



Council of Social Service of New South Wales

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Mr Andrew Tink AM
The Secretariat,
Review of Police Oversight
C/O: Department of Justice,
Sydney, NSW

Via email to: policeoversightreview@justice.nsw.gov.au

Dear Mr Tink,

RE: REVIEW OF POLICE OVERSIGHT IN NEW SOUTH WALES (NSW)

The Council of Social Service of NSW (NCOSS) thanks you for the opportunity to provide a submission to the review of police oversight in NSW. We are mindful of the need for enhanced independent oversight of the police, in light of the report of the NSW Parliamentary Committee report on Operation Prospect, as well as past reports of relevant Parliamentary oversight committees.^{1,2} We note, too, the 2013 report by the former Commonwealth Attorney General, the Hon. Robert McClelland, on this issue.³ Young people, sexual and ethnic minorities, people experiencing mental health issues, as well as those who are socio-economically disadvantaged are more likely to experience violence and have no recourse to any form of effective redress - a central consideration in access to justice.⁴ This is an issue that concerns NCOSS. Accordingly, in responding to the call for submissions, we direct our comments at the following terms of reference for your inquiry, below.

Options for a single civilian oversight model for police in NSW

Effective police oversight, as "must not only be actually independent, and external to the police organization, it must be seen to be independent and constantly be demonstrated to be so to achieve credibility in the eyes of the public."⁵ Currently in NSW, there is overlap in terms of functions and considerable uncertainty for people who lodge complaints, particularly in relation to establishing the status or progress of specific complaints. The recent findings of a Parliamentary report into Operation Prospect, which raise issues concerning recourse to a complaints mechanism for police officers themselves, in our view, lend credence to the need for an effective independent oversight model in NSW.

¹ NSW Parliament Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission (2014). Report 8/55: General meetings. Sydney: NSW Parliament.

² NSW Legislative Council Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect" (2015). Sydney: NSW Parliament.

³ McClelland, R. (2013). *Oversight of Police Critical Incidents, Report to Hon Barry O'Farrell Premier of NSW*. Sydney: Author.

⁴ Hopkins, T. (2009). *An Effective System for Investigating Complaints Against Police: A study of human rights compliance in police complaint models in the US, Canada, UK, Northern Ireland and Australia*. Melbourne: Victoria Law Foundation.

⁵ den Heyer, G. & Beckley, A. (2013). 'Police independent oversight in Australia and New Zealand,' *Police Practice and Research*, 14(2): 130-143.

Moreover, there are a number of key considerations in relation to a system that permits civil action, but lacks an independent oversight body. A primary consideration is that this process is potentially costly and, secondly, that it effectively pits the person making a complaint against the police force and State of New South Wales itself. This potentially creates barriers to access to justice, particularly for members of marginalised communities. Critically, however, a system whereby civil remedies alone are available discourages the police and other bodies that administer justice from making changes to operational policies and practice(s).

These issues could be addressed, in large part, through a civilian oversight model that is independent, adequately resourced, and has appropriate statutory power(s) to discharge its functions.⁶ NCOSS considers that there are considerable efficiencies to be gained from a single civilian oversight model for police in NSW, provided that no gaps in the legislative framework and operational policy remain and that *all* people have recourse to an effective complaints mechanism.

Best practice models from around the world

Whilst there are many distinct approaches to police oversight, we wish to draw your attention to two: Northern Ireland and New Zealand. NCOSS is of the view that the experiences from these two jurisdictions are instructive.

Northern Ireland

In Northern Ireland, police oversight is exercised by the Police Ombudsman for Northern Ireland under the *Police (Northern Ireland) Act 1998*. The Police Ombudsman investigates all serious complaints and critical incidents. The Ombudsman can, where the matter is not a serious complaint, refer it for resolution. The Police Ombudsman is able to investigate a matter referred to them by a complainant, or the Police Board of Northern Ireland and can pursue a matter, provided it is in the public interest to do so.

Roth summarises the process of investigation and resolution, as follows:

After an investigation, the Police Ombudsman officer or police officer appointed to conduct the investigation is to submit a report to the Police Ombudsman. The Police Ombudsman is to consider the report and determine whether it indicates that a criminal offence may have been committed by a member of the police force. If so, the Police Ombudsman must send a copy of the report to the Director of Public Prosecutions together with such recommendations as appear to be appropriate....If (a) criminal proceedings are not instituted, or have been concluded; or (b) a complaint is not suitable for mediation or attempts to resolve it in that way have been unsuccessful – the Police Ombudsman is to consider the question of disciplinary proceedings. The Police Ombudsman is to send the appropriate disciplinary authority (generally the Chief Constable) a memorandum containing a recommendation as to whether or not such proceedings should be brought. If the Police Ombudsman recommends that such proceedings should be brought, and the Chief Constable is unwilling to bring such proceedings, the Police Ombudsman may, after consultation with the Chief Constable, direct him or her to bring disciplinary proceedings; and this direction must be complied with.⁷

New Zealand

The New Zealand model is similarly independent, albeit without a statutory provision for the authority concerned to direct disciplinary action within the police force. The relevant body that investigates allegations of police misconduct, neglect of duty or critical incidents in New Zealand is

⁶ For a broader discussion on the move towards greater oversight, see: Prenzler, T. (2011). 'The evolution of police oversight in Australia,' *Policing and Society*, 21 (3): 284-303.

⁷ Roth, L. (2015). *Briefing paper 6/2015: External oversight of police conduct*. Sydney: NSW Parliamentary Research Service, p.40-41.

the Independent Police Conduct Authority (IPCA), established under the *Independent Police Conduct Authority Act 1988*.⁸ The Authority has the power to:

- Receive complaints (i) alleging misconduct or neglect of duty by any member of Police or (ii) concerning any Police practice, policy or procedure affecting a complainant; or
- Investigate incidents in which a member of Police (acting in the execution of his or her duty) causes or appears to have caused death or serious bodily harm.

Critically, the Act imposes a positive duty on Police to notify the IPCA where an incident of serious bodily harm, or death, has occurred.

Complaints may be referred to the Police for investigation, with IPCA oversight, or investigated independently by the IPCA itself. Although the IPCA has the same powers as a commission of inquiry to summon witnesses, seek information and make recommendations, the authority itself cannot lay charges or initiate disciplinary action. However, if, following the notification of their findings and recommendations to Police, the IPCA are not satisfied with the response, they are obliged to notify the Minister of Police and Attorney General who, in turn, must inform Parliament.

The IPCA is designated as an Independent Crown Entity (ICE), which means that although it is funded through a 'Vote', it reports to Parliament and not, strictly-speaking, a department or other government body. New Zealand's oversight bodies, including the IPCA, also operate as National Preventive Mechanisms under the Optional Protocol against Torture (OPCAT), which the country has both signed and ratified. In practical terms, this means that aside from investigating individual complaints, these bodies issue annual joint thematic reports on areas of concern, with an emphasis on achieving systemic changes in specific areas and thereby *preventing* further incidents that may give rise to complaints.⁹

A recommended model for police oversight including guidance on its design, structure, cost and establishment

NCOSS argues that a hybrid model, incorporating aspects of the Northern Ireland and New Zealand systems is the most desirable option. An independent body should be independent and empowered by statute to inquire into two areas: (1) allegations of police misconduct and neglect of duty; as well as (2) 'incidents where a member of Police (acting in the execution of his or her duty) causes or appears to have caused death or serious bodily harm' (within the scope of what is considered a 'critical incident' in NSW).

It should also have the ability to refer cases to the Director of Public Prosecutions (DPP) and the ability to report directly to the NSW Parliament, and require a response in Parliament by the Attorney General to incidents of a serious nature where no disciplinary action(s) has been taken by the NSW Police, in cases where adverse findings have been made.

At an operational level, NCOSS accepts that, given the likely high-volume of complaints to such as body, not all allegations are likely to be fully investigated by the body itself. Accordingly, we are of the view that a triage system for complaints that do not meet the threshold for bodily harm or serious misconduct (which could be defined in statute) could be implemented. This will enable complaints that do not meet this specific threshold to be referred for internal investigation where necessary, whilst all incidents involving alleged bodily harm, or serious misconduct would be investigated by the independent body itself. This assures members of the public, as well as serving

⁸ <http://www.ipca.govt.nz/Site/about/Role-and-powers.aspx>

⁹ For an example of how the co-ordinating NPM reports in the New Zealand context, see: <http://www.ipca.govt.nz/Site/media/2012/2012-October-23-Joint-Thematic-Review.aspx>

police officers, that where instances of serious misconduct or bodily harm are concerned, genuine independent oversight is exercised.

Further contact

Yours sincerely