Date of commencement of the provision of Sch. 1 relating to the Police Regulation (Allegations of Misconduct) Act 1978, assent, sec. 2.

Police and Superannuation Legislation (Amendment) Act 1990 No. 48. Assented to, 26.6.1990. Date of commencement, 1.7.1990, sec. 2 and Gazette No. 82 of 29.6.1990, p. 5409.

Police Regulation (Allegations of Misconduct) Amendment Act 1990 No. 109. Assented to, 14.12.1990. Date of commencement, Sch. 1 (7) excepted, 18.1.1991, sec. 2 and Gazette No. 16 of 18.1.1991, p. 467; date of commencement of Sch. 1 (7), 11.3.1991, sec. 2 and Gazette No. 41 of 8.3.1991, p. 1903.

This Act has also been amended pursuant to an order under sec. 9B of the Reprints Act 1972 No. 48 (*formerly* Acts Reprinting Act 1972). Order dated 24.2.1987 and published in Gazette No. 38 of 27.2.1987, p. 1085.

Table of Amendments

Sec. 3—Am. 1983 No. 191, Sch. 1 (1). Rep. G.G. No. 38 of 27.2.1987, p. 1085.
Sec. 4—Am. 1981 No. 121, Sch.; 1990 No. 48, Sch. 1; 1990 No. 109, Sch. 1 (1).
Sec. 5—Am. 1983 No. 191, Sch. 2 (1); 1984 No. 77, Sch. 1 (1); 1985 No. 118, Sch. 3.

NOTES—*continued*

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Sec. 6—Am. 1983 No. 191, Sch. 2 (2); 1984 No. 77 Sch. 1 (2).
Sec. 11—Am. 1981 No. 121, Sch.
Sec. 13—Am. 1983 No. 191, Sch. 2 (3).
Sec. 17—Am. 1981 No. 121, Sch.
Sec. 18—Am. 1983 No. 191, Sch. 2 (4).
Sec. 19—Am. 1983 No. 191, Sch. 1 (2).
Sec. 20—Subst. 1983 No. 191, Sch. 4 (1).
Sec. 22—Am. 1990 No. 48, Sch. 1.
Secs. 24A–24C—Ins. 1987 No. 135, Sch. 1 (1).
Sec. 25—Am. 1983 No. 191, Sch. 3 (1).
Sec. 25A—Ins. 1983 No. 191, Sch. 3 (2).
Sec. 26—Am. 1983 No. 191, Sch. 3 (3).
Sec. 27—Am. 1983 No. 191, Schs. 2 (5), 3 (4).
Sec. 28—Am. 1983 No. 191, Sch. 3 (5).
Sec. 29—Am. 1983 No. 191, Sch. 2 (6); 1990 No. 48, Sch. 1.
Sec. 30—Subst. 1983 No. 191, Sch. 4 (2).
Sec. 30A—Ins. 1983 No. 191, Sch. 4 (2).
Sec. 31—Am. 1983 No. 191, Sch. 2 (7).
Sec. 32—Am. 1983 No. 191, Sch. 4 (3).
Sec. 33—Am. 1990 No. 48, Sch. 1.
Sec. 34—Am. 1983 No. 191, Sch. 1 (3); 1985 No. 212, Sch. 1 (1); 1990 No. 48, Sch. 1; 1990 No. 109, Sch. 1 (2).
Sec. 35—Am. 1983 No. 191, Sch. 1 (4); 1990 No. 48, Sch. 1.
Sec. 35A—Ins. 1983 No. 191, Sch. 1 (5). Am. 1984 No. 81, Sch. 1; 1987 No. 291, s. 4; 1990 No. 48, Sch. 1.
Sec. 36—Am. 1990 No. 109, Sch. 1 (3).
Sec. 37—Am. 1980 No. 48, s. 3; 1989 No. 89, Sch. 1.
Sec. 38—Am. 1990 No. 109, Sch. 1 (4).
Sec. 41—Am. 1983 No. 191, Sch. 4 (4).
Sec. 42—Am. 1983 No. 191, Sch. 4 (5).
Sec. 43—Am. 1990 No. 109, Sch. 1 (5).
Sec. 43A—Ins. 1990 No. 109, Sch. 1 (6).
Sec. 44—Am. 1983 No. 191, Schs. 2 (5), 4 (6).
Secs. 44A–44C—Ins. 1990 No. 109, Sch. 1 (7).
Sec. 45—Am. 1983 No. 191, Sch. 4 (7); 1990 No. 48, Sch. 1; 1990 No. 109, Sch. 1 (8).
Sec. 45A—Ins. 1983 No. 191, Sch. 4 (8).
Sec. 46—Subst. 1989 No. 89, Sch. 1.
Sec. 48—Am. 1985 No. 212, Sch. 1 (2); 1990 No. 46, Sch. 1.
Sec. 49—Am. 1981 No. 121, Sch.; 1989 No. 89, Sch. 1. Rep. 1990 No. 48, Sch. 1.
Sec. 51—Am. 1983 No. 191, Sch. 2 (8).
Sec. 52—Am. 1990 No. 48, Sch. 1.
Sec. 57—Am. 1983 No. 191, Sch. 3 (6); 1990 No. 48, Sch. 1.
Sec. 58—Am. 1983 No. 191, Sch. 3 (7).
Sec. 59—Am. 1983 No. 191, Sch. 3 (8); 1990 No. 48, Sch. 1; 1990 No. 109, Sch. 1 (9).
Sec. 60—Am. 1987 No. 135, Sch. 1 (2).
Sec. 61—Am. 1983 No. 191, Sch. 4 (9).

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