

ROYAL COMMISSION
INTO THE
NEW SOUTH WALES POLICE SERVICE

FINAL REPORT

VOLUME II: REFORM

Commissioner: The Hon Justice JRT Wood

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EXPLANATORY NOTES

The amalgamation of the New South Wales Police Force (operations) and the New South Wales Police Department (policy and administrative support) into a single entity known as the New South Wales Police Service, commenced in June 1987. This was formalised by the *Police Service Act 1990* (NSW) which came into effect on 1 July 1990. Throughout this Report, the organisation is generally referred to as 'the Service' or 'the Police Service'.

All legislation referred to is NSW legislation unless otherwise indicated.

The Commission was assisted by a number of consultants who prepared research papers on matters of relevance, in particular Dr Janet Chan, Dr David Dixon, Mr Mark Finnane and Mr Chris Cunneen.

The employee associations for sworn officers of the NSW Police Service are the Police Association of New South Wales, for non-commissioned officers, and the Commissioned Police Officers' Association for commissioned officers. Throughout this Report they will be referred to as 'the Associations' or 'the Police Associations'. A reference to 'the Police Association' (singular) is a reference to the Police Association of New South Wales.

ABBREVIATIONS USED IN THIS REPORT

Abbreviations are for NSW organisations unless otherwise stated.

ABCI	Australian Bureau of Criminal Intelligence
ACLO	Aboriginal Community Liaison Officer
AFP	Australian Federal Police
AIC	Australian Institute of Criminology
ALRC	Australian Law Reform Commission
ASIO	Australian Security Intelligence Organisation
BCI	Bureau of Criminal Intelligence
CAN	Court Attendance Notice
CAPS	Career Advancement Planning System
CARE	Centre for Applied Research and Education
CAU	Customer Assistance Unit (UK)
CCPC	Commission to Combat Police Corruption (New York)
CCRB	Civilian Complaint Review Board (New York)
CIB	Criminal Investigation Bureau
CIU	Crime Intelligence Unit
CIS	Complaints Information System
CJC	Criminal Justice Commission (Queensland)
COPS	Computer Operated Policing System
CPEA	Child Protection Enforcement Agency
CPOA	Commissioned Police Officers' Association of NSW
CPS	Crown Prosecution Service (UK)
DEA	Drug Enforcement Agency
DEET	Department of Employment, Education and Training (Commonwealth)
DLEB	Drug Law Enforcement Bureau
DPP	Director of Public Prosecutions
DPP (Cth)	Director of Public Prosecutions (Commonwealth)
EEO	Equal Employment Opportunity
ERISP	Electronically recorded interview between a suspect and police
FCAN	Field Court Attendance Notice
FEA	Fraud Enforcement Agency
FTO	Field Training Officer
GREAT	Government and Related Employees Appeal Tribunal

HECS	Higher Education Contribution Scheme
HOD	Hurt on Duty
HRAC	Human Resources Advisory Committee
HRM	Human Resources Management
HSC	Higher School Certificate
IA	Internal Affairs Branch or Office, NSW Police Service
ICAC	Independent Commission Against Corruption
IPETAC	Interim Police Education and Training Advisory Council
IPSU	Internal Police Security Unit
IR Act	<i>Industrial Relations Act 1996</i>
IT	Information Technology
LD	listening device
LRO	Legal Representation Office
JTF	Commonwealth-NSW Joint Task Force on Drug Trafficking
MACPA	Ministerial Advisory Committee on the Police Academy
MCPE	Mandatory Continuing Police Education
MMP	Methadone Maintenance Program
NCA	National Crime Authority
NPRU	National Police Research Unit
NSEP	Needle & Syringe Exchange Program
NSWCC	New South Wales Crime Commission
NUCS	National Uniform Crime Statistics Program
NWMCS	North West Major Crime Squad
NYPD	New York Police Department (New York)
ODPP	Office of the Director of Public Prosecutions
OMD	Official Misconduct Division, Criminal Justice Commission, (Queensland)
OPM	Office of Public Management
OPR	Office of Professional Responsibility
ORC	Operations Review Committee, Independent Commission Against Corruption
PACE Act	Police and Criminal Evidence Act (UK)
PAD	Prohibited Amusement Device
PAL	Police Assistance Line
PARC	Police Academy Review Committee
PBC	Police Boys' Clubs
PC	personal computer
PCBC	Police Citizens' Boys Club
PCCM	Police Complaints Case Management System

PCYC	Police Citizens' Youth Clubs (1985-1995), and Police & Community Youth Clubs (1995 to present)
PEAC	Police Education Advisory Council
PEDO	Patrol Education Development Officer
PIB	Professional Integrity Branch
PIC	Police Integrity Commission
PJC	Parliamentary Joint Committee
PRAM Act	<i>Police Regulation (Allegations of Misconduct) Act 1978</i>
PREP	Police Recruit Education Program
PSAC	Police Superannuation Advisory Committee
PSRG	Protective Security Response Group
PSSSE	Police Service Senior Executive Service
RCPS	Royal Commission into the New South Wales Police Service
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
RCIDT	Royal Commission of Inquiry into Drug Trafficking
RCIU	Royal Commission Implementation Unit
RCRU	Royal Commission Response Unit
RCT	Royal Commission Transcript (Commissioner Wood)
RCT(U)	Royal Commission Transcript (Commissioner Urquhart)
SA PCA	South Australian Police Complaints Authority
SCAT	State Commander's Action Team
SCORPIO	Sub-Committee on Response Policing in all Operations
SEG	State Executive Group
SIG	Special Investigative Group
SOG	Special Operations Group
SOP	Standard Operating Procedures
SP	starting price
SPO	Student Police Officer
SPG	Strategic Planning Group
SWOS	Special Weapons Operations Squad
TAFE	Technical and Further Education
TER	Tertiary Entrance Rank
TI	telephone interception
TI Act	<i>Telecommunications (Interception) Act 1979 (Cth)</i>
TIMS	Task Force Investigation Management System
TRG	Tactical Response Group
TSU	Technical Surveillance Unit

GLOSSARY

The expressions listed below describe corrupt and/or criminal practices and other colloquialisms referred to in evidence received by the Royal Commission and in this Report.

A graders	expression used by police to describe the perceived elite members of the Service - usually referring to senior detectives in the specialist squads and task forces. (More often used by a person who considers that he or she is already a member of that group).
barbeque set	clique of senior and/or corrupt police in the 1980s who regularly socialised together.
blooding or 'to blood'	in general, the breaking in of police to the realities of policing following graduation from the Academy; in the context of corruption, the breaking in of police to corrupt practices by including them in an activity which may compromise them.
book up (drugs)	the police process of recording drugs seized during raids.
brick-up	see load up
buy-bust	form of police operation in which an undercover officer buys drugs and then arrests the dealer.
buy money	funds used by police to perform an undercover drug purchase.
Christmas Club	term given to a group of JTF detectives involved in the theft and distribution among themselves of a large sum of money.
cockatoo	a lookout
a 'cook'	the chemical process involved in the manufacture of amphetamine.
cut	the division of a quantity of a drug into smaller quantities often with the addition of another cheaper substance in order to increase the overall quantity.
deemed supply	common expression used for the offence under s. 29 <i>Drug Misuse and Trafficking Act 1985</i> whereby the possession by a person of a certain amount of a prohibited drug(s) is 'deemed' to be for supply unless the person can prove otherwise.
dive-bombing	surprise/random visits by a commander/supervisor to stations, operations or surveillance posts.
dog	an officer who reports other officers or breaks the code of silence.
goods or things in custody	common term for the offence under s. 527C <i>Crimes Act 1990</i> relating to goods or money found during a search, or in the possession of an individual, which are suspected of being stolen or

otherwise unlawfully obtained.

green-lighting	when police permit criminals to conduct robberies or drug dealing, for example, in return for money and/or information. The term is best known to describe the way corrupt police in the 1980s are alleged to have allowed certain criminals to conduct a series of armed robberies.
gutting	in the context of 'gutting a brief' it means to remove documents from or otherwise weaken a brief so that prosecution will be unsuccessful or charges reduced.
holding the line	sticking to a version of events
letter of comfort/assistance	a letter provided by a police officer to be used during sentencing hearings in support of a convicted criminal who has purportedly assisted the police in some way. For example, an officer may provide a letter of comfort for a criminal informant who has provided information which has led to the convictions of other individuals.
load up	where police charge an individual with a crime or crimes the person did not commit - usually by false evidence as to the finding of drugs, a weapon or other items in the possession of an accused, or as to admissions by that person.
note book confession or 'do a notebook'	a form of 'verbal' (see below) in which a record is made in a police note book of a 'confession' which did not in fact occur.
payback (complaint)	a complaint made by another officer against an officer who has himself made a complaint or arrested a civilian. A significant aspect of these complaints is that they come after their target has been identified or suspected of being an internal witness.
pulling (a brief)	withdrawing/losing a brief to prevent prosecution
rat	same as dog
rebirthing (of cars)	the transformation of a vehicle by use of parts taken from other vehicles so that the original will not be recognised.
roll-over	a witness who, after initially maintaining an exculpatory version of events common to other witnesses, provided evidence and/or admissions incriminating him or herself and/or other persons in corrupt or illegal activity.
running interference	to actively and purposively hamper an investigation or prosecution by for example, misinformation, avoidance, delay, or deliberate error.
'salting' of exhibits	interfering with exhibits usually to assist the prosecution
scrumdown	a police term for the practice of getting together to ensure police statements and/or evidence are consistent. The practice can be

used innocently or corruptly; the latter to ensure that the evidence and statements consistently support a corrupt purpose. For example, a scumdown may occur prior to an IA investigation to ensure that all police support each other and maintain a common story about the events in question.

shakedown	extortion; in relation to police refers to the extortion, through abuse of police powers, of money from, for example, licensed premises, unlicensed premises, drug dealers.
sharps	needles, as in hypodermic needles for drug injection
shooting-gallery	a place where a drug user can go to buy a syringe kit and rent a room for a short period of time to inject drugs.
show money	similar to 'buy money'; money shown by police to demonstrate bona fides preparatory to an undercover drug purchase.
show raids	a sham raid which is carried out for the purpose of indicating police activity when in fact the target has been given prior warning or protection from police action.
sly-grogging	selling alcohol without a liquor licence
sponsor	a senior officer who is a mentor, referee and/or advocate for a more junior officer.
spotters' fees	commissions paid to police by private businesses for introducing business to them, particularly funeral and tow truck businesses.
sting	undercover operation
the laugh	the term given to a system of corrupt payments, during the 1980s and early 1990s, between Kings Cross detectives and local criminals for protection from prosecution, primarily shared by sergeants.
trifecta	the colloquial term given by police to a series of three minor charges, for example, - offensive language/behaviour, resist arrest, and assault police. This practice has been used by police to legitimise arrests of individuals against whom there is no legitimate charge, or by way of payback or harassment.
'turn' a witness	the same as to 'roll' a witness; convincing a witness to assist a law enforcement agency in its inquiries including the giving of evidence against others.
used fit	a used needle and syringe
verbal	false evidence given by police that a suspect had confessed or made inculpatory remarks at the time of arrest or during an interview.
whale in the bay	a coded message used to warn colleagues of an internal investigation.

whippy

money found during the execution of a warrant which is retained and divided among police.

whistleblower

term given to an individual who reports misconduct or corruption of another member or members within the same organisation. In the context of policing the term used has until recently been 'internal informer'. This has been replaced by the term 'internal witness'.

CHAPTER 1

THE OVERALL PROBLEM AND THE OVERALL SOLUTION

A. AN OVERVIEW OF THE PROBLEMS FACED BY THE SERVICE

Inadequate Leadership

1.1 At the core of many of the problems that have emerged lies the traditional approach of the Service to its staff:

- they have largely been developed in a conditioned, inward-looking environment which has been characterised by command and control, autocracy and suspicion of new ideas;
- they have frequently been prevented from exercising their delegated authority, and have been encouraged instead to pass the decision upwards; and
- until relatively recently, they have not had the opportunity of command promotion until very late in their careers, at a time when their attitudes have been set, and the opportunities for radical or innovative change are few.

1.2 The depth of this problem has been seen in the disappointing results of the competency tests associated with the Executive Development Program which commenced in 1990,¹ and with the more recent assessment appraisals for persons currently holding the position of patrol commander.²

1.3 On the basis of information recently to hand,³ it appears that the patrol commander appraisals, using the assessment centre process, found that only approximately 36% of present incumbents had surpassed the minimum standards of competence for that position.

1.4 This is the first occasion on which a form of objective testing, developed and applied in conjunction with external expertise, has been used to assess competencies of police in their current office. The outcome is disappointing. It also throws doubt on whether:

- past selection processes have been appropriate and/or effective; and whether
- the Service has properly trained its staff to advance to important management positions.⁴

1.5 The exercise will need to be repeated with new candidates to find the best qualified staff for the key patrol commander positions. It will also assist to address areas of deficiency in those found wanting.

¹ In the first phase of the program results showed that many Police Service senior executives lacked skills in key competencies. These early results were confirmed by later results which also highlighted the narrow nature of early police training which did not prepare police for executive roles; see K. Moroney, Statement to RCPS, 22/8/94, RCPS Exhibit 26, Annexure 24 NSW Police Service Executive Development Program, P. Cioccarelli, 'The Challenge of Implementing Assessment Centres in a Traditional Police Organisation: A Police Service Case Study', 22nd International Congress, Assessment Centre Method, San Francisco, April 1994. Since that time a more comprehensive assessment centre testing has been carried out involving 104 out of the current 110 incumbent patrol commanders. The testing involved small groups attending for a period of two days. It included seven conference room exercises, four role play exercises and seven written exercises. Each candidate underwent two 1.5 hour interviews and also undertook a comprehensive knowledge-based test.

² A Pilot Selection Assessment Centre was conducted from March 1996 to September 1996 to assess applicants for five patrol commander vacancies. The process involved four selection tests - a behavioural event interview, a knowledge test, an integrity test through scenarios and a group exercise. A State-wide patrol commander assessment began in September 1996; see NSW Police Service, Submission re Employment and Promotion, July 1996, RCPS Exhibit 2466, pp. 41-42.

³ Letter from Executive Director, Human Resources and Development, to RCPS, 28/4/97.

⁴ See Volume I, Chapter 3 of this Report (Section E Promotions and Transfers) for further details of the assessment centre process.

1.6 Notwithstanding this experience, there are police in subordinate ranks of real ability, and with tertiary qualifications, who are capable of being trained to fill the gulf in senior command which has become apparent. What has been brought into focus is the process by which these selections should be made, opportunities provided and a new environment created which will bring an end to the limited, authoritarian and conservative outlook which has permeated the upper levels of the Service in the past.

Lack of Direction

1.7 Although the Service possessed a corporate plan as well as a mission statement, these were lacking in the clarity and detail required for practical guidance. Moreover, the Service has not subjected its range of activities to critical evaluation as to the way they might best be delivered.

1.8 Notwithstanding the attempts to devolve responsibility through the regions,⁵ the hierarchical structure of the Service has continued to demand that most decisions pass up the chain of command. Many reached the forum known as the State Executive Group (SEG), a group of senior staff who, until the arrival of Commissioner Ryan, met on a weekly basis.⁶ Apart from creating a significant administrative bottleneck, this process has reinforced an outmoded approach to management, compounding the risk-averse attitude of the Service, and its antipathy to change, and discouraging managerial autonomy and confidence in decision-making.

1.9 Deeply entrenched in the culture of the Service has been the view that it is possessed of special features which require it to be managed in a unique way. This has led to an aversion to consideration of progressive models adopted by other large organisations, and a failure to consult or involve the workforce in corporate planning. As a consequence the Service has been effectively insulated from the influences which could have led to improved efficiency, improved service to the community and the repelling of corruption.

1.10 In his statement to the Royal Commission, Commissioner Lauer, as he then was, set out the differences between the old and undesirable ways of the Service and the roles it had been evolving since the change from a 'Force' to a 'Service'⁷:

'Force' Role	'Service' Role
authoritarian	consultative
reactive only	proactive
closed culture	open culture
rank status	job responsibility
no mistakes allowed	learning from experience
limited police education	extensive education
working in isolation	working together

1.11 Regrettably, the attributes in the left-hand column are still a more accurate description of the functioning of the Service, than those in the right-hand column.

Lack of Openness

1.12 It is unrealistic to expect that individual police officers will make full disclosure of matters of potential concern if the Service itself does not set an example of openness and honesty. Yet this is an area where it has long failed its members; with very serious consequences.

⁵ In 1984.

⁶ The SEG is one of the key management committees of the Service. It meets monthly and comprises the Commissioner, Deputy Commissioner, the SEG Executive Officer and the Commanders of the senior commands, NSW Police Service, *Annual Report 1996*, p. 14.

⁷ A. R. Lauer, Statement to RCPS, November 1994, RCPS Exhibit 12, at 0162044.

1.13 At the core of this problem has been the hierarchical approach of the organisation and the controls and constraints applied to its staff. Information has been unnecessarily controlled and rationed in its release to the staff and even to the Minister for Police and the Parliament. Briefings and information have been progressively sanitised and repackaged as they rose through the hierarchy and critical comment which might have initiated remedial action has largely been suppressed.⁸ The pattern of denial and the reluctance to hear bad news has set a devastating example for the ranks, and the reflex resort to a cover-up in any internal inquiry is hardly surprising.

1.14 This has manifested itself in the experience of this Commission which has found that the greater majority of any material forthcoming from Service members which was critical of policies, procedures or events, arrived by means of anonymous documentation or telephone calls, or through anonymous submissions.

1.15 The attitude within the ranks was well-reflected by the somewhat bitter question posed by the action groups⁹ in their submission to the Royal Commission:

... why should so much of our energy go into propping up a system which has demonstrably failed us? We currently have a system of policing which:

- keeps people mainly in the dark, lost in a blizzard of white paper
- cannot admit to making mistakes
- cannot provide a socially and morally safe working environment for the vast majority of its staff who are honest, decent, hardworking and committed.

Inadequate Focus on Staff

1.16 Until relatively recently, the Service has focused too little attention upon the rights and career paths of staff. It seems not to have understood that goals and reform can only be secured by a process in which:

- the staff are intimately involved; and in which
- senior staff lead by example, and support those who actively seek to advance the objective set.

1.17 Staff management has been oriented more to a mix of control and fear¹⁰ than to example through good leadership or to recognition of integrity and good performance. Whilst a militaristic structure might have been acceptable at the time the Service originated, it is no longer appropriate.

1.18 A major difficulty has been the fact that rank has been linked to success and increased remuneration. Rank means status and power, yet work demands, skills and responsibilities are frequently not well related to rank nor its associated remuneration level. The jockeying, which the

⁸ Former Commissioner Lauer identified this type of approach in relation to crime statistics, RCT, 18/11/96, pp. 34428-29. Mr G. D. Bell, the Director of the Police Service Quality and Review Branch and responsible for internal audits gave evidence to the effect that the police hierarchy did not wish to hear 'bad news' from the internal audit process, RCT, 19/11/96, p. 34518.

⁹ These action groups were established under the aegis of the Police Board Reform Subcommittee, chaired by Dr. Crawford, to help set the direction of major reforms. They consisted of a wide cross-section of members of the Service and each Association was represented in each group. Seven groups were formed, each to address one of the following topics:

- Making the Patrol the Real Centre of Service Delivery;
- Delivering the Results;
- Getting the Strategic Direction Right;
- Achieving Performance through People;
- Building a High Performance Organisation;
- Doing the Real Business of Policing; and
- Expelling and Repelling Corruption.

See Royal Commission Implementation Unit, Implementation Status Report No. 3, May Update 1996, p. 2.

See also P. J. Crawford, RCT, 19/11/96, p. 34535.

¹⁰ P. J. Ryan, *Reform of the NSW Police Service - Phase 1*, 19/11/96, RCPS Exhibit 2820/01, p. 14.

Commission has seen, for promotional positions, and the widespread dissatisfaction¹¹ with the promotional process are indicators of a failed system.

1.19 The history of the Service has been one of standing by and allowing the promotion of flamboyant but unethical police as role models, rather than allowing ethical professional leaders to emerge as exemplars. It has been slow to recognise the activities of those who have stood up to corruption, or to promote the worth of the majority of capable and honest police who have steadily worked at their jobs without inviting media attention.

1.20 Nor has the Service seemed able to come to terms with the different ethos and attitudes apparent in some detectives, particularly those who ascribe to the mould of the hard street-wise officer with an implicit authority to cut corners. The failure of the Service, even after regionalisation, to bring detectives into a truly integrated Service, rather than leaving them largely unsupervised and adhering to a different set of rules has been a significant impediment to creation of a healthy workplace.

1.21 In the past, many staff have received only limited encouragement to grow and develop in the job, leading to widespread cynicism about patronage. The newly-developed Workforce Agenda Project gives hope for the future in this regard, the institution of the assessment centre process being a significant key to the selection of those who are best fitted to progress.

1.22 The human damage arising from this Royal Commission has been widespread, yet it has been essential. Notwithstanding, it is astonishing to see what has been achieved by the very many officers who have continued to carry out their roles, despite inadequate leadership, inappropriate systems and antiquated practices.¹² The question which is posed is how much more can be achieved in the future by a Service in which high morale and job satisfaction are restored.

Insularity of Police Education and Training

1.23 Whilst the ideals of the Police Academy and the motivation of many connected with it have been well-intentioned, delivery of police education has long risked domination by an attitude that it is by police for police, and that the broader community has little to contribute. This requires intensive review if future education and training are to contribute to a changed culture and widen the vision of the Service.

1.24 Current initiatives to develop an academic association with a greater number of tertiary institutions and to expand civilian input into the training of police are encouraging,¹³ and call for further development.

The Police Associations

1.25 The somewhat tense relationship which has existed between the Service and the Police Associations has not helped in securing joint progress towards reform. It has led to strident confrontation, and encouraged the Associations at times to bypass the Police Commissioner and lobby the Minister (or, if lacking a sympathetic audience there, the Shadow Minister), in an effort to secure advantageous outcomes or to block change. This creates undesirable conflict and obstructs necessary reform.

Inability to Implement Change

¹¹ As accepted by Commissioner Ryan; *ibid*, p. 35. There was also a large amount of anecdotal evidence in the form of anonymous complaints and submissions.

¹² *ibid*, p. 1.

¹³ NSW Police Service, *Annual Report 1995-96*, p. 71.

1.26 Whilst past attempts at reform¹⁴ have been well motivated, the great majority have failed, largely because the executive has tried to prescribe solutions without:

- developing an overall plan or direction against which the initiative could be considered;
- recognising the breadth of change to underlying attitudes and culture that is required;
- calling on the external skills needed to be introduced to secure change;
- considering how the change might affect the overall delivery of service; or
- involving the membership in the planning and implementation of the change.

B. THE PROCESS OF REFORM

1.27 It is an imperative that the reform process not lapse into the same institutional errors that have been seen in the past. Paradoxical as it might be, it is necessary that the Service repair itself, but it cannot do this without effecting substantial change to its old culture and systems. This cannot be achieved by proclamation or legislation alone.

1.28 There will have to be:

- a will and commitment on the part of the Service;
- a plan for reform, based upon the recommendations of this Commission, which is sufficiently flexible to allow adjustment;
- support from State and local government; and
- a process that will continue to drive reform after this Commission has concluded, that will audit its effectiveness, and will identify the need for further modification.

1.29 There are a number of circumstances which bode well for the future:

- the Service has acknowledged that there are problems of the magnitude and severity outlined in this Report, and has commenced implementation of phase one of Commissioner Ryan's Reform Plan;¹⁵
- action groups representing a wide cross-section of the Service have furnished perceptive submissions to this Commission, highlighting the areas which they have judged from their day-to-day workplace experience to be unsatisfactory;
- each of the Police Associations has expressed broad support for the Commission, and for the reform process;
- the two Interim Reports of this Commission have been largely implemented;
- the broader community has been shocked by the nature and the extent of the corruption revealed, and it expects a commitment from the Service to bring those practices to an end; and
- the Government, through its adoption of the measures recommended by the Commission, has shown strong support for a better Service, has resisted the temptation to band-aid measures, and has displayed a preparedness to adopt radical measures to implement that process. In this it has been accorded bipartisan support.

¹⁴ See Volume II, Chapter 3 of this Report.

¹⁵ P. Ryan, *Reform of the NSW Police Service - Phase 1*, 19/11/96, RCPS Exhibit 2820/01.

1.30 So long as the opportunity is now taken and the pressure is not released either through reduction of resources, failure to draw on external expertise, loss of interest, or complacency when the job is part done, this Commission is confident that reform can be achieved. Essential, however, to that will be a rigorous mechanism for critical evaluation from both inside and outside the Service.

1.31 The blueprint required must be one which:

- is sufficiently drastic to bring about real changes in attitudes, values, and practices;
- focuses on more than structural change; and
- is capable of implementation.

Otherwise the existing problems will only be rearranged. Some of the key elements required, which are developed later in this Volume, can be noted.

Professionalism

1.32 At the commencement of its round table discussions, the Commission postulated an approach which was accepted by all parties as the foundation for development of its recommendations:

- police are entrusted by the community with great powers and responsibilities;
- police must reciprocate this trust by achieving and maintaining high standards of integrity, professionalism, impartiality and performance; and
- police roles must be carried out in ways which meet diverse community needs and standards for service, efficiency and high performance, which are not constricted by bureaucratic rules or outmoded thinking, and which keep good police on the front line.

1.33 Adoption of the ideals encompassed by the concept of professionalism are seen as central to the reform process. If it is used as a foundation, the Service can work towards a culture which espouses high standards and in which there is no tolerance of conduct unworthy of a profession. This would challenge the fallacious concept at present deeply embedded in police culture that, whatever the circumstances, one must stand by and protect a colleague.¹⁶ Professionalism calls for the peer group to drive out the corrupt, and the wilful non-performer.

1.34 As well as reforming attitudes, there is a need to ensure that key positions throughout the Service are held by persons of proven ability who become proper role models.¹⁷ Objective processes are required to ensure that:

- the best available officers are selected;
- those not able to perform effectively in their present positions are replaced, and, where practicable, given a chance to improve their skills; and
- those not committed to the new standards of professionalism and competence depart the Service.

Service Charter and Code of Conduct

1.35 Additionally, the Service will need to be clear about its charter, its strategic direction, its core roles, and the establishment of the standards to which it expects its members to perform.

¹⁶ J. Kleinig, 'Police Loyalties: A Refuge for Scoundrels' convincingly demonstrates the underlying fallacy in any contention that an honest police officer should cover up or protect a corrupt or incompetent colleague. Paper supplied by the NSW Police Association, RCPS Exhibit 2321/13.

¹⁷ UNSW Police Policy Research Unit, *Police and the Community - the Necessity for Change*, Submission to RCPS, August 1996, RCPS Exhibit 2809/112, pp. 52-53 & 96-97.

1.36 Commissioner Ryan has started to set this right by his enunciation of the core duties of the Service as he sees them, and his release of a Code of Conduct and Ethics. In developing its charter, the Service should make strenuous efforts to embrace problem-solving policing, which involves the community as an ally, both in identifying problems and in dealing with them.

1.37 More specific work will be required to explore the precise activities which should fall within the general core duties enunciated by Commissioner Ryan, and in educating staff as to the precise way the Code of Conduct and Ethics will apply in the field.

Flattened Structure

1.38 A flattening and reorganisation of the structure of the Service, along with a reduction in the number of leadership positions, are axiomatic.

1.39 Additionally, it will be necessary to:

- review job descriptions and management structures to return to active policing the many capable officers who at the moment are presently confined to unproductive or duplicated support duties that could often be carried out by unsworn staff;
- increase patrol capacity and performance, emphasising leadership, and efficient and cost effective service delivery;
- explore lateral entry and civilianisation to secure the best talent available, particularly for specialised tasks;
- reflect responsibility and remuneration through positions held, rather than rank; and
- encourage lateral career development.

1.40 This may mean that some senior staff will find it necessary to move on or to be retrained. Those who elect to leave should be allowed to depart with dignity, and with the help of adequate retirement or redundancy arrangements, in recognition of the fact that they played their part at a time when different structures, rules and attitudes prevailed.

Openness and Honesty

1.41 The Service will need to be far more honest in dealing with the Government and with the community about its resources, and about any problems that emerge. This will require it to:

- explain publicly what is achievable, and what is not, and how resources will be applied to secure the outcomes required. Concentration on numbers of police will need to be replaced by an assessment of how overall resources will be best engaged to meet needs;
- acknowledge bad news, address it rather than suppress it and accept that the complaint system and the internal audit process are valuable tools by which performance can be improved, rather than potential causes for embarrassment; and
- encourage the monitoring of compliance with internal controls and of the most effective use of its resources through the internal audit procedure, supplemented as appropriate by the work of the Council on the Cost of Government.

1.42 It will also need to deal more honestly with its staff, listen to and communicate with them, and then create an environment in which expertise is recognised above rank.

Systems and Procedures

1.43 It will be necessary for all current systems, regulations, procedures and Commissioner's Instructions to be reviewed. Some will have to be rebuilt with a keener focus on the objective and the needs of the user, and with an eye to limiting any potential for corruption. Most will have to be made simpler and more practical, and be co-ordinated into an information-based system which eliminates unnecessary paperwork and facilitates intelligence recovery and co-ordination of investigations.

The Police Culture

1.44 The reasons for the existence within the Service of an intensive group loyalty and core culture are explained elsewhere.¹⁸ This is not necessarily harmful; much of the core culture is positive, and helps maintain direction and good order. Moreover, if harnessed appropriately it can by its very strength be an effective instrument for good.

1.45 What needs to be abandoned are the negative aspects such as:

- the code of silence, which leads to the closing of ranks and protection of the corrupt and wilfully incompetent;
- traditions such as long lunches, the heavy consumption of alcohol, and other forms of personal misconduct which are seen as the way to gain acceptance as a person who can be 'trusted';
- the elitism and mystique enjoyed by detectives and plain-clothes officers, particularly those working in closed squads;
- the networks which acquire inordinate power and distort the promotion system;
- the indifference or contempt held for outsiders, most particularly criminals and those suspected of anti-social offences, that leads to their being assaulted or otherwise deprived of their legal rights.

1.46 Academic and other studies¹⁹ support the notion that, notwithstanding the several cultures that exist within any police service, these negative aspects can be changed, and the core culture harnessed to promote the process of reform. It is essential that there be a close focus on this, and that the solidarity and mutual support which are central to the culture be turned around in support of a goal of integrity and professionalism. Apart from the benefits to the Service as a whole, the job satisfaction, security and personal confidence of individual police are likely to increase.²⁰

The Complaint Process

1.47 The Commission is convinced that the existing complaints process is:

- too legalistic, formal, and focused upon punishment;
- insufficiently focused upon behaviour modification;
- woefully dilatory; and

¹⁸ See Volume I, Chapter 2 of this Report.

¹⁹ See for example: M. Brogden & C. Shearing, *Policing for a New South Africa*, Routledge, London, 1993; J. Chan, *Changing Police Culture: Policing in a Multicultural Society*, Cambridge University Press, Melbourne, 1997; P. Cioccarelli, Submission to RCPS 'Re-engineering policing', 31/10/96, RCPS Exhibit 2809/30'B'; UNSW Police Policy Research Unit, 'Police and the community: The necessity for change', Submission to RCPS, 22/8/96, RCPS Exhibit 2809/112; C. Shearing, 'Changing police culture: The bottom-up view', *Platypus*, vol. 36, July 1992; J. White, Submission to RCPS, 'A model to change police culture by transformational leadership - The key to policing excellence in Australia', 18/6/96, RCPS Exhibit 2809/90.

²⁰ UNSW Police Policy Research Unit, 'Police and the community: The necessity for change', Submission to RCPS, 22/8/96, RCPS Exhibit 2809/112, pp. 45-50.

- subject to an unnecessarily complex appeal process.

1.48 It should be progressively changed to a managerial approach which looks to more than a reactive and narrow response to individual incidents, and passes immediate responsibility to commanders to deal with misconduct of those under their command. The advantages seen are three-fold:

- along with empowerment of commanders will come true responsibility;
- replacement of a punitive model of complaint handling by a remedial model will encourage openness and a willingness to admit mistakes, rather than the traditional resort to cover up; and
- the opportunity of retraining and keeping an officer who might otherwise have been lost to the Service, after a long drawn-out and stressful disciplinary process, will be maximised.

1.49 More serious misconduct should be reserved to an enhanced internal investigation system in which the PIC and the Office of Internal Affairs each have a significant role to play. They need the capacity for sophisticated, covert and broad-based inquiries aimed at securing criminal convictions and/or dismissal for want of Commissioner's confidence of those found to be corrupt.

Implementation

1.50 The Service has in the past demonstrated an inability to effect change either because it has been blocked from within, or because it has not understood what is required for transformational change. That must cease.

1.51 It is critical that attention be given to the process by which such change is achieved. A small leadership team is best placed to set the direction, provide the guidance and energise a process that will take some years to complete. It will need to:

- listen to and employ outside expertise;
- harness the talents and energy of the many officers in the Service who want it to be rebuilt, and to play an active part in that process;
- outflank and outlast those who oppose change, whatever their motives; and
- abandon the notion that the Service is a special entity that should order its management in a way that differs markedly from successful modern organisations.

1.52 Additionally, it will be necessary to develop a strategy for an ongoing external audit, lasting a period of at least three years, to ensure that the reform process does not fall into a hole, or if it does, to help it out.

1.53 These, and other matters are developed in the chapters which follow, it being the firm conviction of this Commission that wide-ranging change is essential. At the same time, a carefully staged process, with set priorities, will be required. Otherwise the whole process risks collapsing upon itself, for the simple reason that if too much is sought to be achieved at the one time, it will not be understood, and individual policies will be developed that will tend to contradict one another.

CHAPTER 2

POLICING RESPONSIBILITIES IN NSW

A. EXISTING FUNCTIONS OF THE POLICE SERVICE

2.1 This Report is prepared in the context of the existing structure of the New South Wales Police Service (outlined later in this Report²¹) and the functions entrusted to it, as described in section 6 of the *Police Service Act 1990* which provides that:

(2) The Police Service has the following functions:

- (a) to provide police services for New South Wales;
- (b) to exercise any other function conferred on it by or under this or any other Act;
- (c) to do anything necessary for, or incidental to, the exercise of its functions.

(3) In this section: “police services” includes:

- (a) services by way of prevention and detection of crime; and
- (b) the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way;
- (c) the provision of essential services in emergencies; and
- (d) any other service prescribed by the regulation²².

2.2 Within this very broad definition of functions and services, convention or convenience has brought the following activities:

Peace-keeping and preservation of order function

- enforcement of laws governing the use of public roadways and waterways, railways and other forms of transport, and the enforcement of parking laws;
- enforcement of laws governing public health, safety and good order;
- enforcement of laws governing various activities permitted under licence, including betting, the sale of liquor, pawnbroking, ownership of firearms, lotteries, and commercial and private inquiry agents;
- involvement in ceremonial and State occasions, crowd control and in the protection, escort and security of VIPs and government officials and premises;
- implementation of tow truck arrangements.

Law enforcement function

- response to domestic violence, enforcement of AVOs;
- exercise of police powers such as arrest, search and detention;
- enforcement of warrants and assistance in the recovery of fines and the like;

²¹ See Volume II, Chapter 3 of this Report.

²² So far as the Commission can ascertain, no ‘other Service’ has been prescribed by regulations under the Act.

- support for corrective services including the escort, protection, transport, and security of persons in custody.

Investigative function

- investigation of criminal offences;
- collection and co-ordination of intelligence, and liaison with other policing agencies on a State and international basis including assistance in extradition proceedings.

Emergency service function

- provision of services in relation to rescue, civilian disorder and the like;
- provision of essential services in emergencies;
- hostage and siege response.

Preventive, protective and interactive community policing role

- police presence;
- deterrence role;
- development and implementation of crime prevention measures;
- assistance in coronial inquiries, and with investigations into deaths and accidents, including preservation and investigation of crime and accident scenes;
- school and community education;
- advice to the Government on matters of policy falling within the area of law enforcement and law and order;
- involvement in the Police Community Youth Clubs movement.

Social service function

- support for welfare and similar authorities in relation to inebriated, mentally ill, homeless, lost and other disadvantaged persons including searches for lost and missing persons;
- management and handling of lost property.

Managerial function

- human resource management;
- budgetary management;
- corporate strategic planning.

Self regulatory function

- development of codes of practice; and
- investigation of misconduct.²³

²³ Headings taken from T. Rohl, 'Professionalisation of Policing in Australia', Paper given to *11th Symposium for Heads of Police Colleges*, Lyon, France, 6/12/94.

2.3 The breadth of these activities inevitably raises the question whether some might be better carried out by an agency or agencies other than the Service. Some are, in fact, already shared responsibilities, or at least carried out in partnership with other government agencies.

2.4 The existence of a degree of confusion and disagreement in relation to the core business of the Service emerged in the course of the evidence, and in the submissions received,²⁴ after this issue was flagged in the First Interim Report.²⁵ It was addressed by Commissioner Ryan in his evidence and his blueprint for the Service,²⁶ and it is an important matter as it impacts on:

- the formulation of policy;
- the training requirements of the Service;
- the management of its resources; and
- morale.

2.5 It is not within the scope of this Royal Commission to undertake the task of assessing the proper range of police functions.²⁷ That task is better achieved by an inter-departmental working party, with the benefit of community consultation. The principal purpose of the Final Report is to provide a structure and capacity within the Service to perform whatever responsibilities are assigned to it, and to identify any necessary change in policy. This matter is mentioned only so far as it might impinge on the effectiveness of the Service, or affect the potential for corruption to continue.

2.6 The Commission is encouraged by the approach of the Police Service in its document *Creating a New Police Service* which identifies in general terms the role of policing in contemporary society, and defines some of the questions which that role invites:

The core business of policing is to contribute to the safety and order of people in their communities so that they can live, work, travel and play in a lawful and peaceful society. People call upon the police to solve problems when the safety of their persons, their property and their communities is deliberately or accidentally threatened.

This general statement can be unpacked into a number of primary police roles:

1. Emergency response - the police should be available at all times to give advice and respond with help.
2. A reassuring presence - through their availability and friendly presence police reassure people about their safety.
3. The investigation and solution of problems - in partnership with others, the police should investigate and facilitate solutions to problems in ways that reduce the likelihood of emergencies and crimes occurring.

²⁴ At least 40 submissions to the RCPS directly addressed the role of police, including: NPRU, *Practical Ethics in the Police Service - Ethics and Policing - Study 3*, NPRU, July 1996, RCPS Exhibit 2902/1; P. Cioccarelli, 'Re-engineering Policing', Submission to RCPS, 31/10/96, RCPS Exhibit 2809/129; NSW Police Service, *Creating a New Police Service*, 1/7/96, RCPS Exhibit 2321/5; D. Dixon, Submission to RCPS, 25/7/96, RCPS Exhibit 2809/37.

²⁵ RCPS, *First Interim Report*, February 1996, p. 118, para. 6.10.

²⁶ P. J. Ryan, *Reform of the NSW Police Service*, 19/11/96, RCPS Exhibit 2820/1, pp. 2 & 11; P. J. Ryan, RCT, 19/11/96, pp. 34565-68 where Commissioner Ryan says; 'The core business of policing is something which has been debated across the world, what should police services or police forces or whatever you want to describe them as - what should they do? ... What's happened over the years because the Police Service is just about the only 24 hour a day, 7 day a week public service, hundreds of things have attached themselves to the Service that the police now find that they have to do. And they range from dealing with lost and found property, dogs and the like, all the way through to serving different types of orders on people or supporting bailiffs who are seizing property, and dealing with some kinds of traffic offences; ... the idea of going back to the core business of policing is to look very carefully at what is it we really ought to be doing, because quite often the other things, the other attachments to policing, take police officers away from their real core function of preserving life and property, preventing crime, preventing breaches of the peace'. See also P. Cioccarelli, Submission to the RCPS, 31/10/96, RCPS Exhibit 2809/129, pp. 15-16, and NSW Council on the Cost of Government, *NSW Police Service Review of Resource Management Scoping Study Report*, November 1996, RCPS Exhibit 2819, pp. 50-55.

²⁷ Justice Lusher was also of the view that the range and depth of police function was a matter of policy for government, and not to be decided by his inquiry. *Report of the Commission to Inquire into NSW Police Administration*, (E. A. Lusher, Commissioner), Sydney, 1981, RCPS Exhibit 2790'A/3, p. 55.

4. Keeping the peace - the police should take actions to enhance the safety and guarantee the rights of persons in public places and on the highways ...

Questions that need to be asked in reviewing police activities include the following:

- in any particular instance where an activity is given up, will it be sworn police or other staff who will be released to perform the task?
- is the activity under review irrelevant to the Service's mission?
- is some other agency better equipped to undertake the activity?
- does the activity require the exercise of police-exclusive authority?
- does the activity require the use of any police knowledge and experience²⁸?

2.7 It is the Commission's view that a thorough review of all current activities of the Service should be undertaken to identify whether it is the most appropriate body to carry them out. The review should not, however, stop there. Additionally, it is necessary to question those laws which no longer have broad community support, or which are either unenforceable in a practical sense, or invite enforcement in a way which is likely to corrupt the Service.

2.8 The Commission recommends that this review take place:

- in a consultative process, involving the community and all stakeholders;
- with proper regard to the preservation of the efficiency of the Service to deal with its core business; and
- with the aid of independent costing and evaluation.

2.9 Although a number of areas of policy were identified by submissions as appropriate for review, three have been selected for special consideration and will be briefly mentioned.

B. DRUG LAW ENFORCEMENT

THE PROBLEM

2.10 Much of the corruption identified in this inquiry was connected to drug law enforcement. The huge sums of cash associated with the drug trade, and the apparent inability of conventional policing to make any impact on the illegal market in narcotics²⁹ creates cynicism among police working in the field. It also creates an environment in which corrupt conduct flourishes:

- of the conventional kind, involving protection and bribery;
- of the kind that involves direct criminal activity, such as theft and supply of drugs; and
- in the various forms of process corruption earlier identified.³⁰

2.11 Quite apart from the devastating influence which the drug trade has on the corruption of law enforcement officials,³¹ the overall cost to the community of substance abuse is enormous. It affects almost every area of society by:

- tying up a significant proportion of policing resources;

²⁸ NSW Police Service, *Creating a New Police Service*, July 1996, RCPS Exhibit 2321/4, pp. 4-6. See also P. J. Ryan, *Reform of the NSW Police Service*, 19/11/96, RCPS Exhibit 2820/1.

²⁹ New South Wales Bureau of Crime Statistics and Research, *Drug Law Enforcement Policy and Impact on the Heroin Market*, August 1995, p. iii.

³⁰ See Volume I, Chapter 4 of this Report.

³¹ See B. S. J. O'Keefe, 'The Drug Trade and Police Corruption', Paper given to the *Indian Law Institute and UN International Conference on Global Drugs Law*, New Delhi, India, March 1997.

- occupying the lists of courts at every level of the criminal justice system;
- filling gaols with suppliers, users, and those convicted of property theft and other crime undertaken to feed a drug habit;
- destroying young lives;
- calling upon resources within the health system to treat not only injecting drug users for their addiction and associated medical problems, but also those to whom disease is transmitted;
- calling upon social security resources for the assistance of those who have become unemployed or sick, as a result of drug use; and
- elevating the incidence of drug-related crime with its flow-on to the victims whose property is lost, and who then face rising insurance premiums.

2.12 On the supply side of the equation;

- the profits to be gained from the drug trade are enormous and such as to attract the best organised, most sophisticated and well-resourced criminals;³²
- the risks of detection, relative to the numbers engaged in the trade, are not great particularly having regard to the ease of entry into a country with the size and coastline of Australia;³³
- modern techniques of money-laundering and the ease of movement of funds internationally, via electronic transfer and other means, inhibits detection of those involved in the trade;
- there is seemingly no limit to the number of foot soldiers prepared to fulfil minor parts in the importation and distribution chain, even for limited personal gain; and
- there is no real capacity within many of the countries of original supply to stem or control the drug trade and, in some cases, not even a will to do so because economies depend on it.

2.13 For these reasons rhetoric based upon a 'war against drugs' or similar notions, is empty, and incapable of fulfilment. The problems associated with 'drug use' require a different approach to the issues related to the 'drug trade'. Law enforcement should continue to aggressively target the drug trade and heavy criminal sanctions should be applied to those who supply narcotics. Alternate solutions however need to be found in order to address drug use - the criminal process does little to reduce the availability of drugs or to discourage their use. It continues to provide opportunities for corrupt police.³⁴

2.14 This Commission has not had the opportunity, nor is it within its terms or capacity, to undertake an exhaustive study of drug use and the drug trade, or to make comprehensive recommendations for reform. There have already been several specific inquiries into this subject.³⁵ Meaningful review should now be undertaken only on a national basis, by a Commission or summit

³² In 1993, it was estimated that the illicit drug trade made \$2 billion annually in Australia. Australian Bureau of Criminal Intelligence, *Australian Drug Intelligence Assessment*, 1993, p. 71.

³³ It is estimated that no more than 20% of any imported drugs are intercepted, T. Van Ray, *Drug Lore, Questioning our current drug law*, June 1996, in Australian Drug Law Reform Foundation, Submission to RCPS, 14/11/96, RCPS Exhibit 2809/14, p. 23. Australian Customs Service barrier examination rates are fairly low (9% of passengers searched and 1% of containers), ACS, 1993, cited in the Report of the Premier's Drug Advisory Council, *Drugs and Our Community*, Melbourne, 1996, p. 100.

³⁴ For the period 1/7/95 to 30/6/96 in NSW there were 808 drug-related arrests with 2,123 charges laid - 32.2% of charges were for use and possession, 38.6% were for supply. Drugs seized in 1995-96 had a potential street value of \$101.3 million. NSW Police Service, *Annual Report 1995-96*, p. 133. The Police Service notes that according to the National Drug Strategy Household Survey, 39% of Australians over the age of 14 have tried one or more illicit drugs. NSW Police Service, *Annual Report 1995-96*, p. 48.

³⁵ eg. Victoria Premier's Drug Advisory Council Report, *Drugs and Our Community*, (Penington Report), Melbourne, March 1996; A. Wodak & R. Owens, *Drug Prohibition: A Call for Change*, University of NSW, Sydney, 1996; Parliamentary Joint Committee on the National Crime Authority, *Drugs, Crime and Society*, AGPS, Canberra, 1989; *Report of the National Task Force on Cannabis*, AGPS, Canberra, 1994; Victorian Drug Reform Foundation, *Drug Law Reform, Key Issues*, 1996; T. Van Ray, *Drug Lore, Questioning Our Current Drug Law*, Australian Drug Law Reform Foundation, 1996; Redfern Legal Centre, *Drug Law Reform: Reducing Police Corruption and other Drug-Related Harm*, 1996.

comprised of experts within the field and then only if supported by a uniform will at multi-government level to bring about the reform and social restructure required to address these issues.

2.15 The most that this Royal Commission can do within its terms is to identify the problems as it sees them from a policing point of view, and otherwise urge the Federal and State Governments to respond to what is one of the most difficult law enforcement challenges that society presently faces.

HARM MINIMISATION

2.16 For many users their addiction has become compulsive and resistant to self help. Tension exists between law enforcement and the recognition that addiction to prohibited drugs is also a medical and social problem. Criminal sanctions do not and cannot address the latter. The National Drugs Strategy objective is harm minimisation.³⁶ This approach in part reflects strategies developed to combat the spread of infectious diseases such as Hepatitis C and HIV/AIDS among injecting drug users.

2.17 Within NSW there has been some limited legislative recognition of the need to deal, at least with injecting drug users, in a way which acknowledges the medical and social dimensions of the problem.³⁷ A legislative foundation for the Needle and Syringe Exchange Program (NSEP)³⁸ was introduced into the *Drug Misuse and Trafficking Act 1985* in 1994. This has seen needle exchange programs established within prisons and on the streets, particularly in high use areas such as Cabramatta and Kings Cross. It has been attributed as part of the reason for the relative success of New South Wales in reducing the spread of HIV/AIDS among injecting drug users.³⁹

2.18 There remains a substantial area of potential conflict between traditional law enforcement methods and the harm minimisation model. The Commission received evidence about 'shooting galleries' in Kings Cross. These were insanitary premises where prohibited drugs were supplied and injected. The owners and operators of these premises had established corrupt relationships with police. The action of the Service in closing down these premises was appropriate in the light of the evidence, as those connected with them were not in any way suitable for any form of imprimatur, official or otherwise, to operate such a facility. Their interest was purely commercial and counter-productive to rehabilitation.

2.19 There are, however, good reasons for the existence of approved injecting rooms in high risk locations, as:

- it is fanciful to think that drug addicts can be prevented from obtaining and using prohibited drugs;
- the risk of the spread of infectious diseases demands that sterile syringes and needles be made readily available to the population of injecting drug users;
- used syringes and needles need to be disposed of safely;⁴⁰
- such an environment reduces the incidence of theft and violent assaults on drug users;

³⁶ NPRU, *Evaluation of Australian drug anti-trafficking law enforcement*, Report no. 28, NPRU, 1996, after reviewing the objectives of each of the State and Territory Police Services, recommended that attention be given to the objective of applying relevant laws in ways which minimise harm to direct users and broader society - see recommendations 1-4 which refer to the National Drugs Strategy.

³⁷ *Drug Misuse and Trafficking Act 1985*, s. 11; and the *Drug Misuse and Trafficking Regulation 1994*.

³⁸ NSEPs provide drug users with free sterile equipment and education to reduce the likelihood that their injecting or sexual behaviour will increase the spread of blood-borne viruses such as HIV. The Premier's Drug Advisory Council, *Drugs and Our Community*, Melbourne, 1996, p. 53, in Australian Drug Law Reform Foundation Submission, 26/7/96, RCPS Exhibit 2809/14.

³⁹ 'Drug harm minimisation and practical policing applications', *Police Service Weekly*, vol. 8, no. 49, 9/12/96, p. 3.

⁴⁰ Cabramatta Council now employs two staff to collect abandoned syringes, the presence of which on the streets poses the risk of needle-stick injuries to children, passers-by and council employees. *Daily Telegraph*, 22/3/97, p. 11.

- injecting drug users, very many of whom want help, can be targeted for education and encouraged to seek treatment for their addiction and associated medical problems; and
- in the event of an overdose, staff are available to contact the Ambulance Service and, if suitably trained, to administer preliminary first aid.

2.20 At present, publicly funded programs operate to provide syringes and needles to injecting drug users with the clear understanding they will be used to administer prohibited drugs. In these circumstances, to shrink from the provision of safe, sanitary premises where users can safely inject is somewhat short-sighted. The health and public safety benefits outweigh the policy considerations against condoning otherwise unlawful behaviour.

2.21 For these reasons, the Commission favours the establishment of premises approved for this purpose and invites consideration of an amendment of the *Drug Misuse and Trafficking Act* to provide for the same.⁴¹

2.22 The model which the Commission invites for consideration is one that would permit such facilities to operate in conjunction with needle exchange services, under licence and with the supervision of the Department of Health. It would be important that any such premises operate under strict guidelines. They must not become associated with the supply of prohibited drugs, and they should be a resource for immediate assistance for those injecting drug users who seek help with their addiction or health problems.

2.23 So long as the personal use of prohibited drugs remains illegal, difficulties will continue to confront police in carrying out their duties without frustrating the harm minimisation objectives of the Department of Health and other government agencies. It is appropriate that the Service work co-operatively with government agencies to avoid this. This appears to be the situation at present. The Police Service supports the harm minimisation model.⁴² Specifically it supports the Needle & Syringe Exchange Program (NSEP) and the Methadone Maintenance Program (MMP). To this end police have been directed to maintain informal communication with premises where such services are offered and not to make unnecessary visits.⁴³ These guidelines do not deter police from attending such premises in the event of a threat to the safety of staff or others, but they should not be seen as a magnet for drug users who might be harassed or made the subject of easy arrest. Otherwise their utility will cease.⁴⁴

2.24 The Drug Programs Co-ordination Unit⁴⁵ has similarly recommended the formation of local advisory committees with representatives from both staff and management of NSEP and MMP projects together with senior police from the patrol. The Unit itself has programs designed to educate police about harm minimisation and the NSEP and MMP programs.

2.25 These initiatives, and the exercise of discretion in targeting injecting drugs users are both sensible and appropriate. However, the basis on which the discretion is exercised needs to be found

⁴¹ At present, it is an offence for a person to aid, abet, counsel, procure, solicit or incite the commission of an offence under the *Drug Misuse and Trafficking Act 1985* - see ss. 19 & 27. In order to permit injecting rooms these sections would have to be amended or repealed.

⁴² New South Wales Police Service, *Annual Report 1995-96*, p. 47. This approach is not novel - In *Evaluation of Australian Drug Anti-Trafficking Law Enforcement* Report No. 128 the National Police Research Unit notes at p. 117, 'From the inception of the National Campaign Against Drug Abuse (now the National Drug Strategy) in 1985, police and other agencies in Australia have accepted the need to ensure compatibility between their specific objectives and the broader parameter of harm reduction'.

⁴³ 'Drug harm minimisation, health & law enforcement working together', *Police Service Weekly*, vol. 9, no. 7, 17/2/97, p. 9.

⁴⁴ See I. Van Beek, RCT, 2/9/96, p. 31362. The *Police Service Weekly* in late 1996 and early 1997 included a series of articles, prepared by the Drug Programs Co-ordination Unit, vol. 9, no. 7, 17/2/97 at p. 9; see *Police Service Weekly*, vol. 8, no. 49, 9/12/96, p. 3 which notes the success Australia has achieved relative to other countries in controlling the spread of HIV/AIDS and then discusses the dilemma some officers may feel in reconciling policing needs with harm minimisation. The article goes on to note that the concept of harm minimisation is not new and applies in other areas of policing. See also *Police Service Weekly*, vol. 8, no. 49, 9/12/96 to vol. 9, no. 1, 6/1/97 and vol. 9, no. 3, 20/1/97 to vol. 9, no. 5, 3/2/97, and vol. 9, no. 7, 17/2/97 to vol. 9, no. 8, 24/2/97 and vol. 9, no. 7, 17/2/97 at p. 9.

⁴⁵ The Drug Programs Co-ordination Unit within the Police Service develops education programs for drug-related issues such as harm minimisation, needle exchange, and methadone maintenance programs. *Police Service Weekly*, vol. 9, no. 7, 17/2/97.

in a clear statement of policy. It is appropriate that the Service, in conjunction with the Department of Health, publish guidelines setting out the agreed basis on which the policing of NSEP and MMP programs and similar public health initiatives takes place. These guidelines need to be widely publicised within the Service⁴⁶ and the community so that both police and citizens know where they stand in relation to enforcement of this aspect of the law.

2.26 Consistent with the harm minimisation model, this Commission considers it time that a national summit or commission was convened to address the problems of drug supply, use, and rehabilitation since it is meaningless to address any one component by itself or by any approach other than by a national one. Such a summit or commission should however be more than a talk-fest. It would need specific guidelines and a mandate to come up with a meaningful strategy for the future, from which political parties should not shrink.

2.27 In the meantime, and as a matter of urgency, the Commission recommends strategies be developed to:

- attack the demand for drugs through increasing public awareness, particularly within the schools, of their dangers and the unacceptability of their use;
- allocate resources to the establishment of public detoxification and rehabilitation units; and to
- expand the availability of methadone and street counselling and assistance, especially for young users.

DECRIMINALISATION / LEGALISATION

2.28 The Commission received a number of submissions urging that the personal use of prohibited drugs be dealt with as a medical problem and not as a criminal offence (some urged decriminalisation or legalisation in broader terms).⁴⁷ The Commission considers that a cautious move towards this approach is well worthy of consideration. It is for this reason that the Commission considers that it would be appropriate for the NSW Government to support the trial in the Australian Capital Territory, of the controlled prescription of heroin to dependent users developed by the National Centre for Epidemiology and Population Health. Although such trial is presently stalled because of the lack of support from the States, it would provide a useful basis for testing a number of the assertions advanced by those favouring decriminalisation.⁴⁸ Without such a trial, which could be conducted subject to stringent control and scrutiny, and suspended at any moment if it was seen to be productive of unacceptable problems, its efficacy or otherwise will never be known. Until attempted, it is very difficult to move forward or to consider alternative strategies.

2.29 Decriminalisation of the personal use of prohibited drugs may have an impact on the illegal market, but it would be foolish to overstate that impact.⁴⁹ There are many issues to consider on both

⁴⁶ See the submission of the Alcohol and Other Drugs Council of Australia, August 1996 which after making reference to the role played by the NSW Police Service in having the Ministerial Council on Drug Strategy endorse new policing initiatives dealing with the impact of police practice on drug related harm, notes the Service's past close relationship with the Department of Health and raises a concern that the initiatives developed by some senior officers and the Department of Health may not have attracted widespread support within the Service or Police Command, RCPS Exhibit 2809/95, p. 4.

⁴⁷ AIDS Council of NSW, July 1996, RCPS Exhibit 2809/102; Australian Drug Law Foundation, August 1996, RCPS Exhibit 2809/15; Australian Drug Law Reform Foundation, NSW Legal Steering Committee, 26/7/96 RCPS Exhibit 2809/14; Australian Drug Law Reform Foundation, Academics Group, November 1995; Netherlands Institute on Alcohol and Drugs, 25/7/96, RCPS Exhibit 2809/45; NSW Society of Labor Lawyers, 26/7/95, RCPS Exhibit 2809/68a; NSW Council for Civil Liberties, 23/5/96, RCPS Exhibit 2809/67a; Redfern Legal Centre, 26/7/96, RCPS Exhibit 2809/76a, together with the 'Harm Reduction Model for Controlled Drug Availability'; Justice Action, 26/7/96, RCPS Exhibit 2809/55; Australian Parliamentary Group for Drug Law Reform, 4/12/95, see too the Victoria Premier's Drug Advisory Council Report, *Drugs and our Community*, (Pennington report), March 1996, p. vii.

⁴⁸ See Victoria Premier's Drug Advisory Council Report, *Drugs and our Community*, (Pennington report), March 1996 at p. 93 which encouraged the Commonwealth to support the trial which it concluded was justified on research grounds.

⁴⁹ See generally the evidence of I. Van Beek, RCT, 2/9/96, p. 31363.

sides of the argument. It is reasonable to assume that nothing short of the removal of all statutory prohibitions on the possession, use and supply of prohibited drugs would succeed in meaningfully reducing the profits to be made from the illegal drug trade,⁵⁰ or end its potential for corruption. However, a resultant increased demand on the health budget and the potential increase in the user population are also possible outcomes of legalisation. The issues are as many as they are serious, and legalisation could not be seriously contemplated without the most comprehensive national public inquiry.

2.30 Regardless of the approach taken to the personal use of prohibited drugs, this Commission considers that a need remains for active law enforcement which targets suppliers. It is in this area, rather than at the level of the street user, that corruption principally occurs.⁵¹ The avoidance of corruption in the future depends more on a professional approach to drug investigations, incorporating the integrity measures referred to elsewhere in this Report,⁵² than it does in either legalisation or decriminalisation of personal use.

DIFFICULTIES IN CURRENT LAW ENFORCEMENT

2.31 The other issue which arises in this context is a recognition of the difficulties police face in enforcing the law. Those who deal in drugs are seldom foolish enough to carry their supplies on their person. Street dealers in places such as Kings Cross and Cabramatta leave their working supplies nearby. When a sale is effected they deliver the commodity in a quantity generally less than the commercial or indictable amount.⁵³ Surveillance on the dealer may make it plain that he or she is, in truth, selling large amounts of the drug on a regular basis, yet it is often effectively impossible to prove a case for supply of more than a single deal.

2.32 Further, in the example outlined above and in similar situations, if the police identify the location of the dealer's 'stash' the likelihood is that it will be a place to which, in theory at least, others have access. In such cases the Crown faces difficulties in proving possession,⁵⁴ in the sense of exclusive physical control, of the drug. The proof of this element in supply and possession cases is often daunting and some police have sought to overcome the difficulty by lying about the circumstances of the finding. Thus, heroin found under a car seat might be said, for the purposes of the brief, to have been on the suspect's person. There were many such examples in the course of the Commission's hearings.⁵⁵ The frustration for police arising from these circumstances is such that they may 'solve' the problem by 'loading up'⁵⁶ the dealer with a larger quantity of drugs, or alternatively engage in theft or extortion to 'punish' the dealer.

2.33 The Commission accordingly recommends that consideration be given to amending the *Drug Misuse and Trafficking Act 1985* by creating an indictable offence of 'engaging in commercial' supply to catch those instances where a person, who is obviously engaged in a regular business of supply, is presently able to minimise his or her criminality by holding and dealing in drugs in quantities less than the indictable or commercial quantity.

⁵⁰ NSW Bureau of Crime Statistics and Research, Submission to RCPS, 14/11/96, RCPS Exhibit 2809/24, p. 3.

⁵¹ See Volume I, Chapters 4 & 5 of this Report, the evidence in relation to the North West Major Crime Squad and drug-related corruption.

⁵² See Volume II, Chapters 7 & 8 of this Report.

⁵³ The indictable amount of drugs is set out in Schedule 1, Column 3 of the *Drug Misuse and Trafficking Act, 1985*. Under s. 21 of the Act, the maximum penalty for a summary offence is a fine of \$2,000 and two years' imprisonment. Penalties for indictable offences vary according to a number of factors including whether the drug is deemed to be a 'commercial' quantity whether the drug in question is cannabis leaf or cannabis plant, whether the offence can be dealt with summarily, and whether the drugs were sold to a person under the age of 16. If an indictable quantity of drugs is small, it may be dealt with summarily under s. 31 of the Act by which a fine of \$2,000, or imprisonment for a term of two years, or both is imposed. By virtue of s. 33AA where a commercial quantity is involved the maximum penalty becomes 4,200 penalty units, ie. \$420,000 and 25 years' imprisonment.

⁵⁴ *Filipetti v R* (1978) 13 A Crim R 335.

⁵⁵ WS14, RCT, 19/9/96, p. 32669 and WS9, RCT, 18/6/96, p. 27137 re the arrest of Fadil Asanovic; WS14, RCT, 11/3/96, p. 21408; WS11, RCT, 11/6/96, p. 26704; WS15, RCT, 5/6/96, p. 26486 and R. Kady, RCT, 13/6/96, p. 26977 re the arrest of Kady; WS14, RCT, 12/3/96, p. 21534; WS11, RCT, 26/2/96, p. 20602 and N. Tran, RCT, 19/6/96, p. 27284 re the arrest of Tran. Refer also to the Kings Cross and JTF segments for further illustrations.

⁵⁶ See Glossary.

C. GAMING AND BETTING

2.34 Police have significant responsibilities in this area:

- under the *Casino Control Act 1992* and the *Registered Clubs Act 1976* in relation to the conduct of lawful gaming and betting activities; and
- under the *Gaming and Betting Act 1912* in the detection and prosecution of those who engage in unlawful gaming and betting activities.

As the result of a variety of often incongruous amendments, the *Gaming and Betting Act* is a piecemeal and frustrating piece of legislation which is difficult to enforce⁵⁷ and does not function as 'a deterrent to those prepared to employ even moderately sophisticated techniques to avoid detection'.⁵⁸ As has been seen earlier,⁵⁹ policing of this Act has been associated with significant corruption, and dereliction of duty on the part of police.⁶⁰ It has also been bedevilled by a degree of confusion on the part of individual police as to the result sought to be achieved.

2.35 The criminalisation of certain types of gaming, some of which have long-standing cultural acceptance and are almost impossible to detect and eradicate, can be said to be responsible for a fertile source of wealth in the criminal sector by pushing them 'underground'.⁶¹ The policy behind the criminalisation of some of the activities needs to be identified, and the subject of a clear policy direction as to whether it rests upon:

- the protection of the revenue earned by the State from licensed activities;
- the protection of citizens from the deleterious effects of gambling; or
- a desire to discourage criminals from consorting.

2.36 Numerous inquiries have found deficiencies in the legislation, most recently the Gaming and Betting Task Force⁶² and the ICAC 'Milloo' inquiry which conducted hearings into the Gaming Squad.⁶³ In its 1995 Report, the Task Force recommended the enactment of new legislation,⁶⁴ having found the current Act to be:

- arbitrary in its restriction of gambling activities considered to be legal;
- a jumble of ill-matched and poorly integrated amendments; and
- incoherent in providing policy as to the purpose of the legislation.

2.37 The recommendations of the Task Force are considered by this Royal Commission to be sensible and are presently in the form of a draft bill, which if enacted would facilitate law enforcement (particularly in relation to prohibited amusement devices), and constitute a useful anti-corruption strategy. The potential for corruption will, however, remain. While ever there are benefits to illegal

⁵⁷ Gaming and Betting Laws Task Force, *Review of NSW Gaming and Betting Laws Report April 1995*, RCPS Exhibit 5675, p. 4.

⁵⁸ *ibid.*

⁵⁹ See Volume I, Chapter 4 of this Report.

⁶⁰ B. Bongiorno, 'Gambling and Crime' in G. Caldwell, B. Haig, M. Dickerson & L. Sylvan (eds), *Gambling in Australia*, Croom Helm, Sydney, 1985, p. 209.

⁶¹ R. & L. Sylvan, 'The Ethics of Gambling' in G. Caldwell, B. Haig, M. Dickerson & L. Sylvan (eds), *Gambling in Australia*, Croom Helm, Sydney, 1985, p. 226.

⁶² The Gaming and Betting Laws Task Force comprised representatives from, the Attorney General's Department, Chief Secretary's Department, Crown Solicitor's Office, Department of Sport, Recreation and Racing, Ministry for Police and Emergency Services, NSW Crime Commission and NSW Police Service.

⁶³ The ICAC 'Milloo' inquiry conducted hearings into the Gaming Squad in March, June and September of 1993. At page 183 of the *Report of the Investigation into the Relationship Between Police and Criminals, February 1994*, the ICAC found that the *Gaming and Betting Act 1912* was difficult to interpret and difficult to enforce, but that 'the difficulties faced by the squad did not justify the conduct revealed by the investigation'. See also Volume I, Chapter 4 of this Report.

⁶⁴ Gaming and Betting Laws Task Force, *Review of NSW Gaming and Betting Laws Report April 1995*, RCPS Exhibit 5675, p. 6.

operators, as well as a core of popular opinion that holds illegal gaming as less than criminal, there will be providers and users of illegal games. The Service can do little more than adopt risk minimisation strategies,⁶⁵ ensure effective supervision, and reinforce ethics and integrity among those who are tasked with the enforcement of these laws. Transfer of the responsibility elsewhere would not end the risk of corruption, but there may well be room for greater integration of the activities of the Service with those of the NSW Department of Gaming and Racing whose responsibilities are to a degree overlapping.

D. POLICE & COMMUNITY YOUTH CLUBS (PCYC)

2.38 As an aspect of community policing, the Service has an involvement in the Federation of Police & Community Youth Clubs. A Police Boys Club was first established in 1937 by members of the Rotary Club of Sydney who combined with police in an effort to combat rising juvenile crime in the inner city suburb of Woolloomooloo. Other clubs followed. In 1945 the organisation became the NSW Federation of Police Citizens Boys Clubs. In 1985 the name of the clubs was altered to the Police Citizens' Youth Clubs, in recognition of their female membership.⁶⁶ In 1995 the name was again changed, this time to the Police & Community Youth Clubs (PCYC), to reflect the expanding community focus of the clubs.⁶⁷ They are linked in a Federation, the central administration of which consists of a patron, president, chairman, board of directors, and company secretary.⁶⁸

2.39 The aim of the PCYC movement is to deliver community-based programs through more than 50 centres around NSW to young people, particularly those at risk of criminal activity.⁶⁹

2.40 While the PCYC movement is legally and financially a completely separate entity from the NSW Police Service,⁷⁰ police involvement in the clubs extends from administration to staffing and includes supervision of club activities and fundraising. The latter role is undertaken in conjunction with volunteers who are responsible to a local club management committee which is affiliated with the Federation.⁷¹

2.41 Justice Lusher was highly critical of the police role in the clubs,⁷² suggesting that this appeared to be a wasteful manner in which to employ the skills and training of police officers. He recommended that:

- police should not be deployed to work for the Federation as part of their official duties;
- members of the police force should not be used as fund-raisers for the Federation; and that
- the use of the word 'police' should be reserved exclusively for the NSW Police force and its functions.

2.42 Ironically, in spite of the justification for police involvement in the PCYC movement being the prevention of youth crime,⁷³ it has not itself been free of allegations of corrupt and criminal conduct.

2.43 In the early eighties, allegations of corruption were raised in regard to the administration of clubs in Parramatta and Glebe. The Parramatta allegations raised by Mr Edgar Azzopardi eventually

⁶⁵ See Volume II, Chapters 7 & 8 of this Report.

⁶⁶ Inter-departmental Committee on Police Citizens Boys Clubs, *Implementation of IDC Recommendations*, 3/6/86, Sydney, p. 13.

⁶⁷ *Police Service Weekly*, vol. 8, no. 9, 4/3/96, p. 6.

⁶⁸ NSW Federation of Police-Citizens Youth Clubs, *Annual Report*, 1993, p. 1.

⁶⁹ The PCYC works with other bodies such as the departments of Education, Health and Juvenile Justice in providing Young Offender Support Strategies, Crime Prevention Workshops and Youth Alcohol Programs, see A. R. Lauer, Statement to RCPS, 7/11/94, RCPS Exhibit 12, p. 13.

⁷⁰ The Federation of NSW Police Citizens Youth Clubs is a company incorporated pursuant to s. 24 of the *Companies Act 1961*. The PCYCs are also a registered charity under the *Charitable Collections Act 1934*. See also J. C. Thoms, RCT, 13/12/94, p. 525.

⁷¹ PCYC background material, 4/4/95, RCPS Exhibit 5999/73.

⁷² *Report of the Commission to Inquire into NSW Police Administration*, (E. A. Lusher, Commissioner), Sydney, 1981, RCPS Exhibit 2790'A/3, p. 281.

⁷³ A. R. Lauer, Statement to RCPS, 7/11/94, RCPS Exhibit 12.

led to the conviction and imprisonment of a police officer who was the secretary of the club and the promoter of an arts union conducted by it.⁷⁴

2.44 Corrupt conduct was also uncovered by an Internal Affairs investigation into the Glebe club, again in regard to financial mismanagement on the part of police officers.⁷⁵

2.45 A review of police involved in the PCYC movement was undertaken by an Inter-Departmental Committee (IDC) in 1983 which made 48 recommendations including.⁷⁶

- the establishment of zones and zone managers (police positions) to oversee and support branch operations;
- reduction of the involvement of police in club administration; and the
- implementation by police of educational programs of a policing and crime prevention nature.

2.46 The IDC was reconvened in 1986 when it was found that little had changed. An implementation team was formed to push through the suggested reforms.

2.47 In 1988 the involvement of police in the clubs again came under scrutiny, and a Ministerial Advisory Committee (MAC) was formed to conduct a further review.

2.48 The MAC Report, completed in 1989, supported continuing police involvement in the Federation and recommended the establishment of a closer working relationship between clubs and patrols and the employment by clubs of non-Service personnel.

2.49 The Inspector General in a 1993 Report also supported a continued police involvement in the PCYC movement, noting that:

- members within the clubs have as much or more impact on youth in the communities as do general duty or beat personnel;
- police involvement with young people in an informal capacity may have some influence in reducing actual or possible criminal activity;
- as a natural element of community policing, the clubs deal with youth from all economic and social circumstances and break down barriers between police and youth while at the same time positively modifying youth behaviour during their formative years;
- in the absence of a police presence, community volunteers within the clubs would not permit difficult youths access to the clubs, programs would suffer, and many clubs would simply become under utilised sports facilities; and
- members sponsor crime prevention programs and provide special services to handicapped children.⁷⁷

2.50 The positive aspects of police involvement in the PCYC movement are obvious and convincing and this Royal Commission would not suggest that the Service should sever its relationship with the clubs. The history of police misconduct and of financial maladministration, however, cannot be ignored. It is an area that continues to be productive of complaints, some having been received by this Commission.

⁷⁴ ICAC, *Report on investigation into harassing telephone calls made to Edgar Azzopardi*, December 1990, p. 13; NSW Ombudsman, *Report under s. 26 of the Ombudsman Act 1974, concerning the Affairs of the Parramatta Police Citizens Boys' Club*, 1982, & Auditor General's Report, 1983.

⁷⁵ PCYC, background material, 4/4/95, RCPS Exhibit 5999/73.

⁷⁶ *ibid.*

⁷⁷ Ministry for Police, *Inspector General's Report on the Inspection of the Federation of Police-Citizens' Youth Clubs*, 22/6/93, p. 2.

2.51 Although circumstances did not permit any in-depth investigation by the Royal Commission, it remains of concern that police involved in the PCYCs have access to substantial sums of money, can exercise wide-ranging authority and discretion in the day-to-day management of the clubs, but report to part-time civilian committees and not to the Police Service. As a result, the Service is not able to exercise effective supervision over their activities.

2.52 Accordingly a question arises whether the good that flows from the community relationship aspect is being undone by the incidence of complaints and attendant suspicion. Unless the question of supervision accountability can be adequately addressed (and the Commission doubts that it can under the present system, having regard to the voluntary part-time nature of the engagement of members of the governing body) the balance would seem to tip in favour of the Police Service retreating from assigning its members to full-time duties in this area.

2.53 Rather than abandon a worthy cause, an effective compromise might be to have patrol members rostered to attend the clubs on a regular basis, to act as counsellors, instructors and role models, and to leave managerial and financial responsibility entirely to civilian administrators and a civilian committee.

2.54 The present situation is not a satisfactory one and there is undoubtedly room for improvement. The issues are complex and there would be benefit in the ICAC reviewing the situation and making recommendations as to whether it is appropriate for police to continue to be involved in this area, and if so, upon what basis.

E. OTHER AREAS

2.55 Other areas that would benefit from examination and review of the role of the Police Service and its interaction with other service providers, in accordance with the principles laid down at the beginning of this chapter, include:

- Rescue and Emergency Services;
- Parking Police;
- Transit Police;⁷⁸
- Prisoner Detention and Control;
- Liquor Licensing;
- Commercial and Private Inquiry Agents;
- Firearms Licensing;
- Tow Truck Contracting; and
- Pawn Brokers, Second Hand and Other Dealers.

⁷⁸ Discrepancies in salary, training and conditions of service of Transit Police have been highlighted in submissions to the Commission (eg. J. Regan, Submission to RCPS, 15/2/96, RCPS Exhibit 2809/119). Since 1988 Transit Police have been under the umbrella of the NSW Police Service but are not sworn police. Their numbers are now considerably less than pre-1988 because positions have not been filled. It seems undesirable to allow such a hybrid part of the Service to continue when an integral part of the reform process is the creation of a single homogenous organisation and when many of the functions of Transit Police fall into conventional law enforcement by dealing with assaults, malicious damage and offences on railway property and buses.

RECOMMENDATIONS

The Commission recommends:

- ◆ A thorough review of all current police functions be undertaken to determine whether they should remain within the charter of the Service (paras. 2.7 - 2.8).
- ◆ Consideration be given to the establishment of safe, sanitary injecting rooms, under the licence or supervision of the Department of Health, and to amendment of the *Drug Misuse and Trafficking Act 1985* accordingly (paras. 2.19 - 2.22).
- ◆ Guidelines be published by the Service in conjunction with the Department of Health, setting out the basis on which the policing of NSEP and MMP programs and similar public health initiatives should occur (paras. 2.23 - 2.25).
- ◆ Strategies be undertaken to increase public awareness of the problems of drug abuse, for the establishment of public detoxification and rehabilitation units, for greater availability of methadone, and street counselling and assistance for young users (para. 2.27).
- ◆ Steps be taken to establish a national summit or commission, involving a wide range of experts and community interests, to address the problems of drug supply and use and the rehabilitation of drug users on a national basis (para. 2.26).
- ◆ Support be given to a controlled heroin trial in the Australian Capital Territory in line with that developed by the National Centre for Epidemiology and Population Health (para. 2.28).
- ◆ Consideration be given to amending the *Drug Misuse and Trafficking Act 1985* to create an offence where a person engaged in more than a certain number of acts of supply of a prohibited drug could be dealt with on indictment for an offence of 'engaging in the commercial supply of drugs' even though the quantity of drugs involved did not exceed in total the prescribed commercial quantity or was unknown (paras. 2.31 - 2.33).
- ◆ The report of the 1995 Gaming and Betting Task Force be implemented to rationalise and improve enforcement of the gaming laws (paras. 2.37).
- ◆ There be a further independent review of the continuing suitability of police involvement in the Police & Community Youth Clubs (para. 2.54).

CHAPTER 3

TRANSFORMING THE NSW POLICE SERVICE

3.1 The point has repeatedly been made in the course of the evidence and submissions received that in order to discourage corruption attention must be paid to the structure of the Service, and to the terms and conditions of employment. The Royal Commission agrees that this is the case. Reform confined to individual anti-corruption strategies, or to bolstering the internal investigation capacity, risks providing little more than a safety net. What is required is a change in the environment in which police work so as to:

- produce a Service that is more efficient and cost-effective;
- provide greater opportunities and job satisfaction for its members; and
- promote professionalism and integrity.

3.2 Without this, the discredited work practices and the negative aspects of the police culture identified earlier in this Report will continue unchanged. In this section of the Report, the key factors examined in the evidence, the submissions and round table discussions are identified. Several have already been targeted by the Service, and by Commissioner Ryan in his blueprint for reform.⁷⁹ Having regard to the work already under way, the desirability of the Service developing the necessary initiatives itself, and the potential reach and long-term nature of the restructuring required, this examination is largely confined to bringing together the matters to be addressed. Where appropriate, recommendations are made by way of guidance. In many instances, it will be appropriate for the Service to call on external experts for assistance in developing a best practice model.

A. ORGANISATION AND MANAGERIAL STRUCTURE

THE SITUATION IN JULY 1994

3.3 As the result of regionalisation introduced under former Commissioner Avery in 1987, the State of NSW was divided into four regions, designed to be broadly equal by reference to the population within each region and the requirement that each region incorporate part of metropolitan Sydney.

3.4 Each region was divided into districts, and within each district there were patrols of varying sizes. Across the State, there were 25 districts and 165 patrols. Within the patrols there were sectors.

3.5 By 1994, a further grouping commonly referred to as the 'fifth region' was created, comprising the Solicitor to the Service, Strategy and Review, Professional Responsibility, Education and Training, Human Resources, Corporate Services, Finance, Special Agencies, and Operations Support which consisted of the SIG, the Federation of PCYCs, the Task Force Group, the Tactical Service Groups, and the Joint Technical Services Group.⁸⁰

3.6 The Commanders of the four regions namely North, North-West, South and South-West together with the Commanders of Special Agencies and Operations Support reported to the State Commander.

⁷⁹ P. J. Ryan, *Reform of the NSW Police Service - Phase 1*, 19/11/96, RCPS Exhibit 2820/1.

⁸⁰ NSW Police Service, *Annual Report 1993-94*, Sydney, 1994, p.17. See also chart showing Service structure as at July 1994.

⁸¹ A. R. Lauer, Statement, 7/11/94, RCPS Exhibit 12, Annexure A.

⁸² *Police Service Act 1990*, s. 8(1).

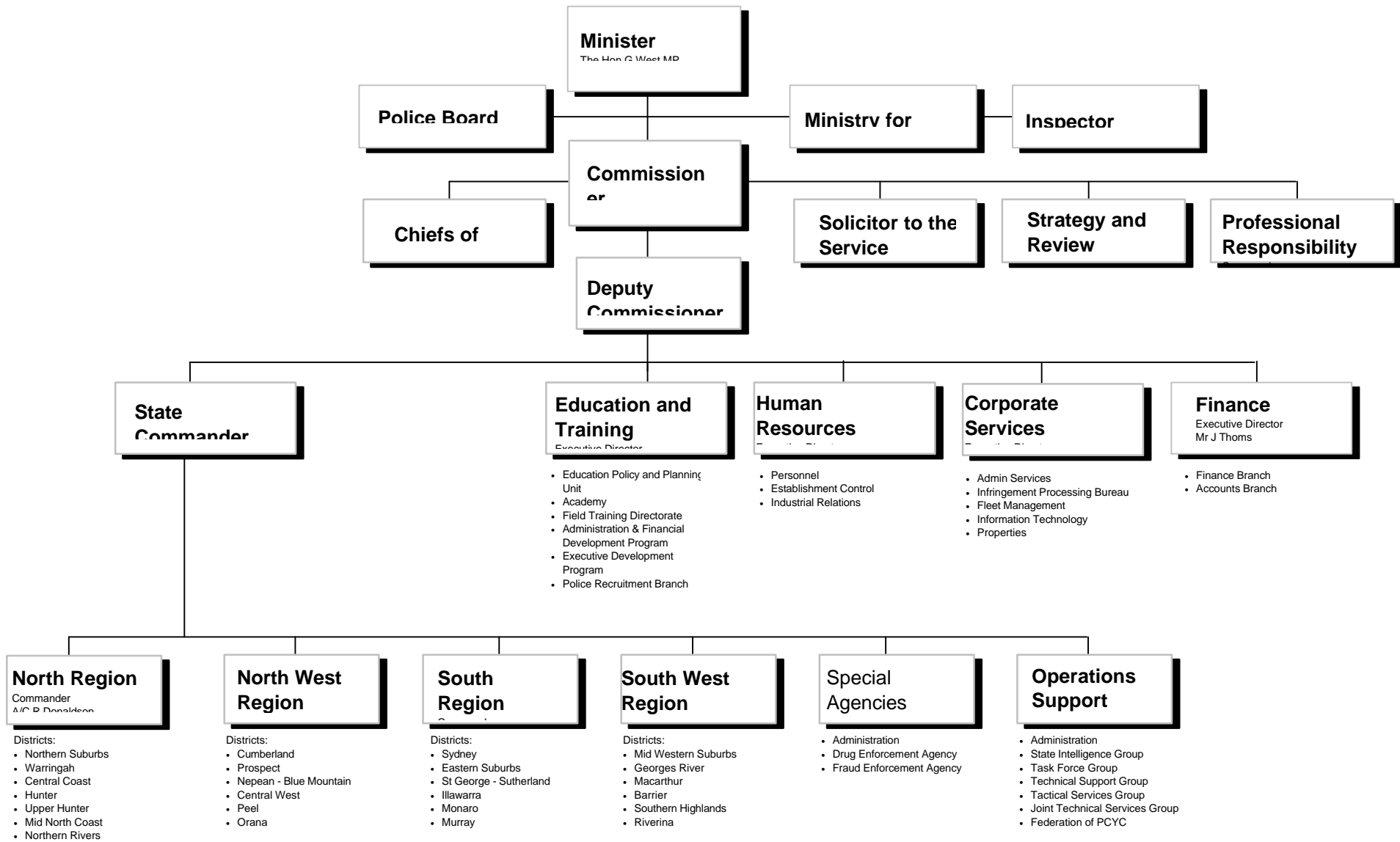
⁸³ *Police Service Act 1990*, s. 8(2).

⁸⁴ *Police Service Regulation 1990*, cl. 4.

⁸⁵ *Police Service Regulation 1990*, cl. 5.

⁸⁶ *Police Service Act 1990*, s. 16.

NEW SOUTH WALES POLICE SERVICE
JULY 1994



THE SITUATION IN FEBRUARY 1997

3.11 In November 1996, Commissioner Ryan produced a report on the reform of the NSW Police Service, Phase 1,⁸⁷ in which he proposed a reorganisation of the Service:

- to make patrols the primary management units of the Service; and
- to flatten the structure by replacing the existing regions and districts with a larger number of regions.

3.12 Additionally, this report noted that less than 48% of senior sergeants positions, just over 70% of sergeants positions, and 73% of constables positions are in the front line.⁸⁸ In part this was due to the involvement of the remainder in basic administrative duties. This is a poor return for the cost of training a sworn officer.

3.13 In February 1997⁸⁹ Commissioner Ryan announced the details of the restructure. Upon a command basis, this provides for:

- a Deputy Commissioner (Field Operations);
- a Deputy Commissioner (Specialist Operations);
- an Executive Director (Management Services); and
- an Executive Director (Human Resources & Development);

all of whom are to report directly to the Commissioner. In addition, the Commissioner has the direct support of his Chief of Staff, and the Director of the Policy Co-ordination Unit.

3.14 There are to be 11 regions and their commanders are to report to the Deputy Commissioner (Field Operations). The Region Commanders are to be responsible for the patrols within their regions, the configuration of which is still to be determined although it is anticipated that a number of patrols will be merged leaving 82 patrols running 469 police stations. In addition to responsibility for the 11 regions, the Deputy Commissioner (Field Operations) is also to be responsible for:

- State Emergency Operations;
- Operational Programs; and
- Police Citizens' Youth Clubs.

3.15 The Deputy Commissioner (Specialist Operations) is to be responsible for:

- Special Branch (or its successor);
- Technical Support;
- Internal Affairs;
- Traffic Services;
- Customer Assistance/PAL Co-ordinator;
- Crime Agencies;
- State Intelligence;

⁸⁷ P. J. Ryan, *Reform of the NSW Police Service - Phase 1*, 19/11/96, RCPS Exhibit 2820/1.

⁸⁸ *ibid.*, p. 22.

⁸⁹ See *What's the Go?*, February 1997, Edition 8, RCPS Exhibit 2949.

- Olympic Security;
- State Protection Group;
- Public Affairs;
- Special Services; and
- Forensic Services.

3.16 The Executive Director, Management Services is to be responsible for Information Technology, NEPI, Administrative & Commercial Services, Audit & Evaluation, Finance and Legal Services.

3.17 The Executive Director, Human Resources & Development, is to be responsible for the Police Academy, Personnel, Establishment Control, Recruitment, Internal Witness Support, Industrial Relations, Employee Assistance and the Reform Co-ordination Unit.

3.18 The Police Board was abolished by the *Police Legislation Further Amendment Act 1996* Schedule 1. This results *inter alia* in the Commissioner of Police being the employer of all members of the Police Service apart from some special provisions relating to the deputy commissioners.

ASSESSMENT

Revised Chain of Command

3.19 On any view, the line of command under the structure existing in 1994 was complex and bureaucratic.

3.20 All Region Commands had their headquarters in greater Sydney together with their support staff. Within the regions, each district had a separate commander who had his or her own support staff.⁹⁰ The District Command Offices were located at various places throughout the State.

⁹⁰ For an analysis of staff in Commands and Districts see Council on the Cost of Government, *NSW Police Service Review of Resource Management*, Scoping Study Report, November 1996, RCPS Exhibit 2819, pp. 15-17.

Minister for Police
The Hon P Whelan MP

**Ministry for
Police**

Commissioner
PJ Ryan

Chief of Staff

Policy Co-

Field Operations
Deputy Commissioner

Specialist Operations
Deputy Commissioner

Management Services
Executive Director

Human Resources & Development
Exec Director A/C C Nixon

- Sydney/Eastern Suburbs Region
- Mid Western Suburbs Region
- St George Region
- Prospect Macarthur Region
- Cumberland/ Nepean/Blue Mountains Regn
- Nthn Suburbs Waringah Regn
- Newcastle Region
- Mid North Coast Northern Rivers
- Illawarra South Coast Region
- Murray/Riverina Region

- Special Branch
- Technical Support
- Internal Affairs
- Traffic Services
- Customer Assistance/PAL Co-ordinator
- Crime Agencies
- Forensic Services

- Information Technology
- NEPI
- Administrative and Commercial Services

- Police Academy
- Personnel
- Establishment Control
- Recruitment
- Reform Co-ordination Unit

3.20 Commissioner Ryan assessed the management and command structure which he inherited as one based on the outmoded classic military hierarchical model, and as one which did not bring about the type of leadership, management and operational performance which was needed.⁹¹

3.21 In its report of November 1996 the Council on the Cost of Government said:

Despite the objective of regionalisation, the proliferation of staff and functions within the regions and districts has not allowed the patrol to become an effective focal point of service delivery.⁹²

This observation is consistent with the view both of Commissioner Ryan and of this Commission.

3.23 The purpose of replacing the districts and expanding the regions is expressed to be 'absolute concentration on front line policing in local area Commands under a flatter management structure'. Early in 1997 following the restructure previously mentioned, Commissioner Ryan made a selection of the most senior officers to fill the Deputy Commissioner positions and the Regional Command positions. The same exercise is under way in relation to Patrol Commanders, assisted by an assessment centre procedure. As a consequence of this process, a number of police in administrative support positions, particularly at district level, have been returned to front line policing duties.

3.24 This Commission commends the restructure, the need for which was flagged in the Interim Reports.⁹³ In summary:

- it appears both workable and sensible;
- the need to flatten the structure and to remove a sizeable and largely unproductive bureaucracy at district level was obvious;
- the reduction in the size of the regions is likely to make the regional commands better informed and responsive to the needs of the region; and
- the concentration on the patrol as the primary management unit accords with the objective of community policing and with a shift to a managerial complaints and discipline system.

Ministerial Direction

3.25 The responsibility of the Commissioner of Police for the management and control of the Police Service is 'subject to the direction of the Minister'. The Minister's power of

⁹¹ P. J. Ryan, *Reform of the NSW Police Service - Phase 1*, 19/11/96, RCPS Exhibit 2820/1, pp. 6, 14 & 15.

⁹² Council on the Cost of Government, *NSW Police Service Review of Resource Management*, Scoping Study Report, November 1996, RCPS Exhibit 2819, p. 17.

⁹³ RCPS, *First Interim Report*, February 1996, para. 6.6; RCPS, *Second Interim Report*, November 1996, para. 3.2.

direction is 'subject to the other provisions of this Act and the regulations.'⁹⁴ In 1995 the Solicitor General of NSW made the following observations:

- Section 8(5) makes it plain that the power of ministerial direction must yield to contrary indications elsewhere in the Act and regulations. This unusual express qualification of a statutory power to give ministerial directions reflects the special history of the relationship between the Police Service and the Executive. Although statutes in NSW and elsewhere have recognised the Commissioner's subjection to ministerial direction since the nineteenth century there is a long tradition of judicial emphasis upon the independence of the police force from executive control, at least in relation to the laying of criminal and disciplinary charges.
- I am not suggesting that the Commissioner is never subject to ministerial direction. Ultimately the matter will turn upon the proper construction of the relevant part of the Police Service Act 1990, doubtless affected by the tradition of independence discussed in cases such as *Griffiths v. Haines*. Outside areas concerning the laying of criminal and disciplinary charges there may be no historical or contextual basis for relieving the Commissioner of the subjection to ministerial direction that is declared in s. 8(5) of the Act.⁹⁵

3.26 This Commission remains concerned at the terms of s. 8(1). In the course of round table discussions it was said that there is a recognised convention that the Minister is concerned with matters of 'policy' and not with 'operational' matters. If this is so, then it seems to the Commission that the statute should reflect that situation, defining what is policy and what is operational, and providing for resolution of any overlap. The problem can be illustrated by asking whether the following matters are operational or policy:

- the particular location of a number of police officers;
- the opening or closing or relocation of a police station;
- the creation of a Task Force;
- the targeting of a particular category of conduct and the means by which it should be achieved.

3.27 In the view of the Commission it is difficult to see why any of these matters is other than an operational matter, in respect of which the Police Commissioner should retain independence. Otherwise a risk remains that:

- by reason of political and electoral considerations, decisions might be forced on a Commissioner by a Minister, which intrude into the responsibility of the former to deploy the Service to meet its operational needs;
- decisions will be made spontaneously and in circumstances where those advising the Minister are not well informed as to the facts; and
- conflicts of the kind seen in the past between the Commissioner and a Minister will continue.

3.28 The Commission acknowledges that ministerial accountability to Parliament is an important principle. It is not suggesting for a moment that the Commissioner of Police should be unaccountable or that the Minister should not be kept informed by the Commissioner. However, it is desirable in principle that the Police Service not be subject to undue political direction, and that the ministerial role be confined to one of policy. It is instructive to note that the Federal Parliament has addressed this area in relation to the Australian Federal Police by legislating in the following terms:

Subject to this Act, the Commissioner has the general administration of, and the control of the operations of, the Australian Federal Police.

⁹⁴ *Police Service Act 1990*, ss. 8(1) & (5).

⁹⁵ Advice of Solicitor General, 29/8/95, RCPS Exhibit 2951. For *Griffiths v Haines* see (1984) 3 NSWLR 653.

The Minister may, after obtaining and considering the advice of the Commissioner and of the Secretary, give written directions to the Commissioner with respect to the general policy to be pursued in relation to the performance of the functions of the Australian Federal Police.

The Commissioner shall comply with all directions given under this section.⁹⁶

3.29 The Commission recommends the repeal of s. 8(1) of the *Police Service Act 1990*, and its replacement with a provision to the same effect as that contained in the Federal legislation.

Deployment of Police

3.30 There are policing myths, often expressed in 'common sense' terms, which are brought out by police services, unions and politicians particularly at election time. These myths have long been demonstrated to be false, yet they continue to be raised. They are a good example of why intuition is a poor tool in police management, and of the necessity for investment in research to determine the appropriate level and allocation of resources. Each merits brief comment as they can have a significant and often detrimental effect on the way the Service deploys its resources.

Authorised Strength

3.31 Although it was repealed as from 1 January 1997,⁹⁷ s. 9 of the *Police Service Act 1990* has left its mark on the management and administration of the Service. It provides a good illustration of the previous constrictive and bureaucratic approach and of the extent to which certain myths about policing have developed and distorted political debate. The section provided as follows:

Maximum number of staff in Police Service :

9(1)

The Treasurer may, after obtaining a report from the Commissioner, determine from time to time the maximum number of Police officers and administrative officers to be employed in the Police Service, being the number the Treasurer considers necessary for the effective, efficient and economical management of the functions and activities of the Police Service.

9(2)

The total number of Police officers and administrative officers employed in the Police Service is not to exceed the maximum number so determined by the Treasurer.

3.32 While this section may have been of assistance to the Treasury in keeping a ceiling on the Service, it was widely misconstrued as a directive to maintain minimum staff numbers, particularly at patrol level, according to historic criteria rather than current need. It became, in the hands of the Service, a tourniquet applied with increasing severity the further down the line it went, and on the way it prevented a flexible response to changing situations, or current policing requirements.

3.33 As the section has now been repealed, it is no longer necessary to consider in any detail its precise relationship with s.8 of the Act, nor to explore the apparent incongruity that it was the Treasurer, not the Minister, who was ultimately responsible for determining the maximum number of police necessary for effective, efficient and economical management of the functions and activities of the Police Service. It should not be revived under another guise.

3.34 The consequences of the application of the concept of 'authorised strength' by the Service, are conveniently illustrated in the report of the Police Board subcommittee known as SCORPIO.⁹⁸ The main role of that subcommittee was to:

- restore strength in local patrols;

⁹⁶ *Australian Federal Police Act 1979*, ss. 13(1), (2) & (4).

⁹⁷ See *Police Legislation Further Amendment Act 1996*, Schedule 1(5).

⁹⁸ NSW Police Board, *Sub-Committee on Response Policing In Operations, Phase 1 Report*, September 1996, RCPS Exhibit 2764.

- make recommendations about which currently unauthorised positions within the Service should be authorised;
- plan for the return of officers to operational policing positions;
- monitor the introduction of minimum shift staffing levels across the State; and
- place more police where crime is worst.⁹⁹

3.35 When one finds within this report a glossary attempting to define such expressions as 'authorised over-strength', 'authorised not to fill', 'authorised strength', 'on loan', 'over-strength', 'minimum shift staffing', 'secondments', 'temporary transfers', 'transfers', and 'unauthorised strength', it becomes apparent that something is seriously amiss. These expressions illustrate the extraordinary steps forced upon the Service to try to manage its workforce within a bureaucratic and rigid system which was then circumvented by strategies operating under a variety of expressions or classifications.

3.36 A recent example of the constraints upon the Service arises from the review of the NSW Police Communications Branch.¹⁰⁰ That review found 'no persuasive evidence ... which demonstrates the need to continue to employ over 70 police as communications operators'.¹⁰¹ Commissioner Ryan approved an action plan in November 1996, based on the review, which 'endorsed 80 police officers being replaced by civilian communications operators'.¹⁰² This has not yet been implemented because the Service does not have 80 civilian salaries available.

Police and Crime Rates

3.37 It is often argued that if police are given more resources, especially personnel, they will be able to protect communities against crime. This is a myth¹⁰³ for the reasons that:

- repeated analysis has consistently failed to find any connection between the number of police officers and either crime rates or the proportion of crimes solved.¹⁰⁴ A number of studies have reinforced the circumstance that differences in crime rates between various cities have no relationship to the number of police employed in each city, and that cities with more crime sometimes have more police;¹⁰⁵
- it is incontrovertible that most causes of crime are social and economic factors over which police have no control;
- crime tends to occur either out of the direct public eye, or otherwise is committed 'quickly, stealthily and without warning'.¹⁰⁶ Short of blanket police coverage, police have little chance of preventing most crime occurring;¹⁰⁷
- any form of management of police based on crime statistics or clearance rates is exceedingly uncertain since each is recognised as notoriously unreliable;¹⁰⁸
- increasing the number of police is recognised as a poor way of increasing the number of police actually available on the street;¹⁰⁹

⁹⁹ *ibid.*, p. 15.

¹⁰⁰ NSW Police Service Communications Review Project Team, *Report into NSW Police Communications*, 25/9/96, RCPS Exhibit 2824.

¹⁰¹ *ibid.*, p. 4.

¹⁰² P. J. Ryan, *Reform of the NSW Police Service - Phase 1*, 19/11/96, RCPS Exhibit 2820/1, p. 23.

¹⁰³ D. Bayley, *Police for the Future*, Oxford University Press, 1994, p. 3.

¹⁰⁴ *ibid.*; and M. R. Gottfredson & T. Hirschi, *A General Theory of Crime*, Stanford University Press, 1990, p. 270 quoted in L. Sherman, 'The Police' in J. Q. Wilson & J. Petersila (eds), *Crime*, Institute for Contemporary Studies, 1995, p. 329.

¹⁰⁵ D. Bayley, 1994, *op cit.*, p. 3.

¹⁰⁶ J. Robinson, 'Police Effectiveness: Old Dilemmas, New Directions', in D. Chappell & P. Wilson (eds), *Australian Policing Contemporary Issues*, Butterworths, 1989, p.173.

¹⁰⁷ R. Jochelson, 'Household Break-ins and the Market for Stolen Goods', *Crime and Justice Bulletin*, no. 24, May 1995, p. 1.

¹⁰⁸ *ibid.*, p.172.

- it has not been demonstrated that increasing the number of police actually gives value for money;¹¹⁰
- moreover, it has not been demonstrated that increasing the number of police will satisfy a public which has been described as having an insatiable demand for 'less crime and more order'.¹¹¹

3.38 This myth has been further exploded in relation to primary policing strategies. For example, it has not been demonstrated that random motorised or foot patrolling either reduces crime or improves the chances of catching suspects.¹¹² It has been observed that:

- police time spent driving the streets waiting for something to happen is not time well spent,¹¹³ and makes about as much sense as it does to have firemen patrol routinely in fire trucks to fight fire;¹¹⁴
- the chances of a beat officer coming across an offence in the course of its commission are minimal,¹¹⁵ although it is acknowledged that a police presence can help to reassure the public psychologically;¹¹⁶ and
- the number of patrols in an area may be doubled, halved, or even removed altogether without changing crime levels. Saturation patrolling does have an effect on crime, but it is too expensive to be more than a short-term expedient.¹¹⁷

3.39 Demands for greater numbers and greater expenditure may make good rhetoric in law and order 'debates', but they are contrary to the overwhelming weight of the published literature in this area. Promises to achieve more through increases in police numbers are in fact empty rhetoric and would be better replaced by mobilising consensus behind a few achievable goals.¹¹⁸

3.40 This form of debate has in fact operated as a disservice. Among its consequence has been the derailing of planning by the Police Academy for recruit intakes.¹¹⁹

3.41 In the view of the Commission the path to follow is:

- to improve the quality of service by the available police rather than to assume that quantity is the answer; and
- refocus on the type of work which actually needs to be performed by sworn police, and release those who are inappropriately included in non-operational duties to operational roles.

¹⁰⁹ Sherman estimates conservatively that in the United States, for every 100 officers employed, only eight will be on patrol at any time. L. Sherman, 'The Police' in J. Q. Wilson & J. Petersila (eds), *Crime*, Institute for Contemporary Studies, 1995, pp. 328-29. Bayley estimates 'to increase the street presence of the police by one additional officer, it is necessary to hire an extra 10 officers'. Bayley, 1994, op cit, p. 52.

¹¹⁰ It was estimated that in Australia in 1989, the cost of just one additional patrol car, fully staffed, on the road for 24 hours a day was \$300,000 per year. P. N. Grabosky, 'Efficiency and Effectiveness in Australian Policing', in D. Chappell & P. Wilson (eds), *Australian Policing Contemporary Issues*, Butterworths, 1989, p. 151.

¹¹¹ J. Robinson, 'Police Effectiveness: Old Dilemmas, New Directions', in D. Chappell & P. Wilson (eds), *Australian Policing Contemporary Issues*, Butterworths, 1989, p.173.

¹¹² Skolnick and Bayley, *The New Blue Line*, The Free Press, 1986, p. 4.

¹¹³ J. Q. Wilson, *Thinking about Crime*, Basic Books, 1975, quoted in J. Robinson, 'Police Effectiveness: Old Dilemmas, New Directions', in D. Chappell & P. Wilson (eds), *Australian Policing Contemporary Issues*, Butterworths, 1989, p. 173.

¹¹⁴ C. Klockars, *Thinking about Police*, McGraw Hill, 1983, quoted in L. Sherman, 'The Police' in J. Q. Wilson & J. Petersila (eds), *Crime*, Institute for Contemporary Studies, 1995, p. 329.

¹¹⁵ R. Clarke & M. Hough, *Crime and Police Effectiveness*, London Home Office Research Unit, 1984, pp. 6-7, quoted in R. Reiner, *The Politics of the Police*, 2nd edn, Harvester Wheatsheaf, 1992, p. 148.

¹¹⁶ Bayley, 1994, op cit, p. 6.

¹¹⁷ Bayley, 1994, op cit, p. 5.

¹¹⁸ L. Sherman, 'The Police' in J. Q. Wilson & J. Petersila (eds), *Crime*, Institute for Contemporary Studies, 1995, p. 348.

¹¹⁹ This practice has been condemned by PARC and PEAC. See Police Board of NSW, submissions to RCPS, *Police Board of NSW - An Evaluation*, RCPS Exhibit 2459/6, p. 67; and *A Brief History of Police Education in New South Wales 1981-1995*, RCPS Exhibit 2462/13, p. 43.

3.42 In summary, the myths of authorised strength and police crime rates should be openly appreciated for what they are, and not perpetuated.¹²⁰ Research is required to determine the optimum level of police staffing and to determine whether the monies required to increase the street presence of police¹²¹ would be better utilised in training of existing officers or funding equipment and technology which would allow existing resources to work more efficiently.

CONCLUSION

3.43 The Commission considers that within the Service budget (established in accordance with the usual budgetary process, and following consultation between the Police Commissioner and the Minister, who would make the budgetary submission) the Commissioner of Police, as chief executive officer, should have the authority to determine the staffing structure, sworn and unsworn, and the deployment of staff required to carry out his statutory duties.¹²²

3.44 It is inappropriate for this Commission to attempt any comprehensive recommendations as to the changes in the organisational and management structures which are under way lest it create an unduly rigid framework at a time when flexibility and openness of mind are desirable. Nevertheless, it commends the following basic principles in approaching these issues:¹²³

- a flatter and more open management structure;
- increased participation and empowerment of the workforce;
- the patrol as the centre of service delivery;
- inclusion in patrols of a wider range of skilled civilians than heretofore;
- central agencies to be kept to a minimum and only to carry out work which is not appropriate for patrol level;
- a focus on the relevance of any activity to core policing;
- a focus on the efficiency of service delivery; and
- full and frank disclosure and public discussion about what is effective policing and what is not, and what can be accomplished with existing resources.

3.45 One particular aspect of the proposed reforms which is welcome, and illustrates the application of these principles, is that of a duty inspector being available on a 24-hour basis seven days a week in a patrol. Another important aspect is the freeing up of the sworn officers who currently carry out clerical, administrative or support functions which could be carried out by civilians. A significant objective of the reform process, as enunciated by the SCORPIO report, should be to return those officers to true policing work.

3.46 An even more important aspect will be to ensure that the allocation of human resources is matched to current needs and not simply to historic staffing figures. What is required is an ongoing analysis of demographics and current demands for police services to ensure that patrols are appropriately resourced.

¹²⁰ This view has the support of the UNSW Police Policy Research Unit submission, 'Police and the Community; the Necessity for Change', RCPS Exhibit 2809/112, pp. 5 & 59.

¹²¹ See paras. 3.37-3.38 supra.

¹²² See para. 3.9.

¹²³ Many of which were urged in the UNSW Police Policy Research Unit submission, 'Police and the Community; the Necessity for Change', RCPS Exhibit 2809/112.

RECOMMENDATIONS

The Commission recommends:

Structure

- ◆ The revised structure of the Service announced by Commissioner Ryan be adopted and implemented, thereby expanding the number of regions, removing districts, and making patrols the primary service delivery and management units (para. 3.24).
- ◆ There be a continuing review to further flatten the structure of the Service and to return police presently carrying out administrative and support duties, capable of being carried out by clerical or unsworn staff, to operational duties (para. 3.24).

Policy

- ◆ The *Police Service Act*, s. 8 be amended along the lines of the *Australian Federal Police Act 1979* (Cth), s. 13 to draw a clear distinction between operational and policy responsibility, and to vest the former in the Police Commissioner and the latter in the Minister (paras. 3.29 & 3.26).

Flexibility

- ◆ There be no return to the concept of authorised strength or any similar notion, and that the Police Commissioner be given the authority and flexibility to determine matters of staffing structure and deployment to meet current needs and resources (para. 3.33).
- ◆ Central agencies be kept to a minimum and confined to work that cannot be appropriately carried out at patrol level and by specific task forces (para. 3.44).

B. THE AGENCIES

3.47 As a result of Commissioner Ryan's reform agenda, attention is being given to the retention and/or structure of the agencies which formerly came within the 'fifth region', and now fall under the command of the Deputy Commissioner (Specialist Operations).

SPECIAL BRANCH

3.48 In the course of its inquiries into the paedophile segment, the Royal Commission received evidence related to the Special Branch¹²⁴ which is relevant to the matters raised in this section of the Report. In the examination of the witnesses called, most notably its Commander, and of various records, a number of matters for serious concern arose relating to:

- the disregard of its charter;
- the fact that it seemed accountable only to itself, operating under a cloak of secrecy;
- the possible abuse of allowances and of monies ostensibly payable to informants or sources of intelligence,¹²⁵

¹²⁴ The details of the evidence relating to the Special Branch investigation will be included in Volume IV of this Report.

¹²⁵ NI, RCT, 11/3/97, pp. 37029-36; NI, RCT, 12/3/97, pp. 37068-71, 37085, & 37089-90.

- lax and inconsistent record keeping practices and woefully inappropriate systems for recording payments and allowances;¹²⁶
- long lunches by supervisors and the consumption of alcohol on duty, particularly within the Special Branch office where it seems a bar was regularly opened in the afternoon;¹²⁷
- the opening of dossiers and the keeping of records in respect of various persons, for example, barristers practising in the criminal law who on no reasonable basis could have been of interest to Special Branch within its charter;¹²⁸
- the ineffective and outdated intelligence system it maintained;¹²⁹
- the belief that it had long been associated with political interests, and seen as an agency which could be used for political advantage against persons on whom 'dirt files' had been kept;¹³⁰
- the limited investigative success it had achieved in relation to subversive activities in the past;¹³¹
- the destruction of files soon after the Royal Commission was announced;¹³² and
- the unsatisfactory recruitment practices of the Branch which were based on patronage and friendship.

3.49 In response to the evidence called, the Police Commissioner on 12 March 1997 announced that Special Branch had been disbanded. Its offices were sealed and its files are now the subject of examination by the Service and the PIC with the aim of ensuring that those files which should not have been kept are removed from the system.

3.50 In taking the course of disbanding Special Branch as it existed,¹³³ the NSW Police Service has followed in the path of other services within Australia which have progressively closed down their equivalent branches and transferred the protection duties elsewhere.¹³⁴

3.51 On 7 April 1997 the Police Commissioner foreshadowed the creation of a new agency to replace Special Branch,¹³⁵ to be called the Protective Security Response Group (the PSRG) to perform the following core functions:

¹²⁶ See generally NI, RCT, 12/3/97, p. 37068; C. Perakis, RCT, 11/3/97, pp. 36936-37; P. M. Ryan, RCT, 11/3/97, pp. 36981-82. Specifically, the existence of an unofficial spiral notebook 'for the officer's own information' which would be destroyed 'at the officer's discretion', see NI, RCT, 3/12/96, pp. 34666-69 and P. T. Peters, RCT, 5/12/96, pp. 34946-50; inaccurate vehicle logs, N. M. Pitt, RCT, 9/12/96, pp. 35172-75; the use of the expression 're inquiry' to describe an officer's attendance to a personal matter, N. M. Pitt, RCT, 9/12/96, pp. 35196-99, B. M. Mohr, RCT, 9/12/96, pp. 35204-06; former Special Branch Commander Peter Ryan admitted the Branch's record-keeping was unprofessional and accepted responsibility for it, RCT, 10/12/96, p. 35322. The most recent Commander of Special Branch examined the record keeping procedures of the Branch following the evidence in December and found them to be 'unacceptable'. He subsequently initiated changes to procedures and requested an audit of the Branch, Briefing Note, 18/12/96.

¹²⁷ NI, RCT, 12/3/97, pp. 37045, 37051; P. Ryan, RCT, 11/3/97, pp. 36985-86.

¹²⁸ NI, RCT, 12/3/97, pp. 37051-52; 37054-56; 34674-75.

¹²⁹ eg. the use of an antiquated system of coloured cards, dossiers and monthly files to record and retrieve information, see NI, RCT, 3/12/96, pp. 34670-74 & 34676.

¹³⁰ eg. NI, RCT, 10/12/96, p. 35371 where NI says that he has seen files at Special Branch which are not relevant to the Branch's work.

¹³¹ NI, RCT, 12/3/97, p. 37051.

¹³² NI, RCT, 12/3/97, pp. 37053-54; 37056-57

¹³³ The history of Special Branch was outlined by Neville Ireland in his evidence, see RCT, 3/12/96, pp. 34645-48. Special Branch had its origins in the Subversive Organisations Investigations Bureau of the 1930s and the Military Police Intelligence Branch of WWII. Special Branch as it has been recently known was formed in 1948 or 1949 following the establishment of ASIO. A similar Branch was formed in every State. It was modelled on New Scotland Yard's Special Branch. Its key responsibilities were:

- to identify politically motivated violence and extremist activity;
- to gather information about various factions in the community;
- to provide security for royalty, dignitaries, politicians etc.; and
- to conduct security reviews where threats had been made.

Special Branch provided intelligence in relation to the criminal investigations into the Hilton bombing, the assassination of the Turkish Consul, the fire bombing of Synagogues, and the Croatian criminal conspiracy.

¹³⁴ Special Branch units existed in all States until the early 1990s.

- strategic analysis focusing on areas of greatest risk;
- tactical/operational analysis on approved targets who present a risk of politically motivated violence;
- risk/threat assessment on areas impacting upon close personal protection, VIPs, and counter terrorist intelligence;
- response to National Anti Terrorist Plan (NATP) and Standing Advisory Committee Politically Motivated Violence (SAC PAV);
- personal protection of Internationally Protected Persons (IPPs) and other dignitaries;
- training of officers in national close personal protection competencies; and
- security surveys and threat assessments.

3.52 This mission is not dissimilar to that of the former Special Branch and concern naturally arises as to whether the PSRG might replicate the past practices.

3.53 There can be no objection to the formation of an agency with a capacity to provide the protective services and associated risk/threat assessment described, having regard to the number of official and distinguished visitors to the State each year, the Olympic Games scheduled for Sydney in the year 2000, and the need to ensure the safety of consular officials, ministers and others holding high public office. It is the other aspects that attract concern since they involve on their face, broad intelligence gathering and analysis functions.

3.54 The Police Commissioner, however, proposed a number of safeguards. For example:

- detailed integrity tests and vetting would be conducted of all members of the PSRG, who would be subject to a five-year tenure policy;
- the PSRG would be answerable to the Deputy Commissioner of Special Operations, and intelligence collection and retention would be subject to sanctioning by a management committee chaired by the Deputy Commissioner Specialist Operations, and including the Commander PSRG and the Commander Olympic Security Group;
- the Joint Audit team currently conducting the audit of Special Branch holdings would be consulted in the design of an ethical records management system;
- all work would be properly assessed, prioritised and approved by a senior officer before allocation;
- a 'job' database would be created to record all service requests and all information and action would be similarly recorded on a database;
- the Service would consult with representatives of ASIO, Foreign Affairs, the AFP, and other groups in relation to records management and functions;
- the PSRG would not control Informant Management funds;
- there would be a random and external audit to ensure ethical target selection, collection, storage and use of intelligence; and
- a group operating manual and risk management guidelines would be developed.

¹³⁵ As announced in the *Police Service Weekly*, vol. 9, no. 14, 7/4/97, p. 15.

3.55 On 17 April 1997 Police Minister Paul Whelan announced that the proposal would be placed on hold pending the report of this Royal Commission and stated that the replacement of Special Branch was a policy issue for which he would take responsibility.

3.56 Subject to the development of suitable practices and guidelines, real accountability, and the selection of suitable and entirely new staff in accordance with the safeguards proposed, this Commission supports the establishment of the PSRG or similar body. While it might be possible for the Service to deal with terrorist incidents or subversive groups through conventional investigative bodies, operating in conjunction with ASIO and SAC PAV, it is the circumstance of the Olympic Games that weighs heavily in the balance. The history of recent Olympic Games suggests that a real risk of terrorist incident exists, such that a soundly based counter-terrorist capacity is needed. Moreover, any close personal protection group needs access to intelligence if it is to carry out its job effectively.

3.57 The Commission accordingly supports the creation of the PSRG or similar body, subject to:

- the guidelines identified above;
- a review of its operations at the end of the Olympic Games to ensure that it has remained within its charter and still has an effective role to perform;
- an annual audit by the Deputy Commissioner of Special Operations in conjunction with the Commissioner of the PIC, to ensure that:
 - it is performing to its charter;
 - its staff are sufficiently aware of its mission statement and have not reverted to the practices of old;
 - it is adhering to strict controls on the use and payment of informants;
 - it has sound operating procedures; and that
 - proper procedures exist for the recording and use of intelligence gathered.

CRIME AGENCIES

3.58 In the current examination of the criminal investigative function of the Service, particular consideration is being given to the wisdom of retaining the special agencies such as the Drug Enforcement Agency and Fraud Enforcement Agency. This review will not be complete until later this year, and the Commission is accordingly unable to express any assessment other than to identify two options that will need to be considered.

3.59 The first option, save for those areas where very considerable expertise and accumulated experience is needed (for example, the Child Protection Enforcement Agency), is for the agencies to be disbanded and for their work to be returned to regional detectives. In the case of large-scale inquiries and particularly serious crimes, *ad hoc* and short-term task forces could be formed of staff drawn from the regions to overcome the elitism and close knit relationships which have been evident within the agencies.

3.60 The second option is that of multi-disciplinary teams in areas such as the Fraud Enforcement Agency, where the Service would benefit from the introduction of outside expertise and where the leader of the team or the person in command of the office need not necessarily be a sworn police officer.

3.61 This Commission welcomes the initiative of the current inquiry. It is appropriate that the ultimate decision for the retention and structure of the agencies be left to the Service, so long as it takes into account the problems and inefficiencies detected and identified in this Report.

RECOMMENDATIONS

The Commission has no specific recommendations, but records its support for:

Special Branch

- ◆ The formation of a newly constituted agency, in the place of Special Branch, with the function of:
 - providing close personal protection for VIPs, internationally protected persons and other dignitaries, and carrying out related intelligence gathering and risk/threat assessment (para. 3.51); and
 - tactical/operational analysis, intelligence gathering, and liaison with other relevant agencies, in relation to approved targets who present a risk of politically motivated violence or terrorist activity, subject to the safeguards, audit, and review identified (paras. 3.54, 3.56, 3.57).

Special Agencies

- ◆ The current review of the investigative function of the Service, in which careful consideration needs to be given to the retention of the Special Agencies and the alternatives identified (paras. 3.58 - 3.61).

C. EMPLOYMENT

RECRUITMENT OF POLICE OFFICERS

3.62 The current minimum entry standards for recruitment to the Police Service of persons who wish to be sworn officers are:

- minimum age of 18 years and three months at the time of application;
- Australian citizenship by birth or naturalisation or permanent residency;
- NSW Class 1A driving licence and acceptable driving record;
- absence of an adult criminal record;¹³⁶
- Senior First-Aid Certificate;
- ability to swim 100 metres;
- typing skills: 25 wpm, 98% accuracy;
- ability to take part in operational policing.

Various medical requirements also apply.

3.63 The academic threshold requirements are:

¹³⁶ Discretion may be applied to PCA offences (driving a motor vehicle while exceeding the prescribed concentration of alcohol) and juvenile record.

- HSC pre-1990: Aggregate equivalent to the top 60% including a satisfactory pass in English;
- HSC post-1990: TER ranking of at least 40 including acceptable grade in English, or TAFE-based Adult Matriculation Certificate with at least five Units (including acceptable level in English);
- qualification at associate diploma or higher level from a NSW university or equivalent in other States;
- TAFE Certificate in an approved subject with at least a pass at credit level, plus School Certificate which includes a minimum Grade 3 English.

Applicants lacking formal educational qualifications, but who demonstrate that they are capable of undertaking the Police Recruit Education Program (PREP) by virtue of their life and work experiences and achievements, are deemed to have met the educational entry standard for policing.

3.64 Applicants who meet the above minimum requirements are put through several procedures with culling at a number of stages:

- applicants are tested by way of written assessment for job-related aptitude, for observational skills, verbal communication, decision-making and inductive and deductive reasoning;
- psychological screening is conducted, but is not used for the culling of applicants. The results of tests may be provided to Selection Committees and become the basis for further assessment where scores are unusual or extreme;¹³⁷ and
- a Physical Agility Course is administered as well as a body fat test and a firearm handling test.

3.65 Following the above, there is an interview with a three-member selection committee composed of a patrol commander, a sergeant and a constable, all of whom have been trained in recruit selection.

3.66 Background checks are then conducted which include comments from former employers about the applicant's service and suitability for police work. On receipt of verified adverse information applicants can be culled.

3.67 There is then a full medical examination with further culling. Those who are left form a pool from which selection is made for classes at the Police Academy. Entry is competitive.

3.68 There are no quotas set at present for recruitment, however at times certain groups can be targeted to increase the representation of, for example, Aboriginal people, ethnic and other minority groups, and women.

3.69 Those who enter the Police Academy at Goulburn as student police officers (SPOs) are paid a salary at the rate of 90% of the base salary of a First Year Constable.¹³⁸ SPOs are covered under the Crown Employers (Student Police Officers) Award.

Raising Age of Entry

3.70 The current base age for recruits in NSW is 18 years and three months at time of application.¹³⁹ It has been asserted that there is no evidence that increasing the base age will ensure

¹³⁷ Such further assessment is based on the California Personality Inventory and is designed to measure aggression, ethno-centrism and authoritarianism. Such assessment is not wide-spread because of the expense involved.

¹³⁸ During residential phases, 20% of their salary is deducted towards the cost of meals and accommodation at the Police Academy unless the SPO can satisfy the Commissioner that he or she maintains a substantially dependent spouse and/or substantially dependent child in which case the deduction is reduced to 2.044% of salary.

officers are less susceptible to corruption.¹⁴⁰ Anecdotal evidence suggests older recruits with broader employment, educational and life experience may be less susceptible to the influence of officers who behave unethically.¹⁴¹ In some other States and overseas Services the age for recruitment has been increased¹⁴² to achieve this objective.

3.71 Among the submissions received were proposals to:

- increase the minimum age of entry to 25 years,¹⁴³ and to
- make completion of a university-based recruit education program a pre-condition to entry.¹⁴⁴

3.72 The Commission considers the Service should raise the base age of entry to 21 years to ensure recruits are more mature, have more experience in dealing with a variety of people and in coping with crises, and have more confidence in their own decisions. Tertiary education is examined later in this volume.¹⁴⁵

Composition of the Service

3.73 Increasing the number of women, Aboriginal peoples, and ethnic and other minority groups in the Service is not of itself an answer to corruption,¹⁴⁶ nor is it the solution to addressing those acts of impartiality which result from personal prejudices.

3.74 Widening the recruitment base, however, may address some of the problems which result from the homogeneity of the Service which tends to reinforce the negative aspects of its culture and to lock out diversity of ideas.

3.75 It is difficult to accurately determine the current proportion of the Service representing Aboriginal people, or recruits from ethnic or other minorities, since their backgrounds or preferences are not always disclosed at recruitment. However, according to current Personnel records:

- 85.9% of sworn officers are male;
- 14.1% of sworn officers are female;
- 0.4% of sworn officers are Aboriginal people;
- 4.3% of sworn officers are from non-English speaking backgrounds.¹⁴⁷

3.76 Attempts have been made in recent times to make the Service more representative of the community it serves, through initiatives such as the bridging course for Aboriginal people offered through Goulburn TAFE. Similar courses could be helpful for other groups lacking educational advantage or language skills.

¹³⁹ Material supplied re Education and Training, by K. Moroney, RCPS Exhibit 5999/4.

¹⁴⁰ P. Cioccarelli, Submission to RCPS, RCPS Exhibit 2809/30c, 8/10/96.

¹⁴¹ ICAC, Submission to RCPS, 26/7/96; *Commission Report: The City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department*, (M. Mollen, Commissioner), New York, 1994, p. 115.

¹⁴² Following the Fitzgerald Inquiry recommendation that applicants with 'more maturity who have education or work experience beyond high school' would have 'a better grounding for police work'. *Report of a Commission of Inquiry Pursuant to Orders in Council*, (G. E. Fitzgerald, Commissioner), Brisbane, 1989, p. 246. The average age of recruits in Queensland has risen from 17 years of age in 1991, to 25 years. The relevant age for entry into the Victorian Police is now 21 years, while that for the NYPD is 22 years.

¹⁴³ CA Research Trust, Submission to RCPS for First Interim Report, RCPS Exhibit 5999/3.

¹⁴⁴ P. Cioccarelli, Submission to RCPS, RCPS Exhibit 2809/30c, 8/10/96.

¹⁴⁵ See Volume II, Chapter 3, paras. 3.157 - 3.163, Continuing Education and Career Development, and see also Volume I, Chapter 2 of this Report, paras. 2.62 - 2.65.

¹⁴⁶ See Volume I, Chapter 2, paras. 2.58 - 2.61.

¹⁴⁷ NSW Police Service, *Annual Report 1995-1996*, p. 110. The Police Service Annual Report notes that identification as one of the EEO groups is voluntary and figures may be under-counted.

3.77 A recruitment policy which encourages diversity of membership of the Service is recommended provided that:

- it does not stereotype recruits or limit opportunities for promotion by confining police who identify as a member of a racial or minority group to the policing of their own community;
- it operates in tandem with the education, training and anti-corruption policies of the Service in promoting an understanding of minority group issues, and of matters affecting minority groups; and
- it establishes strong internal support structures for all members regardless of their background.

3.78 Further considerations which need to be addressed in order to improve the quality of policing so far as it affects people from different cultural backgrounds include:

- training in, and use of, alternative and innovative policing techniques attuned to special local circumstances or cultural, racial and minority needs;¹⁴⁸
- the allocation of resources permitting more effective use of interpreters;
- a greater exercise of discretion in relation to minor offences and the use of alternatives to arrest, unless necessary as a last resort;
- the training of officers in the use of interview techniques which are more sensitive to the understanding and expectations of minority groups;¹⁴⁹ and
- the development of programs in conjunction with community groups which educate members about the rights of citizens and the role and expectations of police in this State.

WORKFORCE

3.79 The Police Service consists of the Commissioner, members of the Police Service Senior Executive Service (PSSSES), all other police officers and administrative officers employed under the *Police Service Act 1990* and temporary employees.¹⁵⁰

3.80 An administrative officer is a member of the Police Service other than a police officer or a temporary employee. A commissioned police officer is an officer of or above the rank of Inspector. A police officer is a member of the Police Service holding a position which is designated under the Act as a position to be held by a police officer.¹⁵¹

3.81 The Commissioner may classify the various duties that members of the Police Service are required to perform and allocate the duties to be carried out by each such member.¹⁵² The Commissioner may determine positions in the Police Service and can create, abolish or otherwise deal with any position.¹⁵³

3.82 The Commissioner is required to designate the positions in the Police Service which are to be held by police officers. A position is to be so designated if the Commissioner is satisfied that the

¹⁴⁸ In parts of Queensland and the Northern Territory this has led to some communities policing themselves.

¹⁴⁹ NPRU, 'Police-Citizen Interactions: Conflict resolution tactics and their influence upon the resistance patrol officers encounter', NPRU, 1993, p. 2 - draws attention to a study from the USA where positive results were gained from white officers being trained in the use of alternative interrogation methods for black people. As also suggested by the Intellectual Disability Rights Service submission, RCPS Exhibit 2809/54, pp. 7-8; The Council on the Ageing also drew attention to the manner in which the elderly are dealt with by police and the need for training on issues that affect the aged, RCPS Exhibit 2809/34, p. 1.

¹⁵⁰ *Police Service Act 1990*, s. 5.

¹⁵¹ *ibid*, s. 3(1).

¹⁵² *ibid*, s. 8(3).

¹⁵³ He is required to classify and grade each such position. *ibid*, s. 10.

holder will be required to carry out, or will be concerned in, operational duties, or that it is otherwise appropriate to do so.¹⁵⁴ The Commissioner may not designate such a position while it is being held by an administrative officer, or remove the designation of such a position while it is being held by a police officer.¹⁵⁵

3.83 These last mentioned provisions introduce a degree of rigidity and a bureaucratic structure into the staffing of the Service that fetters the ability of the Commissioner to allocate duties between sworn officers and administrative officers in a timely way responsive to needs and efficiency. A strong case illustrating the need for this mobility exists in the case of the Communications Branch where the recent inquiry and report revealed inefficiency and unnecessary expense arising out of the shift structure. This could have been remedied by a reorganisation of the Branch and substantial restaffing with unsworn officers.¹⁵⁶ The Commission considers that it is appropriate to repeal s. 11(3) so as to give the Commissioner greater freedom in the reassessment of all jobs and positions within the Service.

3.84 The ranks of police officers within the Police Service in descending order are:

- Commissioner;
- PSSSES member.¹⁵⁷ Currently it is possible for a police officer of, or above the rank of Superintendent to be a member of the PSSSES;
- Superintendent (other than a member of the PSSSES);
- Chief Inspector;
- Inspector;
- Senior Sergeant;
- Sergeant;
- Senior Constable;
- Constable.

Constable

3.85 Subject to the Police Service Act and the Regulations, the Commissioner may appoint any person of good character and satisfactory educational qualifications as a police officer of the rank of Constable. Initially, such a person is to be appointed on probation. Probationary police officers can be dismissed at any time without a reason being given. The period of probation is a year or such other period (not less than six months) as the Commissioner directs. In the case of a member rejoining the Police Service, the probation period can be one to six months. Before being confirmed in the rank of Constable, the officer has to complete the Police Recruit Education Program (PREP) or other initial basic training as determined by the Commissioner. An officer designated by the Commissioner has to report that the Probationary Constable is fit to satisfactorily discharge the duties of Constable.¹⁵⁸

¹⁵⁴ *ibid*, s. 11(1) & (2).

¹⁵⁵ *ibid*, s. 11(3).

¹⁵⁶ NSW Police Service Communications Review Project Team, *Report into the NSW Police Communications*, 30/9/96, RCPS Exhibit 2824.

¹⁵⁷ The Commissioner, with the approval of the Minister, may specify different ranks for police officers within the PSSSES, *Police Service Act 1990*, s. 12; *Police Service Regulation 1990*, cl. 6.

¹⁵⁸ Including medical fitness, aptitude for the discharge of duties of constable, integrity, diligence and good conduct. *Police Service Act 1990*, s. 73; *Police Service Regulation 1990*, rr. 17, 18 & 19.

3.86 Police officers of the rank of Constable are to be appointed to that rank, or to a grade within that rank, and not to a separate position in the Police Service.¹⁵⁹ If within a flatter organisational structure constables are able to assume a command role, then positional appointment should be opened up for them, as has occurred within the Australian Federal Police. This can have a long-term beneficial effect for commitment and morale, and permit additional payments to reflect responsibility and duties performed.¹⁶⁰

Non-Executive Officers of the Police Service

3.87 Non-Executive Officers comprise all members of the Police Service except the Commissioner, members of the PSSSES and temporary employees. The holder of such office does not have to be a sworn member of the Service.

3.88 Appointment to non-executive positions is by the Commissioner.¹⁶¹ If the Commissioner is satisfied that a non-executive position is suitable for either a police officer or an administrative officer the position may be so designated for the purpose of the selection process. Before final appointment, however, the Commissioner must determine whether or not it is a police officer or administrative officer position.¹⁶²

The Police Service Senior Executive Service

3.89 This comprises the persons ('executive officers') holding the positions referred to in Schedule 2 of the *Police Service Act 1990*. The holders can be either police officers or administrative officers, but if police officers they must be of or above the rank of Superintendent.¹⁶³

3.90 Appointments to these positions are made by the Governor on the recommendation of the Commissioner, with the approval of the Minister in the case of Deputy Commissioner or Assistant Commissioner and by the Commissioner in any other case. It does not matter whether the person appointed is not already a member of the Police Service, nor does it matter whether a person appointed to a position designated as a position to be held by a police officer, is or is not a police officer at the time of appointment.¹⁶⁴

3.91 Executive officers have to enter into contracts of employment with the Commissioner. They hold office for such period not exceeding five years as is specified in their instrument of appointment. Their employment or any matter, question or dispute relating thereto is not an industrial matter for the purposes of the *Industrial Relations Act 1996*, and an appeal does not lie to the Police Tribunal or the Government and Related Employees Appeal Tribunal (GREAT) in relation to their employment.¹⁶⁵

3.92 An executive officer may be removed from office at any time by the Commissioner except in the case of a Deputy Commissioner or Assistant Commissioner when it is for the Governor to act upon the recommendation of the Commissioner with the approval of the Minister.¹⁶⁶

The Commissioner of Police

3.93 The Commissioner of Police is appointed by the Governor on the recommendation of the Minister. The Minister is required to make inquiries from the Police Integrity Commission and any other person or body considered appropriate as to the applicant's integrity.¹⁶⁷

¹⁵⁹ *Police Service Act 1990*, s. 10(4).

¹⁶⁰ See paras. 3.270 - 3.271 below.

¹⁶¹ *Police Service Act 1990*, s. 64.

¹⁶² *ibid.*, s. 65.

¹⁶³ *ibid.*, ss. 32, 33 & 35.

¹⁶⁴ *ibid.*, s. 36.

¹⁶⁵ *ibid.*, ss. 40, 41 & 44.

¹⁶⁶ *ibid.*, s. 51.

3.94 The Commissioner holds office for a period not exceeding five years as is specified in his or her instrument of appointment¹⁶⁸ and the employment of the Commissioner is governed by a contract of employment between the Commissioner and the Minister.¹⁶⁹ The appointment is terminable by the Governor on the recommendation of the Minister, but only after the PIC has been notified and has the opportunity to comment on the proposed recommendation.¹⁷⁰

Submissions

3.95 Under its 'Workforce Agenda' the Service has proposed a reform package which has been in development since 1994. The proposals may be summarised thus:

- there is to be a 'one workforce' approach, with the development of multi-skilled teams of sworn and unsworn officers;
- the organisational structure is to be flatter with an emphasis on pre-eminence of job/position titles, with rank to be for operational use;
- pay is to be attached to positions, and positions are to be redesigned and re-evaluated;
- police practitioner career paths are to be developed and resources decentralised to local level;
- access to and standards of employee support are to be improved, and there is to be performance feedback and management;
- a new co-ordinated structure for recruitment, selection and appointment processes is to be established;
- consideration is to be given to term employment, 20-year retirement options, more flexible conditions for leaving the Service, and the alteration of medical discharge provisions.¹⁷¹

3.96 The Police Association has also made submissions in this area which it says are based in part on a survey of its members conducted in November 1995.¹⁷² In relation to Workforce Agenda it states that it:

is committed to positively participate in the development of the Workforce Agenda project ... Issues of salary determination based on position rather than rank, an emphasis on operational, in addition to supervisory or managerial career streams, are two important areas which could rectify many of the problems being experienced by members. Accordingly, changes to employment arrangements for police ought to be made with a view to the Workforce Agenda proposals.

3.97 The Commission endorses fully the objectives of the Workforce Agenda Project, and the observations of the Police Association concerning that project. In particular, it agrees that:

- changes to employment conditions should be the subject of widespread consultation with those who are to be directly affected; and that
- piecemeal solutions are inappropriate, holistic change being required.

3.98 Particular force is seen in the combination of measures designed to achieve multi-disciplinary teams, with emphasis on the position filled rather than rank held. This is an integral part of the flattening of the structure of the Service and the creation of a pay system under which police and

¹⁶⁷ *ibid*, s. 24.

¹⁶⁸ But is eligible (if otherwise qualified) for re-appointment. *ibid* s. 26.

¹⁶⁹ *ibid*, ss. 26 & 27.

¹⁷⁰ *ibid*, s. 28.

¹⁷¹ NSW Police Service, Police Service Reform Implementation Status Report February 1997, RCPS Exhibit 2952, p. 24.

¹⁷² Police Association of NSW, Submission to RCPS for Second Interim Report, RCPS Exhibit 2321/2, Doc. 2336233.

others are remunerated according to the responsibilities of their job, and the worth of their own performance, and in which growth can occur within a position or rank. In developing this program, the Commission strongly suggests that further consideration be given to a reduction in the existing rank structure.

3.99 A number of submissions to the Commission have supported changes to the existing rank structure. The AFP has moved away from traditional rank designations in an effort to ensure that it can select the most capable person for a position rather than selecting from a particular rank level.¹⁷³ Western Australia Police are also planning to move away from an environment dominated by rank.¹⁷⁴

3.100 Those arguing for the retention of rank divisions view the rank structure as providing officers with tangible goals to work towards.¹⁷⁵ The need for such goals is accepted but can be accommodated by opening up alternative career paths and permitting growth within a rank or position. This did not occur in Queensland, and as a result the ranks of Constable First Class and Sergeant First Class in Queensland were reinstated following an adverse impact on morale following their abolition.¹⁷⁶

3.101 The existing rank structure provides a mechanism that might be appropriate for rewarding officers in an organisation with a rigid hierarchical and militaristic structure. It has less of a role in the flatter organisational structure outlined earlier in this Report or in an organisation that provides opportunities for advancement and rewards of the kind proposed under the Workforce 2000 Project.¹⁷⁷

3.102 The Commission considers that it is appropriate there be:

- a grade of Sergeant to discharge a front line supervisory role;
- a rank of Inspector whose duties should be those which the title of the office suggests - namely critical and informed inspection of operational policing as performed by non-commissioned officers; and
- a rank of Superintendent or equivalent to fill command positions in patrols and agencies;

but questions the justification for the retention of two grades of Sergeant, Inspector and Superintendent respectively.

3.103 The reason for the existence of two grades within each of these ranks probably reflects little more than a system which linked pay to rank, and was designed to provide some incentive for officers who might otherwise have lost interest in a hierarchical structure where promotion was slow. This Commission recommends that consideration be given to merging the two grades of Sergeant, Inspector and Superintendent, respectively. It notes that a simplification of the rank structure along these lines was recommended by the Sheehy Inquiry into Police Responsibilities and Rewards in respect of the police services in England and Wales, in Scotland and in Northern Ireland.¹⁷⁸

3.104 There would also be merit in considering a change of designation from Superintendent to Commander, to reflect the command responsibilities outlined in Chapter 4 of this Volume.

3.105 If this merger of rank were to take place, remuneration would need to be restructured so as to reflect the responsibility of the positions held, and to reflect growth within a rank.

¹⁷³ Under the current AFP structure, the Commissioner and Deputy Commissioner hold rank as such, the Assistant Commissioners hold positions as managers, and the other police are designated as agents, the intermediate ranks having been abolished. M. J. Palmer, AFP Commissioner, 15/8/96, RCPS Exhibit 2809/105, p. 7.

¹⁷⁴ R. Falconer, WA Police Commissioner, 29/7/96, RCPS Exhibit 2809/87.

¹⁷⁵ Anonymous submission to RCPS, 26/7/96, RCPS Exhibit 2466/9; K. Hughes, Acting Commander Criminal Research Bureau; M. Plotecki, Senior Sergeant, Submission to RCPS, 26/7/96, RCPS Exhibit 2809/52.

¹⁷⁶ M. Bingham, Report on the Review of the Queensland Police Service, July 1996, p. 101.

¹⁷⁷ NSW Police Service, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/1.

¹⁷⁸ *Inquiry into Police Responsibilities and Rewards*, (P. Sheehy, Chairman), London, 1993.

3.106 As presently advised, the Commission sees some value in the retention of a division in the rank of Constable, having regard to the number of officers involved, the disparate nature of the work entrusted to this level of officer, and the period normally served before promotion to Sergeant. By the time an officer reaches the rank of Senior Constable, an opportunity will have existed for identifying those officers who have demonstrated real capacity and are suitable for positional appointment. It is at this rank that officers are at an age at which important career decisions are made,¹⁷⁹ and it is an important staging post for fast-tracking those who demonstrate commissioned officer potential.¹⁸⁰

TERM AND CONTRACT EMPLOYMENT

3.107 Term employment is already in place for the Commissioner, the members of the PSSSES and for non-executive commissioned police officers,¹⁸¹ while contract employment is also in place for the Commissioner and members of the PSSSES.¹⁸²

3.108 It appears from the submission of the Police Service,¹⁸³ and the submission of the Police Association,¹⁸⁴ that both support the concept of term employment in relation to non-commissioned police officers. It is not yet in place because of an inability to agree on details. The industrial issues are clearly open to negotiation and cannot be resolved in this Report. The issues to be addressed relate to:

- the duration of the initial term (possibly 10 years for non-commissioned officers, and five years for commissioned officers);
- the provision for renewal in the light of satisfactory service, which might be for periods of five years and be automatic unless a notice of intended non-renewal was given within a prescribed period before expiry of the current term;
- the provision of an appeal mechanism against non-renewal;
- the provision of a non-renewal benefit and/or superannuation rollover; and
- a staged introduction to apply initially to newly appointed police, and then to officers taking promotion, as well as to those voluntarily moving to term appointment.

3.109 No particular advantage seems to be conferred by extending contract employment beyond those officers to whom it presently applies. The Commission is, however, of the view that term employment, subject to acceptably negotiated conditions, is consonant with the spirit of the reform process and Workforce Agenda principles, and with the objective of ensuring that the Service is staffed only by officers performing to the best of their abilities and in accordance with standards of professionalism and integrity. It was recommended by the Sheehy report¹⁸⁵ and this Commission similarly recommends its adoption by the NSW Police Service.

LATERAL ENTRY

3.110 Lateral entry is already in place in respect of the office of Commissioner of Police,¹⁸⁶ the PSSSES¹⁸⁷ and non-executive positions.¹⁸⁸ By reason of various provisions in the legislation the Commission is not satisfied that lateral entry is otherwise available.¹⁸⁹

¹⁷⁹ Annexures of Statement of K. E. Moroney, 22/8/94, RCPS Exhibit 26/1, pp. 29 & 30.

¹⁸⁰ C. Nixon, Executive Director Human Resources, Submission to RCPS, 'Future of the NSW Police Service', 27/3/96, RCPS Exhibit 2459/1.

¹⁸¹ *Police Service Act 1990*, ss. 26, 40 & 72A.

¹⁸² *Police Service Act 1990*, ss. 27 & 41.

¹⁸³ NSW Police Service, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/1; see also NSW Police Service, Submission to RCPS, 21/3/96, RCPS Exhibit 2465; and NSW Police Service, Submission to RCPS, 24/7/96, RCPS Exhibit 2466.

¹⁸⁴ Police Association of NSW, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/2.

¹⁸⁵ *Inquiry into Police Responsibilities and Rewards*, (P. Sheehy, Chairman), London, 1993.

¹⁸⁶ *Police Service Act 1990*, s. 24.

3.111 The Service supports¹⁹⁰ lateral entry for all positions in the Police Service. The Police Association opposes¹⁹¹ lateral entry for the position of constable. Nothing has apparently changed in this regard since 1981 when Justice Lusher said:¹⁹²

The strong opposition by Police to the principle of lateral entry into the Police Force is based, in the view of the Inquiry, more on a desire to maintain a closed shop than on any sound argument relating to the efficacy of the Police Administration.

3.112 It is a mark of professionalism that there be competition for positions and that barriers to protect the inadequate disappear. By opening up the field, the quality of applicants is likely to improve and an opportunity provided to break up corrupt relationships and associations. Moreover, it is a step towards establishing a national profession of policing which will permit mobility of staff and benefit all Services through cross-pollination of ideas and experiences.

3.113 This Commission agrees with Justice Lusher that the restrictive and defensive approach of the Police Association in this area is more consistent with 'turf' protection than pursuit of the interests of either the people of NSW or the Police Service in achieving the best possible quality of service. No single good reason for the contrary has been advanced, and the Commission accordingly recommends:

- the introduction of lateral entry to all positions in the Police Service; and
- amendment of Division 2 of the Police Service Regulation 1990 to enable appropriately qualified constables from other police services to join the Service with minimum difficulty.

In developing the necessary scheme, attention will need to be given to suitable procedures for integrity testing and for the preservation of accrued benefits such as superannuation.

3.114 The Commission also considers it appropriate that mutual arrangements be established with other Police Services for the transfer and secondment of officers for periods of time, as a step towards a national profession which would allow the infusion of policing skills acquired in other jurisdictions.

REGISTRATION

3.115 The Commission supports the Police Service in its aim of achieving professionalism. It is within this context that the concept of registration falls to be considered. Registration was referred to in the course of the round table discussions, and it has been the subject of comment from Commissioner Ryan¹⁹³ and of a recent submission from the Police Service.¹⁹⁴

3.116 An external independent Registration Board has been discussed for some years at national level by both the Australian Police Ministers Council and the Australian Police Commissioners. The proposition put before this Commission is that rather than wait for national consensus on the issue, it would be appropriate for the State of NSW to take the lead. The issue for this Commission then becomes - would it be of advantage to the people of NSW for such a Board to exist in NSW?

3.117 Three of the main features of an independent external Registration Board would be:

¹⁸⁷ *ibid*, s. 36.

¹⁸⁸ *ibid*, ss. 64 & 65.

¹⁸⁹ See in particular *ibid* ss. 10(4), 63, 73 & 76; and Police Service Regulation 1990, Division 2.

¹⁹⁰ NSW Police Service, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/1.

¹⁹¹ NSW Police Association, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/2.

¹⁹² *Report of the Commission to Inquire into the New South Wales Police Administration*, (E. A. Lusher, Commissioner), Sydney, 1981, RCPS Exhibit 2790 A/3, p. 344.

¹⁹³ P. J. Ryan, *Reform of the NSW Police Service - Phase 1*, 19/11/96, RCPS Exhibit 2820.

¹⁹⁴ NSW Police Service, *Registration of Police Officers - draft*, 6/2/97, RCPS Exhibit 2950.

- definition of educational and other requirements for registration;
- disciplinary functions over registrants; and
- licensing of police to facilitate inter-Service transfers.

3.118 While recognising the strong merits in the first and third of these propositions, the difficulty is that the NSW Police Service is the only employer of police in the State, and it must have a substantial say in determining those whom it wishes to recruit and retain. Moreover, other watchdog agencies have a significant role in ensuring the observance of standards and in dealing with misconduct. It is difficult to see how the creation of an independent registration board in NSW at this time would add value to the situation, or fit into the managerial complaints and discipline system proposed later in this volume.

3.119 The Commission supports the concept on a national scale where there are multiple employers. It is of the view that once the NSW Police Service has implemented the recommendations in this report, it will be in a strong position to lead the field in setting appropriate standards by its example.

3.120 If the concern is recognition between police services the appropriate way to address it is by way of reciprocal or other mutually agreed conditions about lateral entry and transfer.

3.121 Accordingly, the Commission has no recommendation to make in this respect save to reiterate its support for the pursuit of professionalism and for the concept of inter-Service mobility on a national basis. If registration follows it will be a welcome event.

RECOMMENDATIONS

The Commission recommends:

Recruitment

- ◆ The minimum entry age for police officers be increased to 21 years (para. 3.72).
- ◆ Steps be taken to encourage through recruitment a greater diversity of membership of the Service, including the provision of bridging courses, scholarships and the like; such programs to operate in tandem with training and development designed to make police more aware of cultural, racial and other issues affecting minority groups, and better equipped to deal with policing issues affecting such groups (para. 3.78).

Workforce

- ◆ In working towards a flatter structure which reflects responsibility rather than rank, such legislative impediments as currently exist concerning appointment and transfer be repealed or amended to allow for:
 - appointment to positions;
 - the filling of positions by sworn or unsworn members of the Service as best meets the needs of the position and other commitments of the Service;
 - salary to be linked to positions rather than rank;
 - career growth to be possible within a rank (paras. 3.95 - 3.97).
- ◆ Consideration be given to the development of separate career paths, permitting progression within various categories of operational and managerial work (para. 3.96).
- ◆ The way be cleared for the development of multi-disciplinary teams combining the skills and experience of sworn police with those of other practitioners such as lawyers, financial and intelligence analysts and the like (para. 3.98).
- ◆ Consideration be given to a merger of the two grades presently applying within each of the ranks of Sergeant, Inspector and Superintendent and to redesignating the last mentioned rank as Commander (paras. 3.103 & 3.104).

Term and Contract Employment

- ◆ The Service move to a system of term employment, and enter into industrial negotiations to settle the terms upon which it might be introduced (para. 3.109).

Lateral Entry

- ◆ All existing impediments to lateral entry, and to temporary secondment or transfer of police from other services be removed, and that each be adopted and pursued as a policy of the Service to break up inappropriate associations, and to gain an infusion of skills and experience from other services (paras. 3.113 - 3.114).

Registration

- ◆ The concept of a national profession (and registration) be pursued to advance the development of uniform and acceptable standards of education, training and professionalism on an Australia-wide basis (paras. 3.115 - 3.121).

D. EDUCATION, TRAINING AND DEVELOPMENT**INTRODUCTION****The Lusher Report**

3.122 In his report, Justice Lusher¹⁹⁵ reviewed the history of police education and training and made a number of recommendations. It is convenient to take this report as a starting point, and to summarise the views expressed which, in the opinion of this Commission, have become lost in their translation.

3.123 The report was critical of the attitude that it was for the Force (as it then was) to provide all the training necessary for its members,¹⁹⁶ and questioned whether internal training could ever provide the necessary preparation for the levels of skill and professionalism required.

3.124 Notwithstanding the clear recommendation that the Police Board take over the control of training and education,¹⁹⁷ in the result the Police Service has not relinquished that control. Indeed, the current Service attitude has continued to be one of a determination to remain in control, notwithstanding some rhetoric to the contrary.¹⁹⁸

3.125 Justice Lusher recommended the creation of an upgraded residential Police Academy to replace the antiquated establishment in Bourke Street, Redfern which used other facilities in Elizabeth Street and Liverpool Street, Sydney as well as the Driver Training School at St Ives. His report noted:

- If it was practical, the Inquiry would favour a residential facility, but one which formed part of a wider student community to ensure that recruits in particular are not cut off from the experiences of the community at large.¹⁹⁹
- The Inquiry sees significant advantage in locating such an Academy on the same campus as an existing or future tertiary educational institution.²⁰⁰

3.126 Justice Lusher looked into the question of establishing the recruit training program as a formal course in either a TAFE College or a College of Advanced Education. After discussing the arguments for and against he formed the view that this could not be implemented immediately, but said:

In the longer run the Inquiry considers that these difficulties can be resolved and the way cleared for such an educational programme to be established.²⁰¹

3.127 This recommendation has not been implemented at the Police Recruit Education Program (PREP) level.

3.128 Justice Lusher also recommended that police training become the equivalent of a two-year associate diploma course and that ultimately such a diploma be a prerequisite for entry into the Service as a recruit; in this way, immediate post-recruit training would be limited to a short period dealing with practical and operational skills.

Post-Lusher

3.129 The Police Board commenced on 16 January 1984²⁰² and thereafter involved itself, in an advisory capacity, principally through subcommittees, in the field of education and training.

3.130 In May 1984, recruit training commenced at the Police Academy at Goulburn²⁰³ on a 60-hectare site located 195 kilometres south-west of Sydney. The premises at Goulburn had been a

¹⁹⁵ *Report of the Commission to Inquire into NSW Police Administration*, (E. A. Lusher, Commissioner), Sydney, 1981.

¹⁹⁶ *ibid*, pp. 385, 390, 393, 394, 398, 396, 400-01 & 406.

¹⁹⁷ *ibid*, p. 406.

¹⁹⁸ Assistant Commissioner Moroney, Statement, 22/8/94, RCPS Exhibit 26/7.

¹⁹⁹ *Report of the Commission to Inquire into NSW Police Administration*, (E. A. Lusher, Commissioner), Sydney, 1981, p. 406.

²⁰⁰ *ibid*, p. 407.

²⁰¹ *ibid*, p. 401.

²⁰² Police Board of NSW, Submission to RCPS, *Police Board of NSW - An Evaluation*, RCPS Exhibit 2459/6, p.17.

²⁰³ *ibid*, p.24.

College of Advanced Education, but apart from the ability to provide residential accommodation, it met none of the other requirements recommended by Justice Lusher. Its physical distance from Sydney has not been an advantage either in terms of attracting the best staff, or in its isolation from outside influences. Assistant Commissioner Moroney said:

There can be no doubt that the nature of the industrial agreements that are enjoyed by both sworn and non-sworn members of the Academy staff, which, when coupled with the geographical location of the Police Academy do, in some instances, inhibit our ability to attract the best possible people. It is appropriate therefore that the Police Service through the Education & Training Command has commenced preliminary discussions with the Police Association of NSW on the feasibility of introducing an enterprise agreement or an "island award" unique to the employment of qualified personnel at the Police Academy.²⁰⁴

3.131 The Academy and its curriculum have been much studied. In 1985, the Interim Police Education & Training Advisory Council (IPETAC) was established. It produced a total of four reports.²⁰⁵ IPETAC was replaced by the Police Education Advisory Council (PEAC) which first met in June 1987. PEAC ceased to exist in August 1995 and was replaced by the Ministerial Advisory Committee on the Police Academy (MACPA). The demise of PEAC arose from reports known as the Kelly Report²⁰⁶ and the Taylor Report²⁰⁷ relating to the state of morale at the Academy in 1994. This in turn gave rise to the creation of a committee known as the Police Academy Review Committee (PARC).²⁰⁸ MACPA is currently engaged in an evaluation of the Academy, and of the question whether it should be more closely linked into a university structure.

3.132 As the Academy is presently structured, it has the following links with outside institutions:

- Charles Sturt University, which offers a number of different courses chief among which are the Constables Development Program resulting in the award of a Diploma (a prerequisite for promotion to Senior Constable) and the Bachelor of Policing;
- University of Wollongong - the Command Development Program resulting in the award of a Graduate Certificate in Management;
- Macquarie University - the Executive Development Program resulting in the award of a Graduate Diploma of Police Management; and
- Canberra Institute of Technology - the Diploma of Applied Science in Forensic Investigation (NSW Police).

These courses combine a mixture of delivery and quality control by university and Police Service staff.

3.133 The following institutions also offer, or intend to offer, policing related courses with varying amounts of Service input:

- University of Western Sydney - Bachelor of Policing;
- University of Sydney - Diploma and Master in Criminology;
- University of New England - Bachelor of Professional Studies (Policing); and
- Australian Catholic University - two separate courses, namely Professional Development and Professional Leadership, each leading to a Graduate Certificate.

²⁰⁴ Assistant Commissioner K. E. Moroney, Statement to RCPS, 10/2/97, RCPS Exhibit 2961, p. 4.

²⁰⁵ NSW Police Service, Submission to RCPS, 25/10/94, RCPS Exhibits 2462/1-3.

²⁰⁶ NSW Police Service, Submission to RCPS, 22/6/94, RCPS Exhibit 2462/6.

²⁰⁷ NSW Police Service, Submission to RCPS, 23/6/94, RCPS Exhibit 2462/7.

²⁰⁸ See PARC reports, RCPS Exhibit 2462/9, RCPS Exhibit 2462/10, and RCPS Exhibit 2462/11.

3.134 In its evaluation document,²⁰⁹ the Police Board drew attention to some of the problems which had emerged concerning police domination of the Academy, and the limited ability of those outside the Service, including the Board, to make any significant impact.

3.135 One illustration given²¹⁰ concerned the implementation of the PARC recommendation to create five Head of School positions. PARC had recommended that those positions be open to both police and civilian officers. When the statements of duties and accountabilities were submitted to the Board by the Commissioner for endorsement, three positions were identified as being police positions and the remaining two were identified as being open to a police or civilian appointment. The classification of these positions by the Service was in clear contradiction to the recommendations of the PARC Report. The intervention of the Minister was needed to ensure that, as academic positions, all five Head of School positions were designated as open to police or civilian appointments, and to ensure that the Board could become involved in the selection process for these places and for the replacement of the Dean of Studies.

3.136 Further illustrations of the way in which the Police Service has ignored recommendations of the advisory bodies or otherwise maintained its dominance of the Academy cited to the Commission, include:

- the failure to achieve the IPETAC recommendation that the non-sworn proportion of teaching staff be not less than 10%;
- the failure to achieve the PARC recommendation that the non-sworn proportion be not less than 15% by the end of 1995, and 20% by the end of 1996; and
- the removal of the Dean of Studies, a non-sworn appointment, from the management line in the Academy in 1990, and his effective marginalisation.²¹¹

3.137 On a more general note the Police Board advised the Commission that a:

... review of Board documents ... did not identify any instances where the Board was deliberately misled by the provision of false information by the Police Service. It did, however, find numerous instances where insufficient information, no information or late information was provided. Reference has already been made to the fact that Board members were frequently informed about significant events through media coverage rather than through Police Service reports.²¹²

3.138 Prior to its demise, PEAC was working on the basis that raising the standard of educational requirements for entry into the Service was one of the main ways of achieving professionalism. Tenders had been sought from a number of universities for the provision of courses in policing and responses had been received. With the demise of PEAC, this process does not appear to have developed any further.

3.139 It is also clear that no committee has been asked in recent times to examine the most suitable location for the Police Academy, even though serious questions do arise as to its physical and academic remoteness, and cost effectiveness.

3.140 The Service has a considerable financial investment in training and education, which of itself justifies careful review. It has proved difficult to obtain precise costings of the Academy. However, the current cost of producing a constable in NSW has been estimated at between \$90,000 and \$120,000²¹³ and the total net expenditure on the Academy for 1995/96 was approximately \$30.5

²⁰⁹ Police Board of NSW, Submission to RCPS, *Police Board of NSW - An Evaluation*, RCPS Exhibit 2459/6.

²¹⁰ *ibid*, p. 53.

²¹¹ B. Mansfield & I. Burnard, *A Brief History of Police Education 1981-1995*, RCPS Exhibit 2462/13, pp. 41 & 56.

²¹² Police Board of NSW, Submission to RCPS, *Police Board of NSW - An Evaluation*, RCPS Exhibit 2459/6, p. 71.

²¹³ Queensland University of Technology, Submission to RCPS, 20/8/96, RCPS Exhibit 2809/114a.

million.²¹⁴ The total capital investment in the Academy was recently estimated to be in excess of \$90 million.²¹⁵

3.141 The Police Board stated in its submission that:

The co-existence of academic learning and integrity with police skills training in a traditional police command structure is tenuous. The complexity of modern policing and the change of pace in society means that police education must be directed at producing police officers who are capable of development and change throughout their entire careers and are capable of leading others through the changing requirements of policing. The Academy re-structure currently taking place has yet to come to terms with the problem of providing a quality university education in a traditional police environment.²¹⁶

3.142 In its report of November 1996, the Council of the Cost of Government noted in its submission to the Council on educational matters that the Police Service:

... made no costing comparison between the in-house Academy model and the external University model. However, it discounted the financial attractions of the latter. Overall, the submission advocated continuation of the present practice. The Council contends that a more balanced assessment of both in-house and external delivery options is desirable.²¹⁷

This is an assessment with which this Commission expresses its agreement.

3.143 The Commission received a considerable volume of material and information relating to the Academy at Goulburn both from those employed to instruct and from those undergoing instruction, which raised matters of considerable concern as to the quality of the training delivered, and as to certain structural and managerial issues. Some of this material featured in hearings before the Commission, for example, the papers used in the detective's course²¹⁸ which on any view were expressed in terms that were racist, sexist, judgmental, and utterly inappropriate.²¹⁹

3.144 The Commission also examined the concerns felt by some recruits in connection with their medical examinations, and their subsequent difficulty in being able to report those concerns or to achieve any resolution of them.²²⁰ The Commission was similarly aware of another group of complaints which led to an Internal Affairs investigation in relation to some unsavoury incidents at the Academy which identified various matters of concern.²²¹ Additionally, it received information, unverified at this time, but nevertheless consistent as to serious divisions between certain members of the Academic and Service staff, which clearly risked harmony and effective co-operation.

PREP

3.145 In 1990, an independent evaluation of the Police Recruit Education Program (PREP) was made by the Centre for Applied Research & Education from the University of East Anglia in the United Kingdom, commissioned by PEAC. While making the point in its report (the CARE Report) that it was comparatively early to make an assessment of PREP (which had only commenced in July 1988), it noted:²²²

²¹⁴ NSW Police Service, Reports/Schedules Detailing Operating Results for the Police Academy, 5/2/97, RCPS Exhibit 2965.

²¹⁵ K. Moroney, Statement to RCPS, 13/1/97, RCPS Exhibit 2959.

²¹⁶ Police Board of NSW, Submission to the RCPS, *The Police Board of NSW - An Evaluation*, RCPS Exhibit 2459/6, p. 77.

²¹⁷ NSW Council on the Cost of Government, *NSW Police Service Review of resource management - scoping study report*, November 1996, RCPS Exhibit 2819, at pp. 35-36.

²¹⁸ NSW Police Academy Examination Papers, RCPS Exhibit 932.

²¹⁹ They included expressions such as 'a young chicky babe (Brood Mare)'; 'she wished to place a bet but had no idea in doing so (typical female)'; 'another fancy dressed poof'; 'you arrest the prick to fuck his day and have uniform police to escort his associate for the purpose of questioning'; 'Pinchacar Rajnish' and his cousin 'Secretacar'.

²²⁰ See generally RCT(U), 16/4/96.

²²¹ RCPS Exhibit 2810'C/10.

²²² Centre for Applied Research in Education, *NSW PREP - An Independent Evaluation*, RCPS Exhibit 26/1, p. v.

Given the promising start that PREP has made, [given] due attention to its present limitations, and [given] renewed commitment to its values and ideals, we believe that PREP will be the best recruit education program in the world within five years.

The general assessment was made that the situation post PREP was better,²²³ and that it was producing a better police officer. Approximately 50 recommendations were made for further improvement.

3.146 It is not necessary to summarise the considerable detail contained in the report, but some areas for concern were identified. They included:

- incidences of rapid 'training decay'²²⁴ in which operational and occupational realities undermined both the formal curriculum and the development of reflective and critical understanding, and in which practice drove theory rather than the reverse;²²⁵
- the reluctance of mentors in the evaluation process to criticise performance which led to dishonesty being structured into the assessment and reporting system,²²⁶
- the bureaucratic and faceless feedback loop between the field and the Academy in which Patrol Commanders had almost no contact with the Academy and the Academy was seen as an irritation which had to be managed,²²⁷
- the timetable and planning procedures which were incoherent and more akin to crisis management;²²⁸
- the management model adopted which it likened to one 'structured on traditional police practice, and struggling within its grasp, the embryo of an educational community',²²⁹
- the persistence of police management styles at most levels of the Academy which meant that the 'educationalism' of recruit training was organisationally limited, and needed an injection at management level of more educators from the outside world;²³⁰ and
- the danger of premature stabilisation in an under-developed form in which PREP had been 'allowed' to become a curriculum delivery system rather than a curriculum development system.²³¹

3.147 One observation was particularly relevant:

It is not going too far to say that PREP is badly in need of protection against the organisation that created it. This is an aspect of quality-control to which PEAC should give urgent attention.²³²

As events have transpired, this is precisely the experience which the Police Board confronted.

3.148 By way of response to one of the more serious issues raised in the CARE report, namely 'training decay', the Police Service formed a Directorate of Field Training. It reported directly to the Executive Director Education and Training and was given responsibility for the training of Patrol Education Development Officers (PEDOs) and Field Training Officers (FTOs), and for liaising with patrols regarding the progress of recruits during Phase 4. Patrols of excellence and then demonstration patrols were formed.²³³

²²³ *ibid.*, p. iv.

²²⁴ *ibid.*, p. 54.

²²⁵ *ibid.*, p. 57.

²²⁶ *ibid.*, p. 63.

²²⁷ *ibid.*, p. 69.

²²⁸ *ibid.*, p. 124.

²²⁹ *ibid.*, p. 127.

²³⁰ *ibid.*, p. 133.

²³¹ *ibid.*, p. 154.

²³² *ibid.*, p. 157.

²³³ Mansfield and Burnard comment 'their educational role and learning strategies were not subjected to field and adult learning theory.' B. Mansfield & I. Burnard, *A Brief History of Police Education in NSW; 1981-1995*, RCPS Exhibit 2462/13.

3.149 No external review of the progress of PREP has been carried out since 1990, of which the Commission is aware, nor since the demise of PEAC in 1995 does it appear that any subsequent committee has attempted to evaluate the course content from an educational point of view.²³⁴

3.150 For the reasons identified, this Commission considers it imperative that in any review of the role of the Police Academy, and of police education and training generally, very careful attention be given to the recruit training program (which for convenience can continue to be referred to as PREP).

3.151 Although the Commission recognises that no final decisions should be made in this regard until the Minister and the Commissioner have the benefit of any report delivered by MACPA, and of advice from the proposed Advisory Committee on Police Education,²³⁵ it strongly favours a system under which:

- entry to the Service would depend on the acquisition of a university degree or tertiary diploma in an approved course,²³⁶ obtained through an approved university or external college and acquired before application is made to join the Service;
- the practical skills training would be delivered at the Police Academy:
 - in the case of core activities such as the use of firearms, self defence, vehicle management, use of COPS, and the like by police instructors;
 - in all other areas requiring supplementation, such as criminology, law, ethics and integrity, and the like by civilian educators;
- the skills training would be supplemented, as at present, by structured field training, but integrated more closely with the Academy which would retain a significant input into its structure and quality control; and
- dependent upon the location of the Academy, the academic component could be delivered, if that were convenient, at a TAFE college or university campus, and either by civilian educators on the staff of the Academy, or on contract to it.

3.152 In developing this model, the Commission considers that this would have very significant advantages in:

- ensuring that recruits have an exposure to the external influence of an open campus in which they can interact with students studying in other disciplines, thereby limiting potential for entrenchment of the negative culture which might be encouraged if their entire training was conducted in a closed and isolated residential college;
- encouraging the notion of professionalism through linking career entry to an external tertiary qualification in a selection of approved courses provided by a variety of approved universities or colleges;
- postponing the entry age until a greater level of maturity was reached; and in
- giving a greater prominence to civilian education in all but the core policing skills, which it is recognised are better delivered by experienced police trainers.

Together these factors might assist in developing a more mature and knowledgeable officer, who would be better prepared to deal with the demands of modern policing.

²³⁴ This concern was also noted in the Police Policy Research Unit, UNSW, Submission to RCPS, RCPS Exhibit 2809/112, p. 90.

²³⁵ See para 3.159 post.

²³⁶ ie. one relevant to policing studies within an Arts, Social Science or similar discipline. Courses such as those provided by the John Jay College in New York would provide a useful model.

3.153 This is not to say that police officers who are suitably qualified or interested in the area of police education should not be seconded to the relevant external institutions or given leave to join their staff for a period. Nor is it intended to suggest that the entry qualification be elevated to an unreasonable educational requirement - under current arrangements most tertiary institutions have the flexibility to admit students of potential into at least a diploma course, even if an academic benchmark is not reached.

3.154 In essence what is proposed is a development upon the Lusher recommendation to elevate the quality of training, to broaden its scope and to introduce greater external input from specialist educators, and to ensure at the same time that core policing skills can be imparted by police educators. The Commission considers it essential that the Service monopoly on PREP be broken and that skilled civilian educators be given a prominent role in framing the curriculum and in delivering courses. The Commission would go so far as to suggest that the Principal of the Academy should be a civilian rather than a police officer.

3.155 Under these proposals, the expense of gaining the external diploma or degree would be borne by the applicant under the usual HECS arrangements. Although a change from the existing system, this is not seen as a disincentive since it accords with the current practice in most careers requiring any degree of training.

3.156 Once applicants have been admitted into the skills phase, that is, after qualifying by attaining a degree or diploma and being accepted as a recruit, then the remuneration as student police officers could commence. Independently, this Commission sees a case for the Service offering scholarships for selected potential recruits, particularly those who are disadvantaged or from minority backgrounds, to assist in obtaining the external academic qualification.

CONTINUING EDUCATION AND CAREER DEVELOPMENT COURSES

3.157 There have been an increasing number of development courses presented at the Academy particularly during the current decade. These are too numerous to mention by name, but are grouped under the following headings:

- the Constable Development Program, the passing of which is now an essential prerequisite to promotion to Senior Constable and which is linked with Charles Sturt University;
- the Management Education Program;
- the Field Training Directorate;
- the Weapons Training Unit;
- Specialist Skills;
- the Prosecutors Training Unit; and
- the School of Traffic and Mobile Policing.

3.158 The majority were evaluated by PEAC while it was in existence, but not all. At present there does not appear to be provision for the independent evaluation of these courses.

3.159 This Commission has been provided with a considerable volume of material in connection with course content. Some of them are of a general nature, some of them are of a highly specialised nature. The Commission does not feel qualified to comment on their content, or for that matter on the content of that PREP course, as this is the area of the specialised educationalist and is outside the terms of reference. It is, however, recommended that the Commissioner of Police appoint an Advisory Committee on Police Education comprising expert educators, particularly those with experience in policing matters, and other persons from commerce, to fulfil the educational advisory

function formerly entrusted to the Police Board. By its composition it would be better placed than the Board to advise the Service in this area, particularly in dealing with tertiary institutions. This accords with the general strategy recommended in chapter 5 of this volume, for the creation of expert community consultation committees.

3.160 Similarly to recruit training, this Commission recommends greater external input into the development and further training courses, although of their nature the core components will be advanced policing skills taught by police. Commissioner Ryan has plans to decentralise some of these courses to TAFE colleges in country areas which would help overcome staffing and hardship problems, and conform generally with the broader vision for police training enunciated in this Report. Otherwise the Commission sees no difficulty with their delivery at the Academy, provided that it is accepted, as a matter of principle, that non-core skills should be delivered by civilian educators.

3.161 A significant advance in the area of career development should be noted. At the end of 1996, there were in excess of 1800 job descriptions applicable to the NSW Police Service. Since the beginning of 1997 that figure has been reduced to 12 'job streams' with three levels of skill within each stream.²³⁷ That step should be of considerable assistance in enabling clarification of career paths, and in establishing the principle that salary level is related to the responsibility and skill of the person in the position and is not determined by rank or length of service. It should assist in rationalising eligibility for further career development and training, and in permitting growth within a rank.

3.162 A system which allows police to progress along a path appropriate to their skills, and permits the Service to reward increased expertise accordingly, is infinitely preferable to one which forces police to change the nature of their work for the sole reason of achieving higher rank and thereby higher pay. Many excellent operators in their particular field have been reduced to average or worse than average administrators, as a result of being forced under the previous system to apply for promotion in order to increase their earning and ultimate pension entitlement. This should no longer be necessary, and the program for development and training should reflect such circumstance.

3.163 A further initiative of potential value has been the introduction of Mandatory Continuing Police Education (MCPE) established under the non-Commissioned Police Officers' Enterprise Agreement registered in December 1994.²³⁸ Completion of such program along with certain competency tests is necessary for incremental progression. Packages have been developed by the Distance Education Centre. As the program is self-managed, it will be important for it to be reviewed to ensure that patrol commanders and their equivalents provide for its delivery, that it is effective and constitutes a quality product. As outlined later,²³⁹ some concern presently exists in this regard, but it should be capable of being overcome. Again, this is an area where the proposed Advisory Committee on Police Education could assist.

The Police Academy

3.164 By reason of the matters mentioned above, it is necessary to return to the future role of the Police Academy and its location. If the position favoured by this Royal Commission is adopted, there will continue to be a role for the Academy in:

- delivering the skills phase of the PREP, and in co-ordinating and ensuring quality control of field training;
- delivering specialist career development courses for police; and

²³⁷ NSW Police Service, Documents regarding the reduction in the number of job descriptions in the Police Service, RCPS Exhibit 2962 and NSW Police Service, *Police Service Reform Report*, February 1997, RCPS Exhibit 5994.

²³⁸ NSW Police Service Non-Commissioned Police Officers' Enterprise Agreement, RCPS Exhibit 2465/2.

²³⁹ See 3.336 - 3.444 in this Chapter.

- delivering specialist skills to other NSW emergency services.

3.165 As such, it has potential, with proper guidance and provided it establishes a high academic reputation, to become a centre of excellence for advanced specialist training for police, and allied professions, from other states and Pacific rim countries. If the Academy is to achieve this status, however, it is essential that it:

- shed the shackles which have led it to be dominated by an inward-thinking and narrow Police Service;
- give proper value to the skills of expert educators from outside the Service, and increase the academic contribution in its day-to-day management;
- listen to expert advice from without; and
- concentrate on delivering proper services in return for the financial investment which it represents.

3.166 In this latter regard, it is a matter of considerable concern that:

- it is impossible to determine with certainty the extent of the financial investment in the Academy, or the annual expenditure of the Service on education and training; and that
- no attempt has been made to cost or compare alternative measures of delivery of training.

3.167 In the view of this Commission, a first priority must be to determine whether it is financially advantageous to retain the Academy in its present location, or to relocate it. A second priority must be to introduce some realistic cost accountability and certainty into the education and training budget, and to determine where efficiencies and cost improvements lie.

3.168 This, similarly, is an area where the proposed Advisory Committee on Police Education can provide considerable assistance and it is also one which is deserving of renewed attention either by the Council on the Cost of Government, or through an independent financial and management audit.

MANAGEMENT AND LEADERSHIP TRAINING

3.169 The Lusher Inquiry identified the same kind of management and supervisory failures as emerged in the hearings of this Royal Commission.²⁴⁰

3.170 Management and leadership training is essential, and it is an area best delivered externally by those with expertise in the principles of management and leadership.

3.171 The proposed Advisory Committee on Police Education would also serve a valuable role in this area in identifying suitable courses in which police managers could be exposed to managers with experience in commerce and industry.

²⁴⁰ *Report of the Commission to Inquire into NSW Police Administration*, (E. A. Lusher, Commissioner), Sydney, 1981, RCPS Exhibit 2790 A/3, pp. 70-71, 389.

ETHICS AND INTEGRITY

3.172 It is a statutory requirement that each member of the Police Service act in a manner which places integrity above all.²⁴¹ This is reinforced by the newly introduced Code of Conduct and Ethics.²⁴²

3.173 It is essential that professionalism and integrity become the backbone of the Service, and that the theme 'integrity first' be regularly reinforced during recruit training and at every subsequent stage of a police officer's career. This means that it should be included as a specific component in all training, not just as bare rhetoric, but worked into each course in a way relevant to it and delivered by recognised experts in ethics. Additionally, it is necessary that the Code of Conduct be made relevant to job situations, and that by suitable updates through the Police Service Weekly or other publications, practical illustrations and explanations are provided.

3.174 The Service should seek expert guidance in this area as to the way ethics and integrity can best be imparted in adult education. It might benefit by consulting the St James Ethics Centre and by receiving specific advice on the topic from the proposed Advisory Committee on Police Education.

RESPONSIBILITY FOR EDUCATION AND TRAINING

3.175 There is universal concern as to police dominance over training and education, and growing interest in this field. As a consequence, it is clear to the Commission that education and training should be treated as a policy matter for the Minister.

RECOMMENDATIONS

The Royal Commission recommends:

Recruit Training

- ◆ There be a restructure of recruit training to introduce a requirement for an entry qualification dependent on an externally acquired tertiary degree or diploma in an approved course followed by skills training delivered at the Police Academy supplemented by field training co-ordinated and controlled by the Academy (para. 3.151).
- ◆ Consideration be given to a scholarship scheme for selected students to assist them to acquire the external academic qualification (para. 3.156).
- ◆ Recruitment and remuneration of student police officers be deferred until the skills training phase (para. 3.156).
- ◆ Civilian educators be given a more prominent role in such training (para. 3.154).

Continuing Education and Career Development

- ◆ A review be undertaken of all existing courses (and of PREP) for their content and quality (paras. 3.150 & 3.159).
- ◆ The proposal for distance education through TAFE colleges be implemented (para. 3.163).

²⁴¹ *Police Service Act 1990*, s. 7(a).

²⁴² NSW Police Service, *Code of Conduct and Ethics*, January 1997, RCPS Exhibit 2948.

- ◆ Steps be taken to monitor the quality of the Mandatory Continuing Police Education Program, and compliance with it (para. 3.163).
- ◆ Civilian educators be involved in such further training for all matters not involving specialist policing skills (para. 3.152).

The Police Academy

- ◆ The Academy be retained, at a place and in a form to be determined, to deliver the skills training of PREP, as well as specialised career development courses (para. 3.164).
- ◆ There be an increase in the input and involvement of specialist civilian educators in the management of the Academy, and in the delivery of its programs (para. 3.165).
- ◆ An external review be undertaken to determine whether it is financially and otherwise advantageous to retain the Academy in its present location or to relocate (para. 3.167).
- ◆ An external audit be undertaken to establish with some precision the extent of the financial investment of the Service in the Academy, and the annual cost of training and education, with a view to introducing greater accountability and cost-efficiency (para 3.167).

Management and Leadership Training

- ◆ Commanders and supervisors be provided with training in modern management principles through external management courses (para. 3.170).

Ethics and Integrity

- ◆ The teaching of ethics and integrity be integrated, in a practical way, consistent with adult education principles into every aspect of police education and training, that is at PREP level, and in development courses, continuing education and management training (para. 3.173).
- ◆ The Service seek guidance from ethics experts such as the St James Ethics Centre on the way these subjects can best be integrated into police education and development programs (para. 3.174).

Advisory Committee/Policy

- ◆ An Advisory Committee on Police Education be established, consisting of expert educators, particularly with experience in policing studies, and members of the business community, to advise on all aspects of police education training and development (para 3.159).
- ◆ Education and training be identified as a matter of policy for the Minister (para. 3.175).

E. PROMOTIONS AND TRANSFERS

3.176 These issues were examined principally by way of the round table procedure, it being acknowledged that there was little to be gained by the Commission spending valuable time in public hearings, investigating the host of individual complaints drawn to its attention by dissatisfied members of the Service. It was accepted that these issues had caused, and continue to cause, significant

problems despite a variety of efforts to solve them over the years, including a joint Parliamentary inquiry²⁴³ and the introduction of merit-based promotion.

3.177 Prior to the Second Interim Report, the key elements of the systems of promotion within the Service were as follows:

Non-Commissioned Officers:

Constables and Senior Constables

- the rank of Constable was confirmed on successful completion of PREP;²⁴⁴
- promotion was based on seniority;
- automatic incremental promotion to Senior Constable occurred after five years' service, completion of Constables Development Program and satisfactory medical and conduct reports.

Sergeants and Senior Sergeants

- promotion was based on merit;²⁴⁵
- application was made in response to advertisement published in the Police Service Weekly, in a standard form requiring answers to specified criteria,²⁴⁶ and containing comments by first and second line commanders;²⁴⁷
- a selection committee was formed to compile a list of those selected for interview;²⁴⁸
- interviews were conducted by the selection committee which produced a report and a recommendation forwarded to the Commissioner;
- subject to appeal, the appointment was published in the Police Service Weekly.

Commissioned Officers

Inspectors and Chief Inspectors

- promotion was based on merit;²⁴⁹
- applications were lodged pursuant to advertisements published;
- a selection committee was formed to compile a list of those selected for interview;²⁵⁰
- interviews were conducted by the selection committee which produced a report and recommendation forwarded to the Executive Director Human Resources and Deputy Commissioner/Commissioner;
- the recommendation was subject to Police Board approval, which after consideration of an integrity report selected the applicant of the greatest merit,²⁵¹ and advised the Commissioner;²⁵²
- the appointment was published.

²⁴³ NSW Parliament, *Report of the Select Committee on Police Promotion System*, RCPS Exhibit 2463/13.

²⁴⁴ C. Nixon, Statement to RCPS, 4/11/94, RCPS Exhibit 27, pp. 26-7.

²⁴⁵ 'Merit Based Promotion', *Police Service Weekly*, 5/7/93, p. 11.

²⁴⁶ J. Hartley, Statement to RCPS re procedures of NSW Police Service Promotions Unit, 28/6/95, Doc. 2217408-417, p. 6.

²⁴⁷ From 11/3/96 the first line commander was required to provide comments on the integrity of an applicant.

²⁴⁸ Composition of selection committee varies for each rank. J. Hartley, Statement to RCPS re procedures of NSW Police Service Promotions Unit, 28/6/95, Doc. 2217408-417, p. 7.

²⁴⁹ 'Merit Based Promotion', *Police Service Weekly*, 5/7/93, p. 11.

²⁵⁰ Composition of selection committee varies for each rank. NSW Police Service, Corruption Risk Assessment Submission, January 1996, RCPS Exhibit 2464/8.

²⁵¹ *Police Service Act 1990*, s. 71.

²⁵² *Police Service Act 1990*, ss. 70, 71.

PSSSES

Superintendent and above

- the Commissioner had a discretion regarding the advertising of a PSSSES vacancy;²⁵³
- the Police Board interviewed candidates and made a recommendation to the Minister,²⁵⁴ after selecting the applicant with the 'greatest merit',²⁵⁵ and after due regard to s. 94A integrity reports;²⁵⁶
- once an applicant was selected, the Board recommended the appointment which was made by the Governor.

3.178 The system for transfers involved the following key elements:

Non-Commissioned Officers

- vacancies for lateral transfers were advertised in the Police Service Weekly by the HRAC²⁵⁷ and selections were made using merit-based selection procedures;
- requests were submitted in writing on a transfer form, providing reasons;²⁵⁸
- all transfer applications were forwarded through the officer's chain of command,²⁵⁹ after a pre-transfer interview conducted by the Commander;²⁶⁰
- objections to transfers were submitted on a separate form;²⁶¹
- the HRAC resolved disagreements over proposed transfers;
- disciplinary transfers were carried out with approval of Commissioner or Assistant Commissioner, Professional Responsibility;
- officers subject to disciplinary transfers had the right of appeal to GREAT,²⁶² otherwise no right of appeal existed.

Commissioned Officers

- transfers were considered every two years²⁶³ for Superintendent positions, or every five years for Inspector or Chief Inspector positions; and
- transfer decisions were made in consultation with Senior Executive, the chain of command and staff member concerned, taking into account their overall interests and development opportunities.

3.179 Save for the important changes mentioned hereunder, and substitution of the Police Commissioner for the Police Board in the procedures outlined, the present system is much the same.

3.180 A considerable proportion of the information received on promotions came from officers who remained anonymous, or who earnestly requested that their identities be protected. Their

²⁵³ *Police Service Act 1990*, s. 38.

²⁵⁴ NSW Police Service, Positional Promotion - On the Job Training Program, RCPS Exhibit 5999/81; C. Nixon, Statement to RCPS, 4/11/94, RCPS Exhibit 27, pp 26-7.

²⁵⁵ *Police Service Act 1990*, s. 39(1).

²⁵⁶ *Police Service Act 1990*, s. 39(3).

²⁵⁷ Commissioner's Instruction 7 - Transfers & Rewards.

²⁵⁸ NSW Police Service, Transfer and Tenure Procedures, 20/5/96, RCPS Exhibit 2463/21, p. 2.

²⁵⁹ *ibid.*

²⁶⁰ *ibid.*

²⁶¹ *ibid.*

²⁶² *ibid.*, p. 10, clause 13.1.

²⁶³ *ibid.*, p. 6.

submissions or complaints were supplemented by the survey which revealed similar attitudes to those who sought out the Commission. The material provided raised *prima facie* instances of:

- *pro forma* assessments by first and second line commanders;
- positively misleading information being provided to committees and to GREAT;
- favouritism, and failures by those involved in the selection process to declare conflicts of interest; and
- decisions which seemingly defied logic.

3.181 Although it may be that many of these complaints come down to questions of individual judgment on which minds may reasonably differ, and result from the inevitable disappointment of an unsuccessful applicant, it remains a fact that there are many within the Service who do have the perception that the system is unfair. This perception is not lightly removed and it remains a circumstance contributing to the attitude of cynicism and distrust that has pervaded sections of the Service.

3.182 This fact was borne out in the Commission's survey. Officers who responded to the survey were, on the whole, dissatisfied with the current promotion system, demonstrating an urgent need to increase the job satisfaction of police generally. The commissioned officers as a group were more satisfied than the non-commissioned officers, perhaps because the former have all been successful applicants at various times in their career.²⁶⁴ The Ombudsman noted that the responses to the questions on promotions provide an insight into the depth of dissatisfaction with the current career structure and promotion system:

A large part of the problem arguably relates to the fact that there are so few satisfying career opportunities for talented police officers, both within and outside the Police Service. If the only way to achieve a satisfying career is to move up the rank structure, then it follows that most police officers will remain dissatisfied with their career prospects.²⁶⁵

3.183 There was close agreement in the survey results between the non-commissioned and commissioned officers regarding the factors which should be taken into account as important in promotion decisions (integrity, experience, aptitude, diligence and training) and those which should not be considered important (ethnicity, gender, sponsorship and tertiary qualifications). As noted by Dr Chan, apart from integrity, all the attributes which were suggested by respondents to be 'very important' related to experience and competence on the job:

So the appropriate criteria for promotion, according to the respondents, were predominantly practical ones; academic qualifications were not considered relevant, even among the officers in higher ranks. Promotion, the respondents made clear, was to be a gender-neutral and ethnicity-neutral decision, and one not affected by sponsorship.²⁶⁶

3.184 A significant source of dissatisfaction for both non-commissioned and commissioned officers which emerged from the survey was the perceived lack of importance given to experience and aptitude. The weight given to length of service by both groups suggests that, despite the general acceptance of a merit-based approach, promotion on the basis of length of service is still valued within the ranks.²⁶⁷

²⁶⁴ J. Chan, 'Comments on Royal Commission Survey of NSW Police Officers', Institute of Criminology, Sydney, September 1996, RCPS Exhibit 2828, p. 9.

²⁶⁵ NSW Ombudsman, 'Comments on the Royal Commission Survey of NSW Police Officers', 13/1/97, RCPS Exhibit 5999/29.

²⁶⁶ J. Chan, 'Comments on Royal Commission Survey of NSW Police Officers', Institute of Criminology, Sydney, September 1996, RCPS Exhibit 2828, p. 10.

²⁶⁷ *Ibid*, p. 11.

REFORMS

3.185 In recent months the concept of assessment centres has been introduced into the Service. This involves using a number of assessment techniques in order to evaluate applicants for promotion.²⁶⁸ The technique was used for patrol commander positions in November 1996.²⁶⁹ It assesses applicants by using:²⁷⁰

- a knowledge-based examination on the practice and procedure of patrol commanders;
- a behavioural event interview in which applicants are asked about their performance in their current role;
- an integrity screening test which obtains applicants' written responses to ethical problems; and
- a group exercise in which applicants in a group are asked to comment on an organisational problem.²⁷¹

3.186 The selection panel uses the information gathered from the selection assessment centre to interview the short-list applicants and makes recommendations as to the most capable officers for the available positions.²⁷²

3.187 Assessment centres are to be developed in a 'phased' approach and it is envisaged that the assessment centre methodology will become the principal means of selection, appointment and development in the Service.²⁷³ Rather than assessing candidates for an individual 'role' they will be assessed at a particular level or 'job stream'.²⁷⁴

3.188 Although still in its early stages, it is clearly a worthwhile concept that offers considerable improvement on the previous system. Through its objectivity and transparency it is likely to reduce:

- the incidence of appeals;
- the atmosphere of cynicism and distrust that attaches to the system; and
- the influence of empire makers and 'patrons' within the Service, who have been able to maintain corrupt cliques, promote their associates, and transfer those who offer resistance.

3.189 The Commission regards it as essential that the assessment centres are themselves regularly assessed by external experts for their effectiveness and that in accordance with usual Public Service practice the selection panels include at least one person experienced in human resources, who is not a member of the Police Service. It will also be essential that the PIC, the Office of Internal Affairs, and Commanders are closely involved in delivering careful and realistic integrity assessments.

3.190 As far as transfers are concerned, the Lusher report noted in 1981:

Another illustration of this problem is the use of a transfer to get rid of an unsuitable or unruly member. Such transfers are arranged through personal contacts and are not documented, apart from generalised

²⁶⁸ NSW Police Service, *Interim Report on the Pilot Scheme for Selection Assessments*, 1/5/96, RCPS Exhibit 2463/14.

²⁶⁹ P. J. Ryan, *Reform of the New South Wales Police Service*, Nov. 1996, RCPS Exhibit 2820/1, p. 35.

²⁷⁰ NSW Police Service, *Interim Report on the Pilot Scheme for Selection Assessments*, 1/5/96, RCPS Exhibit 2463/14, p. 3.

²⁷¹ *ibid.*

²⁷² Briefing by Assistant Commissioner Nixon for RCPS, 1/3/96, RCPS Exhibit 2463/19, p. 3.

²⁷³ NSW Police Service, *Response re Reform Implementation Report - Human Resource Matters*, 16/4/97, RCPS Exhibit 5999/55.

²⁷⁴ *ibid.*

explanation such as “in the interest of the Service”. The inquiry concluded that this practice does nothing to correct the problem but usually passes it on to another area of the Force.²⁷⁵

In the course of its inquiries the Commission also heard of this practice and of occasions where transfers had been used as a threat to silence members expressing concern, rather than investigating and solving the problem.

3.191 Transfers raise particular issues where the interests of the Service and of the individual officer can come into conflict, particularly if the officer has a settled family unit. Clearly there must be an ability for management to move personnel, to meet changing demands, to rotate staff in high-risk areas, to overcome the risk of individuals becoming too closely identified with a particular community and to protect internal witnesses. Moreover, it is advantageous for career development for an officer to have the chance to move on. Transfer for these purposes is entirely unexceptional so long as sufficient notice is given, and assistance is provided to reduce any financial impact or family disruption. As mentioned later in this volume,²⁷⁶ transfer should not be used:

- as a punishment;
- to move suspect or incompetent officer to become someone else’s problem; or
- to stifle criticism or resistance to corrupt conduct or malpractice.

RECOMMENDATIONS

The Commission recommends:

- ◆ The Service continue to develop and adopt the assessment centre method, and apply it to all career moves which may be described as promotions (paras. 3.185 - 3.188).
- ◆ Assessment centres be regularly monitored by external experts to ensure their effectiveness (para 3.189).
- ◆ Selection panels include at least one person who is not a member of the Police Service (para 3.189).
- ◆ The PIC, the Office of Internal Affairs and commanders pay particular attention to delivery of careful and realistic integrity assessments (para. 3.189).
- ◆ The basis for transfers be confined to proper administrative and managerial considerations (para. 3.191).

F. APPEALS AGAINST PROMOTION AND TRANSFER DECISIONS

THE CURRENT PROMOTIONS SYSTEM

3.192 There is no provision for appeal in respect of promotions to executive positions. Indeed the current legislation expressly provides against such a right.²⁷⁷

²⁷⁵ Report of the Commission to Inquire into New South Wales Police Administration, (E. A. Lusher, Commissioner) 1981, RCPS Exhibit 2790A/3, p. 71.

²⁷⁶ See Volume II, Chapter 4, para. 4.35 of this Report.

²⁷⁷ Police Service Act 1990, s. 44(2), (6) & (7).

3.193 The position in relation to non-executive positions and constables is governed by Division 5A of Part 6 of the Police Service Act (the Act):

- although technically an appeal by a constable lies to GREAT against a decision of the Commissioner to promote another constable to a higher grading within the rank of Constable,²⁷⁸ progression through the grades of constable at present depends upon the period of service and the completion of specified qualifications. As a consequence, this avenue of appeal appears redundant;
- given the present structure of ranks and grades, a senior constable may appeal to GREAT against a decision to appoint another senior constable to a sergeant position, where the appellant was an applicant for the position and is eligible for appointment to the position.²⁷⁹ A sergeant who is not a senior sergeant may appeal to GREAT against a decision to appoint either a constable or a sergeant to a senior sergeant position.²⁸⁰ The only ground on which appeal may be made is that the merit of the appellant is greater than that of the other officer;²⁸¹
- an officer may appeal to GREAT against the appointment of another officer to any Inspector position, if the officer was an applicant for the position and is eligible for appointment to the position.²⁸² The only ground of appeal is that the merit of the appellant is greater.²⁸³

3.194 The provisions of the *Government and Related Employees Appeal Tribunal Act 1980* (GREAT Act) apply to appeals by officers under this division, subject to the requirement that the sittings of GREAT are to be informal and to be subject to any other modifications prescribed by regulation.²⁸⁴ For these purposes the employer is taken to be the Commissioner,²⁸⁵ and non-executive administrative officers²⁸⁶ are taken to be employees.

3.195 A possible anomaly arising out of s. 65 of the Act has been identified. Where the Commissioner is satisfied that a non-executive position is suitable for either a police officer or an administrative officer, he or she may designate the position accordingly, and each class of 'employee' may apply for it. The Act gives police the right to appeal against the appointment of police, not employees generally, whereas the GREAT Act gives employees the right to appeal against employees. If the Act is read as restricting the right of police to appeal, the result is that police cannot appeal against a decision to appoint an administrative officer. Similarly, with the introduction in 1966 of a new s. 64 into the Act, lateral entry is now possible. It appears that neither the Act nor the GREAT Act give any right of appeal to outside applicants, nor to police or administrative officers if an outside person is appointed. It is understood that legislative amendment is being considered to rectify these situations.

3.196 Quite apart from these anomalies, there is widespread dissatisfaction within the Service regarding the appeal process.²⁸⁷ An appeal against a promotion decision has the effect of placing GREAT, which is composed of a magistrate acting as chairperson, an employer's representative and an employee's representative, in the position of the original police selection committee. A new

²⁷⁸ If the appellant is more entitled to be promoted, having regard to regulations regarding the promotion of Police officers, and the appellant is qualified for promotion to that higher grade. *ibid.*, s. 81A(1).

²⁷⁹ *ibid.*, s. 81B(1).

²⁸⁰ *ibid.*, s. 81B(2).

²⁸¹ *ibid.*, s. 81B(3).

²⁸² *ibid.*, s. 81C(1).

²⁸³ *ibid.*, s. 81C(2).

²⁸⁴ *ibid.*, s. 81D.

²⁸⁵ *ibid.*, s. 81E.

²⁸⁶ *ibid.*, s. 81F.

²⁸⁷ This emerged in a number of anonymous submissions, and was acknowledged by the Service and the Police Association at the round tables. A number of submissions to the Commission complained generally about abuse occurring within the current appeal system and the waste of time, money and human resources involved. Anonymous (current serving NSW Police officer), Submission to RCPS, 22/7/96, RCPS Exhibit 2809/7; D. Bailey (current Police Officer), Submission to RCPS, RCPS Exhibit 2809/18; B. Blacker, Submission to RCPS, 23/7/96, RCPS Exhibit 2809/20a.

decision is made regarding which officer has most merit for the position, yet there is absolutely nothing to suggest that a decision of GREAT has any greater validity than a decision of the original selection panel.

3.197 Within the materials provided to the Royal Commission, the following problems have been identified in relation to the constitution of GREAT for these appeals:

- there is no guarantee that the employer or employee representatives have appropriate experience in relation to management issues or are qualified to sit on selection committees;
- there is no guarantee that the representatives are of a rank that would have been permitted to compose the original selection committee;
- for specialist positions, selection committees are able to avail themselves of the service of a fourth member with particular technical qualifications. There is no requirement, nor does there appear to be any opportunity for GREAT to avail itself of this assistance; and
- the composition of the GREAT panel reflects the same concern police have entertained in relation to the internal selection committees, namely that representative members sometimes bring their own prejudices, preferences and agenda to the process.²⁸⁸

3.198 GREAT is not bound by legal precedent, nor does it have a set of consistent rules for itself in dealing with promotions. Material available to the Commission shows examples of situations where GREAT has taken contrary views regarding the relevance and significance of particular factors.²⁸⁹ This lack of consistency does not breed confidence in the institution, nor does it result in police officers considering that their rights are protected by the appeal mechanism.

3.199 The Act specifically states that the basis of appeal is greater merit. It is not a review of procedural matters nor of matters such as denial of natural justice. Merit is difficult to define and is often subjective. It is conceivable that different selection committees would make different decisions from amongst the same pool of candidates for a particular position, each of which would be equally justifiable particularly if the field was relatively even. GREAT is in the same position as any other selection committee in that sense. It selects the officer it considers to be of greater merit, and in so doing merely substitutes its own opinion for that of the Selection Committee.

3.200 In July 1996, the Service noted in its submission to the RCPS, that the appeal process was under review with consideration being given to instituting an internal review process.²⁹⁰

3.201 Following this, in March 1997 the Police Association advised the Commission that if GREAT was no longer to administer police matters, one option may be to construct an internal review process.²⁹¹

3.202 This proposition was seen as appropriate on the assumption that.²⁹²

- the introduction of assessment centres will reduce significantly the number of appeals;
- an internal appeals process would be similar in structure to that of GREAT;
- the panel would include an independent chairperson, being an agreed nominee of the Association and the Service;

²⁸⁸ NSW Police Service, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/1.

²⁸⁹ eg. previous service at higher levels.

²⁹⁰ NSW Police Service, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/1, p. 45.

²⁹¹ Police Association of NSW, letter to RCPS regarding Promotions Appeals and the Employee Management System, 4/3/97, RCPS Exhibits 2947 & 2971, pp. 1-2.

²⁹² *ibid.*

- the panel would comprise an Association representative (the Police Service having an employer representative); and
- the decision of the panel would be binding on the Service.

3.203 While the current appeal process considers only questions of merit, the Service's submission proposed that an internal review be confined to questions concerning the process of selection.²⁹³ This is similar to current proposals in South Australia and Western Australia.²⁹⁴

3.204 It has been suggested that such a system has the following advantages:²⁹⁵

- it promotes less competition between officers as appellants are no longer called on to argue their merit in comparison to that of their colleagues; and
- the selection panel or assessors are more focused on adhering to the fairness of the selection process itself, thereby promoting greater accountability and eliminating bias.

3.205 Each of those arguments, most particularly the second, has its merits. It is, however, arguable whether an appeal system based on process alone is likely to lead to a better outcome than one based on merit. Appeals based on process could potentially descend to trivial or technical questions of detail. Moreover the notion is not entirely congruent with a selection system that is intended to produce the best candidate for the job.

3.206 Reform of the appeals process needs to be considered in the light of the newly introduced assessment centre process which does not rely so heavily on subjective factors, or on the kinds of assessment by supervisors which were so heavily discredited in the public hearings of this Commission.

3.207 Although it is to be expected that this system will substantially reduce the occasion for appeal, through the reliance by the selection panel on independent, objectively collected material, it remains important that there be some right of review.

3.208 The Commission favours an internal and informal procedure for review of the kind proposed by the Police Association, to extend both to the fairness of the process and to merits, in place of the existing system.

3.209 It should be subject to the requirement that a decision would not be overturned on the merits unless it was shown to be one that was not reasonably open to the selection panel. In other words, the internal review should not return to the existing form of review in which GREAT is simply able to substitute its own decision for that of the selection panel as to which of the competing applicants for the job had the best merits.

3.210 Otherwise the touchstone for intervention should be confined to the overall fairness of the process leading to the decision of the selection panel, again subject to the requirement that in a case where a material unfairness in procedure was shown, the Review Committee would remit the matter back to the selection panel for reconsideration after that unfairness was addressed, rather than substitute its own decision.

TRANSFERS

²⁹³ NSW Police Service, Submission to RCPS, 26/7/96, p. 45.

²⁹⁴ South Australia Police, Submission to RCPS, 1/8/96, RCPS Exhibit 5999/87; and Western Australia Police Service, Letter to RCPS re Selection System, 18/6/96, RCPS Exhibit 5999/88.

²⁹⁵ Western Australia Police Service, Letter to RCPS re Selection System, 18/6/96, RCPS Exhibit 5999/88; and South Australia Police, Submission to RCPS, 1/8/96, RCPS Exhibit 5999/87.

3.211 There is no legislative provision for an appeal against a transfer save where it is a disciplinary or penalty transfer falling within the class of cases where an appeal would lie generally in relation to disciplinary matters. Otherwise, where an officer is dissatisfied with a transfer, he or she may appeal only to police management. The Human Resources command does not normally intervene unless the officer can identify a significant matter of which the Service was not previously aware.

3.212 This has produced:

- disputes as to whether a particular transfer was a disciplinary or penalty transfer;
- dissatisfaction in the case of those officers who have been unwillingly transferred (particularly where it has resulted from their resistance to corrupt conduct or malpractice); and
- dissatisfaction where the Service has filled a position by lateral movement rather than by advertising it as a position to be filled by open competition.

3.213 The Service needs the capacity on a managerial basis to transfer officers both geographically and to different positions within the Service. This is a necessary function for building skills, for rotation as an anti-corruption measure, and for ensuring that the Service is in a position to deliver service. As explained elsewhere, this Commission does not consider that transfer should ever be used as a disciplinary measure. As a consequence, it does not recommend the introduction of any appeal system for transfers. However, it is important that the Human Resources and Development Command develop proper procedures to review transfers where compassionate or other substantial grounds are shown, and to provide support if necessary of a financial kind, to ameliorate significant moves occasioning hardship.

3.214

RECOMMENDATIONS

The Commission recommends that:

- ◆ The right of appeal to GREAT in respect of promotion be removed, and in its place an internal review panel be established which might deal with appeals against promotional decisions involving non-executive staff and constables (para. 3.208):
 - such review should extend to the merits of the decision appealed from, and the fairness of the process by which it was reached (para. 3.208);
 - the review panel should not set aside a decision on the merits unless satisfied that it was one that a selection panel acting reasonably could not have reached (para. 3.209);
 - the review panel should remit the matter to the selection panel for reconsideration if satisfied that there has been a material unfairness in process, affecting the original decision, rather than substitute its own decision (para. 3.210).
- ◆ The Commission does not make any recommendation for the introduction of an appeal system for transfers, save to encourage the Human Resources and Development Command to develop proper procedures to review transfer decisions when compassionate or other substantial grounds are shown, and to provide support to ameliorate any hardship involved (para. 3.213).

G. TERMINATION OF EMPLOYMENT**RESIGNATION**

3.214 Although resignation was not identified as a major issue in itself, some instances attracted attention. These can be briefly mentioned, deferring for the moment the more important aspect of early retirement and redundancy benefits.

3.215 Resignation can be deferred in relation to an officer under suspension who is being investigated.²⁹⁶ The reason for the ability to defer acceptance of resignation relates to the power to direct a member of the Service to answer questions in connection with any investigation being conducted by the Service, and the inability so to direct a person who has ceased to be a member. Despite the proposed changes to the disciplinary system, this particular provision will still be necessary to facilitate managerial investigations where appropriate. Save in exceptional circumstances, this Commission agrees that it remains appropriate for suspension to be with pay.

3.216 A serious deficiency in the managerial approach of the Service to resignations came to light in connection with Commission inquiries into the Yass Patrol. A number of officers who, between them, had accumulated considerable service, resigned over a comparatively short period.²⁹⁷ There was no effective investigation of the reasons underlying those resignations, nor was there any practice within the Service to conduct exit interviews. This was simply bad management. Any healthy organisation should endeavour to learn why it was losing a group of experienced officers, and

²⁹⁶ *Police Service Act 1990*, ss. 30(3), 49(2)(b), 82(2)(b) and 181(C); *Police Service Regulation 1990*, cl. 40.

²⁹⁷ During a period of about 20 months in 1993 and 1994 six officers resigned with a total of nearly 100 years' service between them. R. Parry, RCT, 30/4/96, pp. 2056ff.

attempt to discover if there were problems within the organisation itself, or misconduct by other police, giving rise to that situation.

3.217 The Service recently announced the 'reintroduction' of an exit interview procedure which is to be made available to all staff who voluntarily leave the organisation.²⁹⁸ Patrol commanders or managers are to be responsible for providing staff with the opportunity for an exit interview.²⁹⁹ The Commission supports this initiative, but adds that the Human Resources and Development Command should adopt a positive role in ensuring that patrol commanders and managers do distribute the exit interview forms, and in ensuring that the information is properly collated and utilised.

3.218 Concern has been expressed in relation to the desirability of the Service encouraging or accepting a resignation as an answer to a disciplinary problem or internal investigation. This raises serious competing interests which need to be balanced against the pragmatic considerations relating to the proof of misconduct, particularly to a criminal standard. This Commission takes the view that wherever there is evidence sufficient to support a criminal prosecution, or exercise of the Commissioner's power to dismiss for loss of confidence, that route should be followed, and the easier option of facilitated resignation firmly resisted. However, where the case is not clear, then in the greater interest of preserving a Service of integrity, resignation should remain an acceptable option.

HURT ON DUTY

3.219 Police officers who joined the Service before 1 April 1988 were obliged to contribute to the Police Superannuation Fund set up under the *Police Regulation (Superannuation) Act 1906*. Currently, there are in excess of 8,000 members of the Service to whom this Act and scheme applies. It provides for pension and Hurt on Duty benefits.

3.220 Police officers who joined the Service after this date came within a different regime, which broadly:

- provides coverage for work-related injury and illness under the *Workers Compensation Act 1987*; and
- allowed them to join the State superannuation scheme in force at the time, or to join a private scheme in accordance with the law.

Hurt on Duty benefits do not apply for this category of member, so that this section of the Report is confined to the first mentioned group.

3.221 The *Police Regulation (Superannuation) Act 1906* (the 1906 Act) is a complicated Act giving rise to many problems of interpretation. The scheme is unfunded so that its liabilities are met out of Consolidated Revenue.

The Provisions of s. 10

3.222 This section provides that if a member of the Service is discharged after being certified³⁰⁰ incapable, due to a specified infirmity of body or mind, of discharging the duties of office, and that infirmity has been determined³⁰¹ to have been caused by the member having been hurt on duty, then the member is entitled to a pension equivalent to 72.75% of the salary of office at the date of discharge (irrespective of length of service) with provision for a further 27.25% to be granted.

²⁹⁸ Commissioner's Notice CN97/50, *Police Service Weekly*, 14 April 1997, p. 25.

²⁹⁹ *Ibid.*

³⁰⁰ *Police Regulation (Superannuation) Act 1906*, s. 10(B)(1).

³⁰¹ *Police Regulation (Superannuation) Act 1906*, s. 10(B)(3).

3.223 There is a widespread perception that the provisions of this section, particularly s. 10, have been abused by those seeking an early way out of the Service with maximum benefits. The Commission spent some hearing time looking at these matters and received numerous submissions as well as evidence³⁰² suggestive of such abuse, at least so far as it related to psychological conditions. It became obvious in the course of the Royal Commission study that many police in receipt of Hurt on Duty (HOD) pensions were in fact engaged in full-time employment in other activities, some of which were barely less stressful than policing.

3.224 A Police Board subcommittee attempted a similar review during the currency of the Royal Commission, but for various reasons that inquiry proved inconclusive.

3.225 Whether or not the perception mentioned was well-founded in the individual cases examined, it is clear that the scheme provides a considerable temptation for officers who have not otherwise qualified for a pension to pursue a claim for the benefits under the section, particularly those who are facing internal disciplinary action, dismissal, or criminal prosecution.³⁰³

3.226 No objection is raised by the Commission so far as the section provides compensation for those who genuinely come within its provisions and are unable to work as police. However, the temptation presented to those who have either become disenchanted with their lot, or have come under adverse notice is readily apparent. By comparison a police officer who leaves the Service as a result of infirmity of body or mind resulting other than from the discharge of the duties of office, with 15 years completed service and aged under 55 is entitled only to two years' pay.³⁰⁴

3.227 It was a noticeable feature, not only in its inquiries but also in the material available to the Commission, that officers who either had become the subject of internal investigation or feared that this might be so and were working immediately went off sick and claimed that they were unable to be interviewed for medical reasons. This situation has often become prolonged with the period off sick extending into months or years, and eventuating in a claim under s. 10. The possible abuse of stress leave was similarly the subject of recent comment by the Auditor General.³⁰⁵

3.228 The Section prescribes what is known as a 'one-job test' without any discount for employability in fields of work other than as a serving police officer. This is clearly inappropriate since it is generally accepted that as soon as the link with the Service has been broken, it is probable that the officer will recover and return to some form of employment.

3.229 It is unnecessary to go into this situation in any detail because both the Police Service³⁰⁶ and the Police Association³⁰⁷ agree that the 'one-job test' is insupportable and should be altered so that employability in areas other than the Police Service can be taken into account in assessing the level of a pension under s. 10. The Commission considers that the legislation should be amended, at least prospectively, to give effect to that consensus of opinion. Retrospective amendment is probably inappropriate. It also considers that a more critical examination should be made of s. 10 claims, to prevent abuse of the scheme.

The Police Superannuation Advisory Committee (PSAC)

³⁰² Evidence regarding the pension fund and whether it had been abused or was open to abuse was heard from 6/2/95 to 9/2/95 and on 19/7/96.

³⁰³ eg. Former Commissioner Avery, RCT, 5/12/94, p. 53; Dr Orr, RCT, 9/2/95, p. 1746ff; Assistant Commissioner Nixon, RCT, 12/12/94, pp. 428, Assistant Commissioner Nixon, RCT, 19/7/96, pp. 29021-25, & 29038; NSW Police Service, Report re Psychiatric Express by Stress Working Party, 25/9/95, RCPS Exhibit 2210; C. Nixon, Response to Royal Commission (Police Service) Act 1994, s. 6 269/95, 4/12/95, RCPS Exhibit 2211/2; C. Nixon, Further Response to Royal Commission (Police Service) Act 1994 s.6 269/95, 9/7/96, RCPS Exhibit 2711/3.

³⁰⁴ *Police Regulation (Superannuation) Act 1906*, s. 8(1).

³⁰⁵ See NSW Auditor General's Report to Parliament, 1996, vol. 2, RCPS Exhibit 2953, p. 134.

³⁰⁶ NSW Police Service, Submission to RCPS, 3/9/96, RCPS Exhibit 2809/115.

³⁰⁷ NSW Police Association, Submission to RCPS, August 1996, RCPS Exhibit 2622.

3.230 In 1988, considerable changes in Public Sector Superannuation took place. The State Authorities Superannuation Board was established. Many existing schemes were closed to new members, including the Police Superannuation Fund. The State Authorities Superannuation Scheme was formed, which most police appointed after this date joined. It was closed in 1990 and replaced by the First State Superannuation Scheme.

3.231 From April 1988, the Police Superannuation Advisory Committee (PSAC) took over the administration of the Police Superannuation Fund under delegation, initially from the State Authorities Superannuation Board and currently from the State Trustee Corporation. PSAC is constituted by a chairperson appointed by the Minister, three persons nominated by the Police Association; one person nominated by the Commissioned Officers Association, one person nominated by the State Trustee Corporation, one person nominated by the Workcover Authority and one person nominated by the Minister for Police and Emergency Services.³⁰⁸

3.232 The Police Service in its submission³⁰⁹ acknowledged a potential conflict of interest in the involvement of police in the administration of the scheme. Principally for that reason it advocated the abolition of PSAC. The Police Association on the other hand,³¹⁰ strongly advocated the retention of PSAC.

3.233 It is the view of the Commission that the delegation to PSAC should be withdrawn and management returned to the State Trustee Corporation, for the following reasons:

- no other fund is administered by a committee of this nature;
- PSAC has no similar involvement in current superannuation funds to which police belong; and
- there is a potential conflict of interest in leaving effective or substantial control over an unfunded scheme (which draws on consolidated revenue) to police who might be seen to favour associates, or to have an interest in 'buying' their retirement.

The Commission takes the view that more independent management of the scheme would assist in overcoming abuse.

REDUNDANCY AND EARLY RETIREMENT

3.234 When any large organisation is reformed, it is inevitable that there will be those within it who would prefer not to stay, and there will be those who the organisation would prefer did not stay. In addition, there will be those for whom there is no room.

3.235 There is no doubt that there are officers within the Service who are only staying on in order to qualify for their maximum entitlements under the 1906 Act. They have been referred to in evidence somewhat unkindly as 'POPOs'.³¹¹ They consist in the main of persons of around 20 years' service who are either suffering from burn-out or disillusionment about the lack of promotion opportunities. Although there was general agreement about their existence, nobody was prepared to give a reliable estimate of their number. A suggestion with which the Commission finds itself in sympathy was that such persons should be enabled to depart the Service with dignity, that is, on financially acceptable terms.

3.236 Voluntary redundancy is a matter for the government of the day which must balance a range of considerations including its cost effectiveness. Some years ago, the concept of an optional

³⁰⁸ *Police Regulation (Superannuation) Act 1906 s. 2H.*

³⁰⁹ NSW Police Service, Submission to RCPS, 3/9/96, RCPS Exhibit 2809/115.

³¹⁰ NSW Police Association, Submission to RCPS, August 1996, RCPS Exhibit 2622.

³¹¹ Passed over and pissed off.

disengagement benefit for those with 30 years' service who had attained the age of 50 was introduced into the 1906 Act.³¹² This proved popular. There were more wishing to take advantage of it than the special funding provided was able to permit.

3.237 There is a difficulty in introducing a degree of selectivity into such a scheme, to ensure that those essential to the well-being of the organisation do not take the opportunity to leave, without discriminating against individual rights. This difficulty is compounded by the perception that the initiative puts a premium on incompetence, lack of application, or ineptitude, unless available to all. Yet it has its advantages as well as the support of the Service and the Police Association.

3.238 The most the Commission feels able to do is to invite the Government to consider the provision of special funding, and to free the Commissioner from current statutory constraints so as to allow him to provide an incentive for inappropriate staff to leave the Service early. However described, it is important in the Commission's view for the future well-being of the Police Service to facilitate the freedom of movement of its workforce and to remove any financial disincentive in this regard.³¹³

3.239 Generally the 1906 scheme discourages early retirement unless the officer can establish an entitlement to HOD benefits. The scheme pays little regard to the operational realities of policing which render it difficult for an officer to maintain efficiency and interest after a lengthy period of service, unless promoted to senior rank. One way of addressing this would be to permit retirement with reduced benefits from the time of 20 years' service onwards, or to enable portability of accrued rights. This has the support of the Police Associations, and it is a concept more in attune with current employment practices which place value on job mobility.

3.240 In the following chapter, consideration is given to the formulation of a new complaints and disciplinary system, and to the manner in which dismissal for misconduct should occur. In working out that scheme, it is appropriate that attention be given to the impact of the provisions previously mentioned upon officers who are dismissed before becoming eligible for any pension benefits. Unless arrangements are introduced to ensure that such officers are not additionally penalised in the loss of notionally accumulated pension/superannuation rights, drawn out litigation is inevitable, and the effective exercise of the Commissioner's confidence provision likely to be threatened.

RECOMMENDATIONS

The Commission understands there is a working party in existence examining the *Police Regulation (Superannuation) Act 1906* with the aim, if possible, of separating out the worker's compensation provisions from the pension provisions and of examining various inequities including the matters raised in this section. That exercise or a similar exercise should be encouraged consistently with the views expressed in this Report. Otherwise the Commission recommends:

- ◆ Prospective amendment of s. 10 of the 1906 Act to replace the one job test with a test that takes into account employability in areas other than policing (para. 3.229).
- ◆ Return of the management of the Police Superannuation Fund to the State Trustee Corporation, revoking the delegation to the Police Superannuation Advisory Committee (para. 3.233).

³¹² *Police Regulation (Superannuation) Act 1906*, s. 8A.

³¹³ See also the discussion concerning severance with dignity in relation to the exercise of the Commissioner's confidence power at 4.92 et seq.

- ◆ Consideration be given to reactivating the redundancy scheme and/or permitting retirement with reduced benefits after 20 years' service (para. 3.239).

3.241 The point of these recommendations is to facilitate the exit with dignity of those long-serving police who either do not fit into the new regime, and who are likely whether deliberately or not to hinder reform progress, or to block promotion of those officers who are needed for command positions, and positions of responsibility. The Commission recognises that the issues involved are complex, that misunderstandings and differences of opinion exist as to the proper application of the existing arrangements, and that a substantial number of police are potentially affected. For these reasons it stops short of any positive recommendation other than to encourage careful consideration of the options available, and entry into industrial negotiations with the Associations to remove any inequities.

H. APPEALS IN SICK LEAVE AND HOD CASES

3.242 If an officer is refused leave of absence on full pay during any period of absence caused by that officer being hurt on duty, a right of appeal lies to GREAT.³¹⁴ Both the Service and the Police Association take the view, which this Commission shares, that GREAT is an inappropriate Tribunal to deal with such an appeal which turns substantially on medical issues. It is the only issue of such a nature presently committed to GREAT from any source in the Public Service.

3.243 The Commission is accordingly of the view that s. 186 of the *Police Service Act 1990* should be amended to provide that the right of appeal lies to the Compensation Court rather than to GREAT.

3.244 The 1906 Act imposes upon PSAC the duty of deciding whether an officer is hurt and on the Commissioner of Police the duty of deciding, for the purpose of the Police Superannuation Fund, whether a particular infirmity of a member was caused by that member being hurt on duty. The Service in its submission³¹⁵ suggests that it is inappropriate for the Commissioner of Police to exercise the task having regard to the same kind of conflict of interest as arises in relation to PSAC.³¹⁶

3.245 In the view of the Commission, that submission is sound. The initial decision should rest with the administrator of the Police Superannuation Fund, rather than with the Police Commissioner.

3.246 Appeals under the 1906 Act relating to decisions of PSAC and the Commissioner of Police may be made to the Compensation Court of NSW.³¹⁷ The Commission takes the view that this is the proper forum for decisions of this kind.

RECOMMENDATIONS

The Commission recommends:

- ◆ Amendment of section 186(1) of the *Police Service Act 1990* to provide for the appeal referred to therein to lie to the Compensation Court in place of GREAT (para. 3.243).

³¹⁴ *Police Service Act 1990*, s. 186(1).

³¹⁵ NSW Police Service, Submission to RCPS, 3/9/96, RCPS Exhibit 2809/115.

³¹⁶ See paragraphs 3.232 and 3.233 *supra*.

³¹⁷ *Police Regulation (Superannuation) Act 1906*, s. 21.

- ◆ All decisions relating to whether or not an infirmity of a member was caused by that member being hurt on duty be vested in the administration of the Police Superannuation Fund, subject to appeal to the Compensation Court (para. 3.245).

I. CIVILIAN SUPPORT AND ADMINISTRATIVE SERVICES

PRESENT ARRANGEMENTS

Appointment and Employment

3.247 PSES appointments of administrative officers³¹⁸ are made by the Commissioner and their employment is governed by a contract of employment with the Commissioner.

3.248 Non-executive administrative officers are selected for appointment by the Commissioner³¹⁹ and their employment is governed by the *Public Sector Management Act 1988* and the regulations under that Act.³²⁰

3.249 Industrially, administrative officers are represented by the Public Service Association.³²¹ Enterprise agreements entered into by the Police Association, or the Commissioned Officers' Association, have no application to administrative officers, and as a result different conditions of employment exist.

3.250 As at mid-1996, the total number of persons in the Service was 16,537 made up of 13,070 police and 3,467 civilians. The latter serve in a variety of positions and provide a range of clerical, support and other services.

Designation of Positions within the Service

3.251 The Commissioner is required to designate the positions in the Police Service which are to be held by police officers. This designation is to occur if the Commissioner is satisfied that the holder of the position will be required to either carry out or be concerned in operational police duties or 'that it is otherwise appropriate to do so'.³²²

3.252 The reality is that many police officers carry out work which does not require an exercise of the powers of the office of the Constable. The Police Association in its submission to this Commission suggested that 'the measure of a successful career in the current structure [of the NSW Police Service] is to escape from policing into management'.³²³ This is reflected in the inordinate number of police officers who have been employed in Police Headquarters, and in support or administrative positions at regions, districts and patrols. There are other areas of the Service which appear to have an over provision of police officers.³²⁴

3.253 The Police Association does not support increasing civilianisation of the Service³²⁵ and has enunciated a broad set of criteria for those positions which should be held by a police officer:

- roles which require the exercise of police knowledge and training;

³¹⁸ Administrative officer means 'a member of the Police Service other than a police officer or a temporary employee'. Police officer means 'a member of the Police Service holding a position which is designed under this Act as a position to be held by a police officer'. *Police Service Act 1990*, s. 3(1).

³¹⁹ *Police Service Act 1990*, s. 81.

³²⁰ Public Sector Management (General) Regulation 1996.

³²¹ Some officers are represented by more specific associations, for example medical officers are represented by the Australian Salaried Medical Officers Federation.

³²² Operational police duties are not defined, nor are the general powers, functions or duties of police officers. *Police Service Act 1990*, ss. 11(1) & (2).

³²³ NSW Police Association, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/2.

³²⁴ NSW Police Service Communications Review Project Team, *Report into NSW Police Communications*, 30/9/96, RCPS Exhibit 2824. A recent review of the NSW Police Communications Branch found that there was an over-employment of police officers as communications operators and supervisors, and concluded that only one such officer was required per shift. Other Services have reached similar findings, for example, the Tasmania Police are reversing the mix of their Communications Operations Section from domination by police to the majority of operators being civilians. Tasmania Police, Information regarding industrial relations, civilianisation and disciplinary proceedings, RCPS Exhibit 2944.

³²⁵ NSW Police Association, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/2.

- roles that provide essential training for career police officers;
- roles where police insight can improve the operation of the Service;
- roles where operational police can be placed at risk by the imposition of industrial action by others;
- roles where employment opportunities are made available for those police who are rendered physically disabled and who desire to continue to make a contribution consistent with their capabilities;
- roles which may enable the Service to generate revenue which provide opportunities for self-funding operations;
- roles which provide opportunities for legitimate secondary employment consistent with a user-pays scheme; and
- roles which require a state-wide 24-hour commitment.

3.254 These are reminiscent of claims made in 1981 to Justice Lusher by the Police Association.³²⁶ They tend to reflect the existing top heavy structure of the Service, and the desire of police, identified by the Association itself, to escape operational policing and to move into management while maintaining the perquisites and status associated with being a sworn police officer.

3.255 The tests propounded are not convincing, and ignore:

- the circumstances that in some areas, for example the Communications Branch, all that is needed is a shift supervisor or team support officer with police knowledge and training;
- the fact that administrative officers can be trained for many of the skills needed for their field of work, and do not need generalised police training; and
- the additional skills that staff, with a background other than policing, can bring to the Service.

3.256 A disparity exists within the present system so far as the Commissioner has power, when satisfied that a non-executive position is suitable for either a police officer or an administrative officer, to designate it as available to both, for the purpose of the selection process. Before appointment, however, a final determination must be made as to the designation, which then determines the pay entitlements attaching to the office. This arises from the circumstance that police and administrative officers are covered by separate awards and separate enterprise agreements with different pay and conditions.

3.257 The outcome has no relationship to the work being performed, but depends rather on the status of the office holder which is based on the possession of powers which may never be required for the position.³²⁷

3.258 As a matter of principle it seems more sensible for pay and other conditions to be determined by the job rather than by the status of the office holder. It provides a good reason for a move towards greater unity within the Service, or for a more rational classification of those positions which can be held respectively by police and administrative officers respectively.

Reasons for Change

³²⁶ *Report of the Commission to Inquire into New South Wales Police Administration*, (E. A. Lusher, Commissioner), Sydney, 1981, RCPS Exhibit 2790A/3.

³²⁷ eg. there was a disparity of \$13,000 between the amounts offered to police and administrative officers for the positions of Heads of School at the Police Academy. NSW Police Service, *'Either/Or' Positions - Disparity of Employment Conditions*, RCPS Exhibit 2957.

3.259 Sworn police officers are a community resource. They have received training in operational policing at considerable cost to the State and have acquired practical skills and experience on the job. Common sense dictates that they should be deployed primarily in operational policing. Their involvement in administrative work should be confined to those positions where their supervision or special skills are needed.

3.260 The engagement in suitable positions throughout the Service of staff who have not been immersed in the police culture can operate as:

- an anti-corruption measure; and
- a brake on the cycle of patronage.

Similarly to lateral entry it is a necessary part of the reform package.

Medical Officers and Forensic Experts

3.261 A particular problem was identified in relation to Medical Officers employed in the Clinical Forensic Medicine Section and in the Employee Assistance Branch of the Service. The nature of their work, and their professional and ethical responsibilities, requires them to have independence in their clinical activities.³²⁸ However, under the existing management structure, they are directly responsible to sworn officers who may have conflicting operational responsibilities or requirements.

3.262 A transfer of the Clinical Forensic Medical Section from the control of the Police Service to the Institute of Forensic Medicine³²⁹ would overcome this problem in part and ensure that advice obtained by the Service in this area was not only objective and independent, but seen to be so.

RECOMMENDATIONS

While it is not appropriate for this Commission to state definitively the appropriate make-up of the Service, it recommends:

- ◆ Sworn police officers be employed in positions which require the use of the special powers of police, and as a corollary there should be a greater involvement of administrative officers in positions which do not require an exercise of those powers (para. 3.259).
- ◆ Greater emphasis be placed generally within the Service, in the designation of positions and remuneration, on the nature of the job and the skills required, and less reliance placed on the status of its holder at any given time (para. 3.256 - 3.257).
- ◆ There be a move towards greater unity within the Service, in relation to pay and other conditions of employment, together with the removal of disparities which currently exist. Desirably, the Service should work towards a single industrial and disciplinary system applicable to all its staff (para. 3.258).
- ◆ The Clinical Forensic Medical Section be removed from the Service and transferred to the control of the Institute of Forensic Medicine (para. 3.262).

J. SALARIES AND ALLOWANCES

³²⁸ Australian Salaried Medical Officers' Federation, Submission to RCPS, 16/8/96, RCPS Exhibit 2809/109.

³²⁹ A move favoured by the Director of the Institute of Forensic Medicine and the former Chief Coroner of NSW.

3.263 In the First Interim Report, this Commission indicated its intention to examine salaries and allowances for any relevance they might have to the problems detected. The Commission is aware that research is inconclusive regarding a possible link between corruption and salary levels.

3.264 Other factors such as morale,³³⁰ power, frustration, excitement, an individual's need to prove themselves and desire to administer their own brand of street justice have been identified as of greater relevance.³³¹ Indeed, consistently with this view, the Commission found that many acts of corruption were committed for trivial rewards and the greed exhibited by some corrupt officers was such that it would not have been satisfied by any salary. An officer who is lacking in moral fibre, and susceptible to temptation, is likely to cross the line irrespective of his or her take-home pay.

SALARIES

3.265 It is not appropriate for this Commission to attempt to determine salary levels. For it to do so would be outside its terms of reference. That should be done only as part of the normal process of industrial negotiation, and in the light of changes brought about by the reforms in the wake of this Inquiry. However, it is appropriate for the Commission to record some of the issues which have emerged.

3.266 The Police Association in its submission suggested that:

- the status of police in society is in large measure determined by the salaries paid,³³² and
- the re-creation of the Service with an anti-corruption ethos can be achieved only if the salaries and conditions of those who serve are sufficient to attract quality recruits and to act as a real disincentive to corrupt behaviour.³³³

3.267 It has been suggested that the salaries payable to NSW police have for some time lagged behind those paid to police in other States.³³⁴

3.268 The Commission has not attempted to verify these assertions or to evaluate the material identified by the Police Association, which tends to suggest that by comparison with other OECD countries, police in Australia are underpaid. Considerable care is needed with any such comparative analysis to ensure that like is being compared with like, and that routine conditions of employment providing for overtime and allowances are taken into account. Furthermore, since some of the studies identified, there has been an increase in remuneration for NSW Police. The most that the Commission can do is to invite careful review to ensure that the levels of remuneration for NSW Police are equitable, and represent value for the responsibilities of the office.

3.269 This is a not unimportant consideration in the light of the circumstance that the mobility of police may be set to increase with the power given to the Police Commissioner to recruit non-executive officers from other services³³⁵ and the increasing interest in the establishment of a national

³³⁰ *Report of the Commission to Inquire into New South Wales Police Administration*, (E. A. Lusher, Commissioner), Sydney, 1981, RCPS Exhibit 2790A/3, p. 30.

³³¹ *Commission Report: The City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department*, (M. Mollen, Commissioner), New York, 1994, p. 21.

³³² NSW Police Association, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/2.

³³³ The results of a large-scale study of police perceptions conducted by Professor Kevin McConkey of the University of NSW led him to recommend increasing the pay of police to encourage ethical behaviour; NPRU, *Practical Ethics in the Police Service: Ethics and Policing - Study 3*, NPRU, 1996, RCPS Exhibit 2902/4, p. 19.

³³⁴ 'Daylight Robbery', *Daily Telegraph*, 27/12/96, p. 16.

³³⁵ *Police Service Act 1990*, no. 47, part 6, Division 2 provides for the appointment of non-executive officers who are not already members of the Police Service.

profession.³³⁶ The Service needs to be able to attract and retain quality staff.³³⁷ Lower relative pay for officers in NSW will not assist.

3.270 This Commission agrees unequivocally with the Service submission³³⁸ that for the future:

- positions should be established using an acceptable job description methodology, taking into account levels of responsibility, competencies and qualifications required; and
- remuneration should be linked to position, that is, the work to be performed rather than rank as it is at present.³³⁹

3.271 The Commission supports the adoption of these principles in any future negotiation of salaries. It also supports a review of all police salaries, to ensure that they represent value for the office and compensate for any extra duties, or changes in work practices, resulting from this Inquiry.

ALLOWANCES

3.272 It is the experience of this Commission that great caution should be taken in relation to the payment of police allowances. If an allowance is to be paid, the reason for it must be clear. There is no place for its existence as a means of overcoming shortcomings in remuneration. One such allowance, the detectives' allowance, was discontinued during the term of the Royal Commission because it was clear that it was not being used for the purpose for which it had been created, but became merely a perquisite of office.

3.273 The Police Association submission included a 'non-exhaustive list' of areas it considered worthy of attracting a special duties allowance.³⁴⁰ They comprise:³⁴¹

- detectives;
- accident investigation squad;
- patrol commanders representative;
- intelligence officers;
- education and development officer;
- field training officers (including driver and weapons trainers);
- recruitment branch;
- telephone intercept unit;
- joint technical services group;
- State protection support officers (part-time);
- patrol support element (part-time);
- initial response (sexual assault) officers;
- youth, gay and lesbian, domestic violence liaison officers;

³³⁶ NSW Police Service, *Registration of Police Officers - draft, 6/2/97*, RCPS Exhibit 2950; P. J. Ryan, *Reform of the NSW Police Service*, 19/11/96, RCPS Exhibit 2820/1.

³³⁷ RCPS, *Second Interim Report*, November 1996, p.109.

³³⁸ NSW Police Service, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/1.

³³⁹ *ibid*, p. 49.

³⁴⁰ NSW Police Association, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/2.

³⁴¹ *ibid*, p. 16.

- mounted police;
- water police (part-time);
- licensing police.

3.274 The basis for the assertion was that these officers perform duties requiring additional skills, training and experience, but receive no extra compensation. The difficulty is that over time these allowances become divorced from the reason for their creation, resulting in anomalies. The Service submission noted that 'current conditions of work have developed in an incoherent and unplanned fashion over time, many of the conditions are inequitable and were designed to protect anomalies and historical rights'.³⁴²

3.275 The preferred approach in the view of the Commission is that previously stated, namely that salaries should be determined according to positions and responsibilities rather than by reference to a base salary attached to rank, supplemented by individual allowances, which can result in inequities.

3.276 In its submission, the Police Association took issue with paragraph 6.22 of the First Interim Report, and claimed that police were no more likely to abuse travel allowances than any other public sector employees.³⁴³ This is not a relevant consideration. No abuse by any employee of travel allowances, overtime or the like is justifiable, and it certainly should not be treated as a way of making up for an inadequate base salary.

³⁴² NSW Police Service, Submission to RCPS on employment and promotion, 26/7/96, RCPS Exhibit 2321/1, p. 48.

³⁴³ NSW Police Association, Submission to RCPS on employment, 26/7/96, RCPS Exhibit 2321/2, p. 15.

RECOMMENDATIONS

- ◆ For the reasons mentioned, the Commission considers it inappropriate for it to become involved in any review of salaries or allowances save to encourage adoption of the general principle that remuneration for police should represent value for the office performed, be related to the position occupied and responsibility attaching to it and take into account extra duties and changes in work practices resulting from this Report (paras. 3.265, 3.268 - 3.271, 3.275 - 3.276).

K. SECONDARY EMPLOYMENT

3.277 The practice of engaging in secondary employment was prohibited for police officers in NSW until 1987.³⁴⁴

3.278 In May of that year, police were allowed to engage in secondary employment with the approval of the Assistant Commissioner (Personnel).³⁴⁵ In 1989, the responsibility for secondary employment approvals was passed to the Assistant Commissioner (Professional Responsibility)³⁴⁶ and made dependent on a conflict of interest test.

3.279 Following widespread publicity over the unauthorised employment of police officers in security positions at Sydney Airport which led to disciplinary action, all secondary employment in the security and liquor industries was banned from 30 June 1991.³⁴⁷ This ban was lifted a week later, following representations by the Police Association.³⁴⁸

3.280 In 1992, the NSW Ombudsman flagged an intention of recommending reinstatement of a blanket ban on employment in the liquor and security industries. In August 1992, the ICAC published its Corruption Prevention Report into Secondary Employment of NSW Police Officers.³⁴⁹ Rather than recommending a ban on employment in particular industries, this report proposed a more detailed approval process.³⁵⁰

3.281 The Service responded with the issue, in 1993, of a Secondary Employment Policy³⁵¹ whose stated purpose was to:

ensure that the integrity of the service is maintained, and that no police officer is placed in a position where they are faced with a conflict of interest, or in a position which the general public perceive to be in conflict with their official duties.³⁵²

3.282 Under this policy:

- approval of the District or Branch Commander has been required for all remunerative employment,³⁵³ although where it involves employment in the security, liquor and heavy

³⁴⁴ ICAC, Independent Commission Against Corruption, *Corruption Prevent Project: Secondary Employment of NSW Police Officers*, August 1992, p. 1.

³⁴⁵ *ibid*, p. 6.

³⁴⁶ ICAC, Independent Commission Against Corruption, *Corruption Prevent Project: Secondary Employment of NSW Police Officers*, August 1992, p. 8.

³⁴⁷ *ibid*, p. 9.

³⁴⁸ *ibid*.

³⁴⁹ ICAC, Independent Commission Against Corruption, *Corruption Prevent Project: Secondary Employment of NSW Police Officers*, August 1992.

³⁵⁰ *ibid*.

³⁵¹ NSW Police Service, *Secondary Employment Policy*, January 1993, RCPS Exhibit 5999/86.

³⁵² *ibid*, p. 2.

transport industries that must come from the Assistant Commissioner, Professional Responsibility;

- approval is not given, in general, unless secondary employment:
 - is undertaken in the officer's own time;
 - does not and could not involve a conflict of interest or be perceived to do so;
 - would not by reason of its time or duration adversely affect the performance of police duties;
 - finishes at least three hours before the officer's rostered shift; and
 - gives way in precedence to police duties;
- secondary employment has not been approved for partnerships, large shareholdings, or directorships of businesses involved in the security, private investigation, or liquor industries; and³⁵⁴
- secondary employment has not been approved for direct employment in the security, liquor or transport industries for police having specific duties in those areas.³⁵⁵

3.283 During the course of its hearings, the Commission received evidence from several witnesses of the continued existence of unauthorised secondary employment, which in some areas clearly involved a conflict of interest or risk of corruption.³⁵⁶

3.284 It also extended to other areas where approval had not been sought, even though it was likely that it would have been forthcoming.

3.285 Despite the adoption of the 1993 Secondary Employment Policy and the issue of Commissioner's Instructions in 1995 the objective in securing compliance, in a way that will avoid conflicts of interests, has not been achieved.³⁵⁷ Moreover, it became evident that individual police were working under assumed names and receiving cash to avoid income tax - a form of conduct which does not reflect well on their integrity.

3.286 The Service has made a recent attempt to encourage greater compliance by issuing the new 'Code of Conduct and Ethics' which reminds officers that:

You must have approval before you engage in any form of employment outside official duties. Police Service duties take precedence and secondary employment will not be approved when there is actual or potential conflict of interest.³⁵⁸

3.287 The Police Association of NSW opposes any blanket ban on particular types of secondary employment.³⁵⁹ The CPOA, however, accepts that secondary employment should not be in a field where possible conflict with a member's duties as a police officer might occur.³⁶⁰

3.288 While acknowledging that it is fair for police to have some opportunity for secondary employment, this Commission takes the view that their role as a police officer must always remain

³⁵³ NSW Police Service, Commissioner's Instruction 13.03, 1/11/93.

³⁵⁴ NSW Police Service, *Secondary Employment Policy*, January 1993, RCPS Exhibit 5999/86, p. 5.

³⁵⁵ Police employed on 'general duties' have not been restricted from secondary employment in these industries. NSW Police Service, *Secondary Employment Policy*, January 1993, RCPS Exhibit 5999/86, p. 5.

³⁵⁶ NSW Police Professional Responsibility, Confidential documents re Secondary employment, 24/11/95, Doc. 1385682; NSW Police Professional Responsibility, Secondary Employment without approval, November 1995, Doc. 1542152 and J. T. Jarratt, RCT, 1/2/95, pp. 1349-52

³⁵⁷ NSW Police Service, *Secondary Employment Policy*, January 1993, RCPS Exhibit 5999/86, p. 2.

³⁵⁸ NSW Police Service, *Code of Conduct and Ethics*, January 1997, p. 8.

³⁵⁹ Police Association of NSW, Letter to the RCPS regarding secondary employment and transfers, 3/5/96, RCPS Exhibit 2465/17, p. 1.

³⁶⁰ Commissioned Police Officers' Association of NSW, Letter to the RCPS, 25/3/96, RCPS Exhibit 2465/16, p. 1.

paramount, whether on or off duty. In order to maintain the integrity of the Service, it would be wise to rule out secondary employment in those industries in which police also have a regulatory or law enforcement role, for example, commercial and private inquiry agents, transport, liquor, security, and gaming and racing. A considerable range of part-time or casual work is left available, which can comfortably fit in with the shift work of police, and not interfere with their official duties.

3.289 There are still a number of matters which should be addressed in order to ensure compliance with the existing policy. The need exists for:

- an annual review of all existing applications for secondary employment;
- random audits in order to check whether officers who are sick, suspended or on holiday are in fact working in second jobs; and
- re-examination of the policy for PSES members for whom approval was formerly a matter for the Police Board, but now would be more appropriate for determination by a Deputy Commissioner.

RECOMMENDATIONS

The Commission recommends:

- ◆ Secondary employment be prohibited in those areas in which police have a regulatory role such as commercial and private inquiry agents, transport, liquor, security, and gaming and racing (para. 3.288).
- ◆ Existing secondary employment applications be reviewed on an annual basis (para. 3.289).
- ◆ The Service develop effective mechanisms to audit officers undertaking secondary employment (para 3.289).

L. LEGAL SERVICES

3.290 Three areas arise for consideration:

- in-house legal advice;
- the conduct of internal police disciplinary matters; and
- the Police Prosecuting Branch.

3.291 The first two areas fall within the responsibility of the office of the Solicitor for the Police Service, (Service Solicitor). This office is located at Police Headquarters and comprises a total staff of 42. Under current policy the office recruits only staff (other than for clerical duties) with legal qualifications.

IN-HOUSE LEGAL ADVICE

3.292 The office was established in 1992 in response to a report of the Office of Public Management of the Premier's Department (OPM) which recommended the disestablishment of the then Legal Services Branch, and the establishment of a Legal Office, to be managed by a qualified legal practitioner.³⁶¹ In April 1992 the Police Board approved the creation of the Office of the Solicitor for the Police Service.³⁶² The Service has also appointed a practising barrister to act as General Counsel upon a retainer, although for many cases it briefs other counsel from the independent Bar. The Office is available to provide general legal advice to the Service if required.

3.293 It is a fact that many public and private sector organisations maintain in-house legal units. However, as the Attorney General's Department reported in 1995,³⁶³ there are few government agencies with systems in place to objectively measure the performance of their legal services, nor do many agencies conduct a periodic review of their legal service requirements. Further, as the body of legal knowledge increases in complexity, it is self-evident that a small internal team of lawyers, however well motivated and resourced, will find it increasingly difficult to meet all areas of legal servicing to the necessary standard.³⁶⁴

³⁶¹ NSW Police Board, *NSW Police Service Review of Support Functions*, February 1992, RCPS Exhibit 1369/3.

³⁶² F. W. Hutchinson, Statement to RCPS, June 1995, RCPS Exhibit 1369/4.

³⁶³ NSW Attorney General's Department, *Successfully Managing Legal Services*, RCPS Exhibit 1369/9.

³⁶⁴ *ibid*, p. 4.

3.294 These observations are, in the view of the Commission, applicable to the Office of the Solicitor for the Police Service. However, there are further matters which call for comment. The Service has a history of 'shooting the messenger', and of wishing to receive only that advice which accords with its predetermined position and which puts it in the best possible light. There is a risk of pressure being brought to bear on any legal adviser to the Service, whether employed full-time or on a retainer to it. The injection of impartial and external legal advice would overcome that problem, remove any appearance of partiality, and bolster public confidence.

3.295 This is not to say that the Service should entirely abandon any capacity for internal legal advice. Good reason exists for the retention of a residual in-house legal unit to deal with:

- non-contentious matters such as those relating to the Service's acquisition or ownership of property, the drafting of documentation, and the like;
- support for those involved in criminal investigations, including the preparation of materials required for applications for warrants, (search, listening device and telecommunication interceptions). These are valuable adjuncts to policing and timely in-house legal skill and expertise in these areas is worthy of preservation.

Otherwise this Commission would encourage greater reliance on the Office of the Crown Solicitor for advice in respect of matters of a disciplinary or contentious kind.

DISCIPLINARY MATTERS

3.296 At present, the discipline unit of the Office of the Solicitor for the Police Service is responsible for providing advice in relation to disciplinary issues, and representing the Commissioner before the Tribunal and GREAT. This unit is composed of four advocates, of whom two are solicitors and two are police prosecutors.

3.297 The Assistant Commissioner, Professional Responsibility does not authorise the preferment of any departmental charges without first obtaining the advice of the Service Solicitor. Members of the discipline unit draft advice as to the sufficiency of evidence, and this is reviewed by the unit commander. Each matter is then referred to the Service Solicitor for consideration. Matters involving possible criminal charges against police are referred to the DPP for advice, and are not dealt with by the Service Solicitor.

3.298 Material available to the Royal Commission indicates that there have been some concerns about the time taken for advice in these matters and about the quality of Service representation in disciplinary cases.

3.299 In the chapter which follows, the Commission recommends the abolition of the existing formal disciplinary system³⁶⁵ and its replacement by a managerial system with internal review. If this recommendation is adopted then there will be little role for any lawyer to play in the process. However, in the event of such recommendation not being accepted, and a system continued in which the Police Tribunal and GREAT, or alternatively the Industrial Relations Commission, hear disciplinary matters in a tribunal setting, then this Commission considers it preferable for the necessary work to be undertaken by the Crown Solicitors Office. It presently acts in employment and disciplinary matters involving public sector employees. It has also had the carriage of some disciplinary proceedings before the Police Tribunal.³⁶⁶

POLICE PROSECUTORS

³⁶⁵ See Volume II, Chapter 4 of this Report.

³⁶⁶ Crown Solicitor's Office, Submission to RCPS, 7/3/96, RCPS Exhibit 1369/10; Crown Solicitor's Office, Submission to RCPS, 12/11/96, RCPS Exhibit 2900/2; Crown Solicitor's Office; letter regarding transfer of police discipline legal work, 22/11/96, RCPS Exhibit 2900/3.

History

3.300 The Police Prosecuting Branch was established in NSW in 1941 as part of the CIB. It then became the function of police prosecutors to appear on behalf of other police in proceedings before Courts of Petty Sessions (now Local Courts), both in summary prosecutions and in committal proceedings for indictable offences. In 1965 the Branch was removed from the CIB and established as a separate entity. At the time of regionalisation in 1987, the central branch was dissolved and Legal Service Commands were set up in each region. Each was under the command of a chief inspector who reported directly to the region commander.³⁶⁷

3.301 As at March 1997 there are 236 appointed, and trainee, police prosecutors. Police prosecutors appear by leave in the local courts. Legal qualifications are not a requirement for appointment,³⁶⁸ but prosecutors do receive specialist training, and gain a considerable degree of practical experience in their daily work in the local courts. They are subject to the Service Statement of Values, Commissioner's Instructions and the Police Prosecutor's Code of Conduct, but not to the ethical rules of the NSW Bar Association or Law Society.

3.302 In recent years, commencing with the Lusher Report, there have been calls for the prosecution function to be taken away from police prosecutors and given to an independent agency.³⁶⁹ This is in line with the recommendations of a number of interstate and overseas inquiries.³⁷⁰

3.303 In 1990, the Office of the Director of Public Prosecutions (ODPP) took over the responsibility for the conduct of all indictable matters before local courts. The police prosecutors continue to appear in summary matters, and in applications for the issue of apprehended violence orders.³⁷¹ Additionally, they provide advice to police on matters of law including the sufficiency of evidence to support charges.

3.304 The ICAC's second report into the relationship between police and criminals contained a recommendation that the Director of Public Prosecutions and the Police Service hold discussions, with a view to having all prosecutions in a particular police region conducted by ODPP lawyers for a trial period beginning in late 1994.³⁷²

3.305 The role of the Police Prosecuting Branch was flagged as one of the reform issues for consideration in this Commission's first Interim Report.³⁷³ In response to that Report, a submission was received from the Director of Public Prosecutions proposing that his office take over the conduct of all prosecutions.³⁷⁴

3.306 On 18 June 1996, Commissioner Urquhart chaired a round table discussion with representatives of the Police Service, the Commissioned Police Officers' Association, the Police Association and the Director of Public Prosecutions. The round table considered the ODPP proposal for a pilot study in which it was agreed that:

³⁶⁷ NSW Police Service Submission to the RCPS on Replacement of Police Prosecutors, 22/4/1996, RCPS Exhibit 2460/1, p.15.

³⁶⁸ NSW Police Service, Submission to the RCPS, 22/4/96, RCPS Exhibit 5412/1, p.17; as at February 1996, 8% of Police Legal Services personnel were qualified in law, a further 22% were engaged in external law related studies.

³⁶⁹ *Report of the Commission to Inquire into New South Wales Police Administration*, (E. A. Lusher, Commissioner), Sydney, 1981, p. 258. *Royal Commission of Inquiry into Drug Trafficking*, (D. Stewart, Commissioner), February 1983, p. 620. *Royal Commission into Certain Committal Proceedings against K E Humphreys*, (Sir L Street, Commissioner), July 1983, p. 99.

³⁷⁰ *Royal Commission into Criminal Procedure*, (C. Philips, Commissioner), 1981, p.186; *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, (G. Fitzgerald, Commissioner), 1989, p. 238; *The Royal Commission into Criminal Justice*, (Viscount Runciman of Doxford, Commissioner), HMSO, Cmnd 2263, 1993, p. 69.

³⁷¹ NSW Police Service, Submission to the RCPS, Replacement of Police Prosecutors, 22/4/96, RCPS Exhibit 2460/1, p. 15.

³⁷² ICAC, *Investigation into the Relationship Between Police and Criminals, Second Report*, April 1994, p. 53.

³⁷³ RCPS, *First Interim Report*, February 1996, p. 127.

³⁷⁴ ODPP, Pilot Scheme Takeover by the Director of Public Prosecutions of the role of Police Prosecutors at the Central Local Court, 27/2/96, RCPS Exhibit 1369/2; M. J. Finnane QC & Commissioner Wood, RCT, 11/3/96, p. 21372 .

- officers of the ODPP would take over the prosecution of all summary matters at the Campbelltown and Dubbo Local Courts; and
- the study would continue for six months, and it would be the subject of evaluation after three months and again at its conclusion.

3.307 The pilot commenced on 1 July 1996 and concluded on 31 December 1996. The work of evaluation was given to the Premier's Department to be undertaken with the assistance of a retired Magistrate, Kevin Waller. A progress report on the first three months of the operation of the pilot project was completed in November 1996.³⁷⁵ The final evaluation report, including detailed costings of the various alternatives, has not yet been released.

3.308 The interim evaluation suggested that the transfer of the prosecuting role from police prosecutors to solicitors employed by the ODPP is likely to reduce court backlogs,³⁷⁶ and was an effective measure. Key participants interviewed as part of the evaluation were also generally positive about the transfer of function to the office of the Director of Public Prosecutions.³⁷⁷

3.309 The Commission does not see any need for an extension of the pilot program, or any advantage in having it trialled elsewhere.

The Principle Involved

3.310 The Commission received submissions from the police prosecutors stating that there was little or no evidence of members of their command engaging in corrupt conduct. The Royal Commission did not come across any current evidence of such corrupt behaviour although it was a matter of concern to the ICAC,³⁷⁸ and there is anecdotal support for the existence of dubious practices and unhealthy relationships on the part of police prosecutors in the past.

3.311 The desirability of having the prosecution process separate from the investigation process does not depend on evidence of misconduct or corrupt behaviour on the part of police prosecutors. It rests essentially on the principles of independence and impartiality which are relevantly affected in the present context by:

- the fact that police prosecutors are answerable to their supervisors in the chain of command;³⁷⁹
- they do not owe a legal duty to the court in the same way that solicitors and barristers do;³⁸⁰ and
- they are not subject to the same code of behaviour and professional discipline as members of the legal profession.³⁸¹

3.312 Moreover, in the minds of the public they are inevitably associated with the interests and values of the Service. Even though they are no longer uniformed when they appear in court, they often give the impression of protecting witnesses 'on their team' (that is other police officers) with excessive zeal.

³⁷⁵ NSW Premier's Department, *Progress Report on the Evaluation of the DPP Summary Prosecutions Pilot Project*, November 1996, RCPS Exhibit 3035.

³⁷⁶ *ibid*, p. 17.

³⁷⁷ A survey of Magistrates, Clerks of Court, Legal Aid Officers and Law Society Officials, revealed that all respondents thought that both in practice and principle there were advantages in separating investigative and prosecutorial functions, *ibid*, p. 19.

³⁷⁸ ICAC, *Investigation into the Relationship Between Police and Criminals, Second Report*, April 1994, p. 49.

³⁷⁹ A problem confronted in the Cessna Milner case. See Volume I, Chapter 3 of this Report.

³⁸⁰ The police prosecutor's Code of Conduct requires prosecutors to 'discharge their duties to the Court and the Police Service honestly and impartially'. Police Prosecutors Course Outline, February 1996, p. 3. At the same time, the Prosecutors Course adjures all police prosecutors to 'embrace' the principle of the legal practitioner's duty to the Court as expressed in *Giannarelli v Wraith* (1988) 165 CLR 543.

³⁸¹ See NSW Police Service, Prosecutor Training Unit, October 1995, RCPS Exhibit 5412/9, Lesson Note 2, p. 4.

3.313 The Police Service acknowledged the importance of the principle of independence in its submission to the Commission:

The Police Service supports in principle the philosophical proposition that the interests of the community, in a legal system structured as it is in NSW, would be best served by a separation of the investigatory and prosecutorial roles.³⁸²

3.314 This submission was prepared prior to the appointment of the present Commissioner of Police. In his report on reform of the Police Service, Commissioner Ryan noted that he had no objection to the concept of prosecutions being separate from investigations, but he wished to avoid the difficulties which had occurred in England in the transition and thereafter when such a scheme was adopted.³⁸³

3.315 In summary, the arguments for retention of the status quo³⁸⁴ relate to:

- the fact that a transfer of the prosecution function to the ODPP would significantly affect the careers of the police who are currently working or training as prosecutors;
- the difficulties and possible expense to the ODPP in taking over the prosecutions throughout the State;
- the loss of the experience of those police who have served long periods in this work;
- the loss of the avenue for quick practical advice currently available to police investigating criminality, or considering whether or not to initiate a prosecution;
- the loss of the educative contact that prosecutors have with operational police in the presentation of patrol based lectures;
- the difficulties that would be faced by the large number of other government agencies who use the police prosecutor for their advocacy; and
- the contribution that police prosecutors make in the training and education of other police (in conducting mock courts and the like).

3.316 The arguments for implementation of the ODPP submission,³⁸⁵ in summary, relate to:

- the need for independence and accountability;
- the professional skill reposed in the ODPP staff;
- the greater preparedness of ODPP staff to discontinue matters that should not be before the courts;
- the greater discretion reposed in ODPP staff, and accountability for their decisions;
- the absence of any incentive or pressure for ODPP staff to defend police witnesses where their credit, reliability or integrity is contested;
- the professional duty ODPP staff owe to the courts, and the professional standards that bind them as members of the legal profession; and

³⁸² NSW Police Service, Submission to the RCPS, 22/4/96, RCPS Exhibit 2460/1, p. 4, para. 2.

³⁸³ P. J. Ryan, *Reform of the New South Wales Police Service - Phase 1*, 19/11/96, RCPS Exhibit 2820/1, p. 48.

³⁸⁴ NSW Police Service, Submission to RCPS, 22/4/96, RCPS Exhibit 2460/1; NSW Police Association, Submission to RCPS, 10/4/96, RCPS Exhibit 2460/3; NSW Police Legal Services, Submission to RCPS, 25/3/96, RCPS Exhibit 2460/6; G. Wells, Submission to RCPS, 3/5/96, RCPS Exhibit 2460/10; B. Miles, Submission to RCPS, 13/8/96, RCPS Exhibit 2809/108.

³⁸⁵ ODPP, Submission to RCPS, Summary Prosecutions, 26/10/95, RCPS Exhibit 1369/1; ODPP, Pilot Scheme Takeover by the Director of Public Prosecutions of the role of Police Prosecutors at the Central Local Court, 27/2/96, RCPS Exhibit 1369/2.

- the greater preparedness of ODPP staff to report matters of concern in relation to misconduct of police, seen in the course of their work.³⁸⁶

3.317 The conduct of prosecutions has, to one degree or another, been transferred from the police to an independent prosecution authority in many other jurisdictions including Victoria, South Australia, England and Wales. In Queensland, there have also been pilot projects to test the consequences of replacing police prosecutors with officers of the DPP in committal proceedings.³⁸⁷ The issue is an important one because of the need to maintain complete integrity in the criminal justice system, the faith in which has been squarely challenged by the widespread evidence of process corruption gathered in this Inquiry.

3.318 This Commission is in favour of this function being transferred to the Director of Public Prosecutions. Every effort, however, needs to be made to avoid the difficulties experienced in England to which Commissioner Ryan referred and which related to:

- the speed with which the Crown Prosecution Service (the CPS) was set up;
- an initial lack of suitable personnel and resources for the CPS; and
- friction between the police and the CPS, in relation to the preparation of briefs, the discontinuance of prosecutions, and lack of support for police.³⁸⁸

3.319 This is a matter that has been addressed by the Director of Public Prosecutions who has noted that the transfer in function would not occur overnight. A staged takeover is envisaged, starting with larger centres.³⁸⁹

3.320 It is to be noted that the change proposed is less dramatic than that experienced in the United Kingdom at the time of the establishment of the CPS. The Director of Public Prosecutions in NSW already has the carriage of all indictable matters, including those before local courts, as well as summary matters involving the prosecution of police, and some public figures. The Commission also notes that the recent Inquiry into the Delay in the Criminal Justice System in the United Kingdom examined whether the Crown Prosecution Service should be abolished and sought the opinions of interested parties. The police did not support the abolition of the CPS³⁹⁰ nor did the Narey Report recommend it.³⁹¹

3.321 In order to reduce some of the concerns raised by the police prosecutors, this Commission regards it appropriate that consideration be given to:

- protecting the career prospects of prosecutors by:
 - the provision of retraining for those officers who wish to transfer to general policing, or to management;
 - assigning prosecutors to regions as legal advisers or to crime agencies where they might provide valuable input in a similar way to that in which the solicitors participated in the multi-disciplinary teams used by the Royal Commission;
 - the establishment of special redundancy arrangements, for those officers who prefer to leave the Service; and

³⁸⁶ Although note the Standard Operating Procedure, Exhibit 2464, does require police prosecutors to report matters of judicial criticism regarding the integrity of police, to their region's legal services commander. See Police Prosecutors Standard Operation Procedure, RCPS Exhibit 2464/11.

³⁸⁷ CJC, *Evaluation of the Brisbane Central Committals Project*, CJC, August 1996.

³⁸⁸ See 'Courts fail to Prosecute', *Police News*, vol. 74, no. 3, March 1994, p. 28.

³⁸⁹ Minutes of Police Service Reform Process - Police Prosecutors - meeting of 18/6/96, RCPS Exhibit 2456, p. 6, para. 24.

³⁹⁰ Of eight Chief Constables interviewed for the purposes of the Report, only one favoured the abolition of the CPS.

³⁹¹ UK, Home Office, *Review of Delay in the Criminal Justice System - A Report*, Home Office, London, February 1997, p. 8.

- a progressive transfer of duties and enhancement of the ODPP capacity on a hub and spoke basis for country areas, it not being the preferred option of this Commission to privatise, or contract out the role to law firms. Contracting out, in the view of the Commission, is likely to be more expensive in the long term, less efficient, productive of uneven service, and likely to run into difficulties with conflicts of interest.

RECOMMENDATIONS

The Commission recommends:

- ◆ It is appropriate to retain the Office of the Solicitor for the Police Service to conduct non-contentious matters. Some former police prosecutors may be assigned to regions to provide legal advice. Otherwise, all work of a contentious nature or involving disciplinary proceedings should be referred to the Office of the Crown Solicitor for carriage by that Office (para. 3.295 & 3.299).
- ◆ The responsibility for all prosecutions be progressively transferred to the Office of the Director of Public Prosecutions (para. 3.318).

- ◆ Such transfer to be co-ordinated by the Director of Public Prosecutions.
- ◆ Arrangements be made to preserve the careers of police prosecutors by retraining and redeployment, or by assignment to regions as legal advisers, or by their integration into multi-disciplinary investigative teams, and to provide for redundancy for those who prefer to leave the Service. Where police prosecutors are assigned to regions they should be answerable to the region commander, and not seen as branch officers of the Solicitor for the Service (para. 3.321).

M. PERFORMANCE MANAGEMENT

3.322 The Service has the following schemes in place for managing employee performance:³⁹²

- a Police Service Senior Executive Service (PSSSES) Scheme introduced in 1990 with a revised scheme implemented in 1995;
- a scheme for non-PSSSES staff implemented progressively from 1993 to 1995.

At present there is no performance management scheme in relation to constables. A pilot program was however conducted in the first half of 1996.³⁹³

BASIS FOR PERFORMANCE MANAGEMENT REVIEW

Statutory Provisions

3.323 The performance of executive officers is required by statute to be reviewed, at least annually, either by the Commissioner or by a person nominated by the Commissioner,³⁹⁴ and the same applies to non-executive commissioned officers.³⁹⁵

3.324 There are no statutory provisions relating to performance review for non-executive administrative officers, or for non-commissioned police officers.

Present Industrial Arrangements

3.325 The Enterprise Agreement, entered into between the Service and the Commissioned Police Officers' Association and registered on 10 March 1995, provides for the application of the agreed Performance Management Scheme then in place for officers of the rank of Inspector and above.³⁹⁶ Similarly, the Enterprise Agreement, entered into between the Police Association and the Service in relation to non-commissioned police officers, registered on 2 December 1994, provides for the application of the agreed performance management scheme then in place for officers of the rank of Sergeant and above.³⁹⁷

³⁹² NSW Police, Submission to RCPS, Workforce Agenda Team Report re Employment and Promotion, RCPS Exhibit 5999/20, p. 66.

³⁹³ *ibid.*

³⁹⁴ *Police Service Act 1990*, s. 43. A contract of employment between an executive officer and the Commissioner is to include performance criteria for the purpose of performance reviews. *ibid.*, s. 42(1)(a).

³⁹⁵ *ibid.*, s. 72D.

³⁹⁶ NSW Police Service, *Police Service of NSW Non-Commissioned Police Officers' Enterprise Agreement*, 2/12/94, RCPS Exhibit 2465/2.

³⁹⁷ NSW Police Service, *Police Service of NSW Commissioned Police Officers' Enterprise Agreement*, RCPS Exhibit 2465/5.

3.326 The Enterprise Agreement with the Police Association provides that those who are subject to the scheme and fail to perform at the agreed level, are to be placed on a poor performers' scheme. Where, at the conclusion of a poor performers' scheme, an officer has not satisfied its requirements, incremental progression is to be deferred until the officer can satisfy the scheme.³⁹⁸ The similar provision in the CPOA agreement is not yet in force.

3.327 The Enterprise Agreement with the CPOA does not apply to the Commissioner nor to PSSSES officers; the latter are however bound by contracts which include performance criteria.³⁹⁹ No enterprise agreement exists for civilian employees, although they are subject to general government policy on performance criteria.

Performance Assessment under the Schemes

3.328 The schemes are somewhat imprecise and uncertain in status. Essentially they contemplate that:

- each officer will enter into a performance agreement with his or her line commander;
- the line commander will monitor compliance with that agreement; and that
- remedial programs will be made available to those officers who do not meet the agreed criteria.

3.329 Several obvious problems have arisen in the implementation of these arrangements:

- there tends to be a degree of vagueness or lack of specificity about the agreed performance targets or criteria;
- the assessment is almost totally subjective;
- the remedial programs are poorly defined and do not involve any direction from the Police Academy;
- effectively the agreement and assessment comes to an end upon transfer of either the officer or line commander; and
- the link between the performance management scheme and compliance with the competencies referred to in the enterprise agreements, has effectively been severed, as a result of informal agreement between the Service and the Associations.

3.330 In these circumstances, the level of compliance, and the worth of the performance schemes are presently, at best dubious. That this should be so is a matter of real concern. It should not continue. A scheme which exists only on paper as a public relations exercise, is in fact of less value than no scheme. If necessary, additional resources should be applied and the Human Resources and Development Command empowered to provide and apply a meaningful and workable scheme for performance assessment.

Pilot Scheme for Constables

3.331 This scheme essentially involved a procedure of self-assessment coupled with reports from a supervisor.

³⁹⁸ NSW Police Service, *Police Service of NSW Non-Commissioned Police Officers' Enterprise Agreement*, 2/12/94, RCPS Exhibit 2465/2, clause 18.10, p. 23; NSW Police Service, *Police Service of NSW Commissioned Police Officers' Enterprise Agreement*, 10/3/95, RCPS Exhibit 2465/5, clause 15.10 at p. 19.

³⁹⁹ *Police Service Act 1900*, s. 42(1)(a).

3.332 The report on the Pilot Performance Management Scheme for constables found that the performance management scheme trialled was:

clearly unsuitable for Service-wide implementation given the current structural arrangements and work practices of the Police Service.⁴⁰⁰

It noted that:

- the tangible benefits were 'disappointingly few';⁴⁰¹
- there was an inability to maintain one-on-one contact between constables and supervisors; and
- rostering practices did not support a team approach.

3.333 It was claimed that the low compliance figure:⁴⁰²

confirmed the lessons learned from the implementation of the middle managers Performance Management Scheme.

Most disquieting was the finding that the program:

identified major deficiencies in the ability of supervisors to provide support and feedback to Constables on a regular basis

and that this:

exacerbates the problems associated with non-collaborative management practices.⁴⁰³

3.334 The initiative is not at an end so far as constables are concerned since the Enterprise Agreement requires the parties to continue to negotiate with a view to reaching agreement on a competency-based performance management scheme for constables.⁴⁰⁴ Moreover, by agreement with the Police Association, a remedial program has been in place for constables since July 1996.

OTHER PERFORMANCE MEASURES

3.335 Apart from the Performance Management Scheme, there are two other measures designed to secure performance.

Mandatory Continuing Education

3.336 Mandatory continuing education was provided for in the enterprise agreements.⁴⁰⁵ It came into force for non-commissioned officers in July 1996. It is not yet in force for commissioned officers; and if and when it does come into force, it seems that commanders will have a discretion whether or not they participate.

3.337 It involves mandatory attendance at four lecture sessions per year, each session involving a period of between one and four hours. The sessions are based on educational packages prepared and approved by the Police Academy, and they are delivered locally by Education Development Officers (EDOs). The Commissioner's Executive Team can specify two topics; the remainder are

⁴⁰⁰ NSW Police Service, Evaluation Report on the Constables Pilot Performance Management Scheme, 19/12/96, RCPS Exhibit 2958 at Doc. 2656090.

⁴⁰¹ *ibid.*

⁴⁰² The report found that while 71% of participants participated in the performance interview, less than 50% of participants completed the annual review stage of the scheme process, RCPS Exhibit 2958, 19/12/96, Executive Summary, p. i.

⁴⁰³ *ibid.*, at Doc. 2656091.

⁴⁰⁴ Clause 18.10.

⁴⁰⁵ NSW Police Service, *Police Service of NSW Non-Commissioned Police Officers' Enterprise Agreement*, 2/12/94, RCPS Exhibit 2465/2, clause 18.10, p. 23; NSW Police Service, *Police Service of NSW Commissioned Police Officers' Enterprise Agreement*, 10/3/95, RCPS Exhibit 2465/5, clause 15.10 at p. 19.

selected by the relevant Commander in consultation with the EDO. Failure to attend can lead to deferment of an increment.

Competencies

3.338 In the case of non-commissioned officers, an annual certificate as to compliance with a series of general competencies⁴⁰⁶ is required. Demonstration of the relevant competencies is a precondition for incremental salary progression.

3.339 A certificate is to be issued annually, in respect of each officer, as to his or her compliance with the required generic competencies involving:

- physical fitness;⁴⁰⁷
- officer survival training;⁴⁰⁸
- maintenance of CPR and basic life support training;
- maintenance of driver status;⁴⁰⁹ and
- COPS literacy (assessed by multi-choice computer generated questions).⁴¹⁰

3.340 Questions arise concerning the effectiveness of this form of testing so far as:

- several of the generic competencies are only tested if a problem has already been identified; and
- the testing overall seems not particularly onerous.

CONCLUSION

3.341 As yet no incremental progression has been denied on the basis of non-completion of the performance management scheme⁴¹¹ and concern has been identified as to the participation and completion level in respect of all existing measures designed to assess performance and competency. A performance management compliance scheme was for that reason introduced in November 1996.⁴¹²

3.342 A further matter of concern is that there seems to be no clear co-ordination or common objective in the existing measures. Sensibly, continuing education and competency assessment should be part of a co-ordinated scheme for measuring performance. At the round table discussions, the Service acknowledged that it has been unable to implement a satisfactory system for performance management. Despite the sincere endeavours by some, the overall impression gained is that the schemes introduced have not risen above rhetoric, and have not been taken seriously by the Service or staff.

⁴⁰⁶ *ibid.*

⁴⁰⁷ This is considered only where an incident or situation has occurred or arisen and which the officer's level of fitness contributed, in which circumstance the officer may be referred to the medical branch for fitness assessment and if it is appropriate the development of a remedial program.

⁴⁰⁸ This includes maintenance of defensive tactics and firearms training and requires officers to complete the current annual shoot and survival training.

⁴⁰⁹ This is considered only where an officer's status to drive police vehicles is revoked. NSW Police Service, *Police Service of NSW Non-Commissioned Police Officers' Enterprise Agreement*, 2/12/94, RCPS Exhibit 2465/2, p. 21, cl. 18.6.3.

⁴¹⁰ This competency becomes an issue only if it is found that an officer demonstrates skill deficiencies which seriously affect the performance of the duties associated with their deployment.

⁴¹¹ NSW Police Service, Documentation re Non-Commissioned Officers Enterprise Agreement, 28/1/97, RCPS Exhibit 2958.

⁴¹² NSW Police Service, Performance Management Branch, *Evaluation Report*, 19/12/96, RCPS Exhibit 2958, Doc. 2656087.

3.343 Objective measurement of performance management is of paramount importance for the future of the Service. It is imperative that the difficulties it has experienced in developing and implementing a suitable scheme do not cause it to falter because:

- for their own personal and professional development, police officers need guidance as to their performance;
- the Service requires such knowledge as part of its system for promotions, transfers and selection of staff suitable for fast-tracking; and
- such schemes are the basis for rewarding good performance and remedying bad performance.

3.344 This Commission considers it imperative that the Service redouble its efforts to introduce an effective performance management scheme for all ranks, that it seek external expert assistance, and apply the resources necessary, to overcome any current difficulties, and that such schemes as are implemented are subject to on-going review. In combination with the assessment centre procedures, the schemes should be the basis for identifying officers suitable for promotion and for rewarding demonstrated competency and good performance.

RECOMMENDATIONS

The Commission recommends:

- ◆ The Service redouble its efforts to introduce effective and co-ordinated performance management schemes for all ranks (para. 3.344).
- ◆ For that purpose, it seek external expertise to develop and implement such schemes (para. 3.344).
- ◆ It ensure compliance with such schemes, and defer increments for non-complying officers (para. 3.344).
- ◆ Such schemes be subject to on-going review (para. 3.344).

CHAPTER 4

THE COMPLAINTS AND DISCIPLINE SYSTEM

4.1 The current system for the management of complaints and discipline within the Service was dealt with in some detail in the First Interim Report. Nothing has occurred since that Report which would persuade this Commission to depart from the assessment then made,⁴¹³ that this system is:

- complex, inconsistent and inflexible;⁴¹⁴
- counter-productive because of its adversarial nature and its concentration on punitive, rather than remedial action;⁴¹⁵
- directed towards command and control, rather than management of its members;
- characterised by substantial delay;⁴¹⁶
- prone to leaks, collaboration and ineffective investigations;⁴¹⁷
- affected by bias;⁴¹⁸
- typified by an almost instinctive reaction to defend any charge, no matter how indefensible, and to appeal against any decision made;
- conducive to fear and want of openness in dealings between members and the organisation;⁴¹⁹ and
- productive of anxiety and uncertainty during the long waiting period, sometimes leading to genuine stress-related illness.⁴²⁰

4.2 The purpose of the First Interim Report was to enhance the investigation of corrupt conduct, and for that purpose to introduce a model that allowed for a combination of internal and external investigation.⁴²¹

4.3 It was foreshadowed that further work would be undertaken, to refine the complaints and disciplinary system.⁴²² In the meantime, as an interim measure a system of classification was proposed by way of demarcation of complaints into four categories of seriousness. Under this system:

- matters of internal management, customer service and lesser misconduct, were to remain with the Service for managerial action, conciliation and disciplinary charge respectively; and
- those matters which might involve serious misconduct or corruption, likely to attract a criminal charge or dismissal, were reserved for the PIC⁴²³ or for Internal Affairs (subject to PIC oversight).

⁴¹³ RCPS, *First Interim Report*, February 1996, paras. 3.88 - 3.93.

⁴¹⁴ *ibid*, paras. 1.91 - 1.93, 3.16 - 3.25.

⁴¹⁵ *ibid*, para. 3.26.

⁴¹⁶ *ibid*, paras. 3.27 - 3.31 and timeline chart at p. 73.

⁴¹⁷ *ibid*, paras. 3.46 - 3.49.

⁴¹⁸ *ibid*, paras. 3.40 - 3.45.

⁴¹⁹ *ibid*, paras. 2.75 - 2.78

⁴²⁰ *ibid*, para. 3.31.

⁴²¹ *ibid*, paras. 5.17 - 5.19.

⁴²² *ibid*, para. 5.54.

⁴²³ *ibid*, paras. 5.56 - 5.59.

4.4 The complaints process has been further analysed in the year following the release of the First Interim Report through submissions, round table conferences, and informal discussions with the Service and other key participants. Arising out of this further review, a Second Interim Report was issued⁴²⁴ which underlined the need for the Service to turn to a more remedial management-based system of discipline,⁴²⁵ and for the Commissioner to have a power to dismiss those officers in whom he had lost confidence.⁴²⁶

4.5 The Commission is now in a position to complete the review commenced in the First Interim Report by outlining its proposals for a modified complaints and disciplinary system, and by delivering final recommendations as to the avenues of appeal from disciplinary decisions, and from decisions for dismissal based on the loss of Commissioner's confidence. In reporting on this matter it has taken into account a draft framework prepared by a working party convened by the Minister for Police.

A. NEED FOR A NEW SYSTEM

DEFICIENCIES OF THE CURRENT SYSTEM

4.6 Although the deficiencies in the complaint system were outlined in some length in the First Interim Report, some of the more significant problems are worth recalling.

4.7 A primary concern in relation to the complaints system is that it is not well related to supervision, or to managerial improvement of the performance of staff about whom complaints are made. This arises out of:

- the need for complaints to be processed through a rigid system which has the many ports of call shown in the timeline chart set out in the First Interim Report;⁴²⁷
- the fact that the immediate supervisor of the officer the subject of the complaint loses all knowledge and ownership of the complaint; and
- the circumstance that it is usually productive of an immediate stand-off between the Service and the member concerned, which effectively precludes any chance of problem solving.

4.8 A further concern is that the complaints system is inflexible and formal:

- insofar as this has caused it to be reactive to single instances of misconduct, or to be driven by issues, the result has been:
 - the loss of opportunity to discover more broadly based misconduct, and corrupt connections; and
 - the minimisation of the gravity of some matters through fragmentation;
- insofar as this has required all complaints to be dealt with subject to the same regime, the result has been:
 - to overburden the system, and to use up valuable investigative resources for lesser complaints which could more profitably have been dealt with informally;
 - the loss of opportunity to reach a managerial solution at local level; and
 - delay and consequent hardship for both complainant and officer alike, and loss of productivity, if not of career, as the result of stress in relation to the latter.

⁴²⁴ In November 1996.

⁴²⁵ RCPS, *Second Interim Report*, November 1996, para. 2.2 and see also RCPS, *First Interim Report*, February 1996, para. 5.83.

⁴²⁶ RCPS, *Second Interim Report*, November 1996, paras. 4.1 - 4.9.

⁴²⁷ RCPS, *First Interim Report*, February 1996, p. 73 reproduced in Appendix 26 in Volume III of this Report.

4.9 The disciplinary system through its dependence on the proof of specific charges in a legalistic, adversarial context, and its punitive nature, has also:

- usually guaranteed the spirited defence of any charges that might be brought;
- encouraged the code of silence, and the practice of cover-up noted earlier in this Report;
- discouraged honesty and a willingness to admit mistakes; and
- been productive of delay and enormous disruption to the careers of the officers involved.⁴²⁸

4.10 Within this environment of a formal and legalistic system, in which the emphasis is on attribution of blame and a punitive outcome, it is not surprising that in the past:

- internal investigations have been affected by bias, leaks of information and collaboration, and by an approach that is very much less thorough and convincing than conventional law enforcement;
- internal informants have been harassed and discouraged; and
- investigations have often given the appearance of being conducted with the objective of writing them off as unsustainable as soon as decency permits.

⁴²⁸ Several recent cases in the Police Tribunal took many years for decision, eg. Kaufmann, Walsh and East.

4.11 It is similarly not surprising that:

- the penalties imposed have often not been commensurate with the misconduct involved, and have proven to be remarkably inconsistent, notwithstanding a system for penalty indications which was designed to produce some order, consistency and certainty;
- there has been a reluctance to institute criminal proceedings against police;
- Local Commanders lose interest in the protracted procedures and hesitate to make any inquiry as to progress of an investigation for fear of being accused of leaking information; and
- it has proved extraordinarily difficult to rid the Service of corrupt police and wilful non-performers.

CHANGE TO A MANAGERIAL MODEL

4.12 The Commission is firmly of the view that the Service should endeavour to move from the formal adversarial model to a more managerial or remedial model that places the responsibility on commanders at patrol or equivalent level to deal with complaints and matters of discipline.

4.13 This involves a somewhat radical change and it has the potential to evoke public scepticism. How, it might be asked, can a Service with the shortcomings outlined in this Report, be expected to set its own satisfactory standards and enforce them?

4.14 The answer lies at the heart of the reform process. The best platform for change does not involve the preparation of a new set of rules and regulations and the imposition of a more vigorous regime for their enforcement. Rather it involves the Service setting proper professional standards and then doing whatever it can to encourage its members, in a managerial way, to lift their performance. Unless this is achieved, no system of discipline or complaint management will ever bring about reform. At best it will be a safety net.

4.15 In formulating this approach the Commission has also taken into account that the purpose of a disciplinary system within a professional organisation is:

to protect the public, to maintain proper standards of conduct and to protect the reputation of the organisation. It is not to punish.⁴²⁹

4.16 The deficiencies of the existing system have prompted virtually all of the interested parties, including the representative Police Associations and the Ombudsman, to join the call for a radical departure from it.⁴³⁰ The Australian Law Reform Commission, in its recently released report proposing a system to deal with complaints made against, *inter alia*, officers of the National Crime Authority and the Australian Federal Police, has similarly recommended the adoption of an approach which is managerial rather than disciplinary.⁴³¹

⁴²⁹ *Hardcastle v Commissioner of Police* (1984) 53 ALR 593, 597 (Full Court of Federal Court). Similar observations have been made by the High Court and the NSW Court of Appeal in relation to the discipline of police and members of other professions, (eg. medical practitioners and lawyers). See eg. *Commissioner of Police v Donlan & Hanson*, unreported, NSW Supreme Court, Court of Appeal, 8/8/95; *NSW Bar Association v Evatt* (1968) 117 CLR 177, 184; *Clyne v NSW Bar Association* (1960) 104 CLR 185, 202; *McBride v Walton*, unreported, NSW Supreme Court, Court of Appeal, 15/7/94.

⁴³⁰ UNSW, Police Policy Research Unit, 'Police and the Community: The Necessity for Change', Submission to RCPS, August 1996, RCPS Exhibit 2809/112; L. Fox, Submission to the RCPS 8/8/96, RCPS Exhibit 2809/94; NSW Ombudsman, Submission to the RCPS, 28/11/96, RCPS Exhibit 2809/131; Police Association of NSW, Submission to the RCPS, 26/7/96, RCPS Exhibit 2321/2; Commissioned Police Officers Association of NSW, Submission to the RCPS, 26/7/96, RCPS Exhibit 2321/3; NSW Police Service Action Teams, Submission to the RCPS, 26/7/96, RCPS Exhibit 2321/6; T Collins 'Transformation of the NSW Police Service Complaints and Discipline System', Submission to the RCPS, 5/7/96, RCPS Exhibit 2464/5; D. Dixon, Submission to the RCPS, 25/7/96, RCPS Exhibit 2809/37; P. Macklin, Submission to the RCPS, 1/8/96, RCPS Exhibit 2809/60.

⁴³¹ Australian Law Reform Commission, 'Integrity: But not by Trust Alone', Report No. 82, November 1995, p. 21.

4.17 The strategies required to achieve this change, and the need for a fair and equitable process of review, are developed later in this chapter where the Commission recommends that the change be progressive, or staged, and subject to careful ongoing review to ensure that it can achieve its objectives.

PILOT PROGRAM

4.18 In anticipation of this change being recommended in the Final Report, the Service took steps to set up a pilot program, known as the Employee Management Scheme.

4.19 This project commenced in March 1996 and received enthusiastic support from within and without the Police Service.⁴³² For the purposes of the pilot, Ombudsman Ms Irene Moss extended the class or kind of matters to which she would agree could be dealt with managerially.⁴³³ Without this co-operation it could have proceeded only within a very narrow compass of minor matters.

4.20 Early attempts to implement the pilot failed due to a lack of direction and a continued adherence to old command and control attitudes, facts indicative of the deep-seated inability of the Service to effect change. This occurred notwithstanding the support and the genuine efforts of those involved. The arrival of Chief Superintendent Terry Collins in November 1996 brought new purpose and commitment to the project, but attitudes and expectations entrenched through decades of exposure to a rigid system are not easily dispelled. The project represents a true challenge to the Service and can be regarded as a barometer to indicate the progress of attitudinal change.

4.21 Having regard to the fact that the pilot only began to make headway after November 1996, it is premature to form any conclusion as to its success. Sufficient, however, has been seen to suggest that if properly used it can produce a final outcome that:

- accommodates the needs of the complainant;
- promotes honesty, openness, and improved performance; and
- is much quicker than the old system.

4.22 The pilot program has, however, demonstrated certain obstacles which will need to be overcome before the new system can work effectively:

- amendment of the Police Service Act is needed, to permit the required range of outcomes without the necessity for a disciplinary charge to be admitted or formally established;
- the training of Local Commanders⁴³⁴ will need to be supplemented by significant input from persons outside the Service who have had the experience of exercising managerial skills and discretion of the kind required by the program;
- senior commanders will have to permit delegation of responsibility for the process to the Local Commander;
- Local Commanders will need to overcome their inhibitions in confining the process to minor matters;
- the reluctance in some quarters to involve other members of the command in the process, by way of consultation or explanation, will have to be overcome; and

⁴³² The Service itself, both Associations, the Royal Commission, the PIC, the Ombudsman, the Ministry for Police, and the Police Board all gave enthusiastic support to the project.

⁴³³ *Police Service Act 1990*, s. 139A.

⁴³⁴ This term is used throughout this chapter to refer to patrol commanders or their equivalents.

- the practices inherited from line command investigations of simply referring the matter to a patrol detective for formal investigation and report within defined issues will need to be replaced by a more object-focused approach.⁴³⁵

B. THE NEW SYSTEM EXPLAINED

4.23 The proposals outlined below are formulated in the light of the ongoing restructure of the Service, which apart from the Special Agencies and Headquarters divides its operations into regions and patrols. For the proposal to be implemented it would be necessary for the power to deal with complaints and misconduct, currently vested in the Police Commissioner, to be delegated by him to patrol commanders or their equivalents (for convenience, referred to in this chapter as Local Commanders).

OUTLINE

4.24 If the system proposed is adopted, then:

- sworn and unsworn Service members will be obliged to report all incidents of misconduct or suspicion thereof, and all complaints coming to their notice, in writing or otherwise, to the PIC or to a more senior member of the Service;
- subject to the foregoing, the scheme will initially apply to sworn police only with other members of the Service being subject to the disciplinary procedures of the *Public Sector Management Act 1988*;
- three classes of complaints will be established:
 - category 1, more serious matters involving criminality or misconduct capable of leading to dismissal, requiring investigation by the PIC or the Office of Internal Affairs;
 - category 2, less serious matters reportable to the Ombudsman and suitable for disposition by the Service under the proposed scheme;
 - category 3, lesser matters of internal management, not reportable to the Ombudsman,⁴³⁶ but subject to discretionary or random audit by her;
- the Service, the PIC and Ombudsman will, as under the present system, agree on the class or kind of matters falling within each category and reportable to the Ombudsman and/or the PIC;
- matters within category 1, will be entrusted to the PIC, or the Office of Internal Affairs (subject to PIC oversight, or joint management) for investigation;
- matters within category 2, will be entrusted to the Local Commander for investigation and resolution along managerial lines;
- matters within category 3, will also be dealt with by the Local Commander according to current practice;
- the supervisory role of the Ombudsman will continue in the same way as in the current system;

⁴³⁵ The reports produced, the number of witnesses interviewed, and the manner of interview in these cases during the pilot, all bespoke the undesirable complexity and formality of the old charge-based discipline system.

⁴³⁶ *Police Service Act 1990*, ss. 127, 139A, 139B, 139C.

- the right to remove persons from the Service will be reserved to the Commissioner under the Commissioner's confidence provisions later discussed;
- the existing charge-based disciplinary proceedings and the existing avenues of appeal arising out of these proceedings will cease, that is, once the decision was made to move to full implementation of the scheme; and
- a comprehensive system of recording all complaints received by the Service will be established noting the outcome of any action taken whether criminal, managerial or otherwise.

4.25 The details of these key elements, including an explanation of the respective roles foreseen for the PIC, the Office of Internal Affairs, the Ombudsman and the Local Commanders, are dealt with later in this chapter.

THE MANAGERIAL APPROACH EXPECTED

4.26 Essentially what is envisaged is the empowering of commanders in a way that is commensurate with the responsibility and accountability expected of them. The managerial system proposed involves the following concepts:

- Local Commanders should be responsible for the behaviour of subordinates and, as an adjunct to that responsibility, should have the capacity to deal with their misbehaviour or shortcomings;
- after the next selection process is completed and the initial round of exercise of Commissioner's confidence power has run its course, a presumption should exist that all members of the Service are inherently capable of performing to the standard required, and that individual shortcomings can be addressed by counselling, monitoring, and learning from mistakes;
- mistakes and conduct falling short of the standard should be dealt with openly and fairly, not only from the standpoint of the police officer the subject of the inquiry, but also from the point of view of any person who brought the problem to notice;
- Local Commanders must be aware of day-to-day events, and be prepared personally to establish what has occurred if a problem exists and then act speedily and fairly to resolve it. They must also be aware of the strengths and weaknesses of all those under their supervision and be prepared to act as coach and mentor or to secure welfare assistance if appropriate;
- Local Commanders (and all other senior police) should reinforce the fundamental precept that the Service will not tolerate corrupt and criminal behaviour on the part of its members;
- a presumption should exist that having expended considerable resources in recruiting and training each member, the first recourse will be to remedial rather than punitive action, but that in return those whose behaviour has grossly offended against proper standards of integrity and honesty should not expect anything other than an early exit from the Service; and
- the success with which Local Commanders perform this supervisory and managerial role should be a critical factor in the assessment of their capability to retain command, or to advance to more senior positions within the Service. In this regard, the discovery and reporting of corrupt conduct should be seen as a positive factor, rather than as a potential black mark, unless they have been neglectful in allowing it to continue or expand, when with the exercise of reasonable diligence they should have intervened earlier.

4.27 The responsibility of Local Commanders for their staff should not be limited to a response to complaints. A good manager must be alert to all circumstances affecting their area of command that pose risks or potential matters for concern. They must be prepared to intervene and exercise the broad range of options available.

4.28 This is an important consideration since the complaints system must fit in with the overall managerial approach of the Service. It is not confined to misconduct alone. If in the course of management, good performance is identified, then it should receive suitable recognition and acknowledgment. Good employee management is as much about the recognition of good performance as it is about the censure of bad performance. Indeed, the former is a more positive value in the pursuit of integrity and professionalism.

4.29 While the expectation is that resort to behavioural management strategies rather than punishment will be sufficient in most cases, there will be occasions of serious misconduct where, although falling short of justifying dismissal or criminal prosecution, some form of personal detriment

will be required to act as a deterrent, and to meet the reasonable expectations of a complainant. It is for this reason that the managerial process needs to include a disciplinary component, although resort to the latter should occur only when the Local Commander is satisfied that simple remedial intervention is insufficient.

THE SCOPE OF MANAGERIAL ACTION

4.30 Under the present legislation, the action capable of being taken (without the establishment of a departmental or criminal charge) is limited.⁴³⁷ Although it includes counselling and reprimand, the significance and effect of these options does vary from person to person. Sometimes it involves little more than a formality, depending on the seriousness with which a commander sees his or her role, and the extent to which the officer concerned accepts the counselling or reprimand. The Commission views these options as too limited and as falling far short of that required for an effective complaints handling system.

4.31 The ability to take managerial action should, in its view, be as broad as the initiative of a fair and capable commander. The challenge should be to make the action fit the particular circumstances, including:

- the seriousness of the current incident;
- past responses by the officer to management action;
- the degree of behaviour modification sought;
- the need to satisfy the complainant that the matter has been redressed; and
- the need to demonstrate to the public, and members of the Service, that the conduct is unacceptable.

4.32 The options available, in the case of recognised good performance, should include:

- a letter of appreciation;
- recommending the officer for a certificate of commendation or like recognition;
- recommending an accelerated incremental payment;
- recommending fast-tracking of the officer for promotion, subject to the assessment centre process; and
- entrusting the officer with greater responsibility, as a team leader or otherwise, in a way that demonstrates to the rest of the patrol or Agency that integrity and good performance are appreciated.

4.33 The options available in the case of bad performance should fall into two categories, one of which is reviewable and the other which is not.

Non-Reviewable

- informal discussion with the officer to elicit the cause of the behaviour attracting concern, and the ways in which improvement can be achieved, including:
 - retraining;
 - counselling;

⁴³⁷ *Police Service Act 1990*, s.179.

- personal development;
 - supervision;
 - transfer from a particular area of work;
 - assignment to work with a mentor;
 - change of shift;
 - referral to welfare, for example, in cases involving difficulties in personal relationships or substance abuse;
 - presentation of a report;
- conciliation or other form of problem solving, involving the complainant;
 - caution;
 - reprimand;
 - restriction of duties; and
 - transfer to uniform.

Reviewable

- fine;⁴³⁸
- deferral of an increment;
- loss of seniority;
- reduction in salary;
- annulment of an appointment;
- demotion or reduction in rank or position; and
- dismissal for want of Commissioner's confidence.⁴³⁹

4.34 It is anticipated that in cases of serious misconduct involving a criminal offence, the Service would prosecute the officer concerned and/or invoke the dismissal procedure. In those cases, however, where for technical reasons the evidence or information available would not be admissible in a prosecution,⁴⁴⁰ a managerial disciplinary outcome falling within the reviewable category might be necessary. Otherwise, the Local Commander would not be expected to use any of the reviewable options unless satisfied that there was no option within the non-reviewable category appropriate for the circumstances of the particular case.

4.35 Suspension and transfer would not, in the model proposed, be regarded as disciplinary options. Rather, they would be regarded as a procedural adjunct permitting:

- removal of an officer from all duty (suspension), or from existing duties (transfer), pending resolution of the complaint and disciplinary process; and as

⁴³⁸ Fines should be reviewable only if they exceed five penalty units. A limit of 50 penalty units should be imposed.

⁴³⁹ See paras. 4.89 - 4.95.

⁴⁴⁰ eg. where it was obtained under compulsion.

- a management trial in the case of transfer, where in the interests of the Service, or member, physical relocation or change in the area of work is necessary.

As such neither would be the subject of review.

4.36 Effective Local Commanders would be expected to involve senior members of their command in this process. Moreover, they should:

- explain to their command the actions taken, and the reasons for it;
- encourage honesty by not resorting to immediate criticism or discipline in cases where mistakes are made and admitted;
- support officers who report misconduct; and
- ensure that the latter are introduced to those running the Internal Witness Support Program.

4.37 Local Commanders should record carefully the action taken and the reasons for it, and to be accountable if upon any subsequent review, their management of the problem is found to be wanting, for example, because it was unduly harsh, unduly lenient, or otherwise obviously inappropriate. These records should be reviewed by the Human Resources Command to develop trends and benchmarks, and to detect deviations from the norm, with the objective of ensuring consistency across the organisation.

4.38 It follows that it will be inappropriate, as well as dangerous for their careers, if Local Commanders continue the practices seen in the past whereby:

- blind faith was placed in all members of their staff;
- personal friendship and group solidarity were placed ahead of the interests of the Service;
- problems were concealed and an invocation of the code of silence encouraged to avoid embarrassment; and
- difficulties with individual staff were solved by encouraging or forcing their transfer elsewhere.

THE EXERCISE OF THE MANAGERIAL PROCESS

The Process Required

4.39 The managerial process is a method of dealing with misconduct and inept performance falling short of criminal conduct or conduct that warrants dismissal. As such, it should not involve the formulation of a specific charge or invocation of a formal disciplinary proceeding, dependent on technical rules of evidence and procedure.

4.40 Rather, the exercise is more akin to the notion of reasonable satisfaction founded on fairness, based upon the result of the inquiries undertaken and on the record of the officer's past performance.

4.41 Most certainly, fairness is required in all the circumstances. It is expected that a statement of the matter causing concern, expressed in clear narrative form although not in the nature of a specific charge or charges, would be supplied to the officer who would be allowed in due course to see the relevant material, and given an opportunity to provide any response or additional material which he or she wishes to place before the Local Commander.

Commissioner's Instructions and Code of Conduct

4.42 In their present voluminous form⁴⁴¹ and regulatory obligation of obedience on pain of penalty,⁴⁴² the Commissioner's Instructions bespeak command and control. So detailed is their format and so broad their coverage that the exercise of initiative or even common sense is often stifled. Commissioner Ryan has said of them:

Commissioner's Instructions were there really, or should be there as guidance to people on how the job ought to be done, not seen as an administrative form of discipline⁴⁴³...

Moreover, some are obsolete, inconsistent or difficult to understand.

4.43 The Commissioner's Instructions and the Code of Conduct and Ethics can properly be taken into account in determining whether conduct in question falls short of professional standards, but not in a way which reverts to formal and specific charges.

4.44 This Commission recommends (whether or not the present proposal is taken up) that the instructions and any relevant regulations defining conduct of police be re-examined and redrafted so that they constitute consistent and practical guidelines for exercising professional and common sense judgments. In the process they should be condensed to a manageable length and brought up to date. Rather than an instrument of discipline they should be turned into a helpful guide for police, subject of course to the proviso that in some circumstances they will call for strict adherence.⁴⁴⁴

Neglect of Duty

4.45 The tension between a disciplinary charge-based system and one that relies on behavioural management considerations is highlighted by decisions of the Police Tribunal of New South Wales concerning the disciplinary offence of neglect of duty.

4.46 In essence, there have been two lines of authority, a circumstance which, of itself, undesirably tends towards uncertainty as to when the boundaries of proper conduct are transgressed. In *Commissioner of Police v Wilkinson* (November 1985), Badgery-Parker DCJ (as he then was), sitting as the Police Tribunal and addressing the legal test as to breach of duty, said:

...the correct approach is not to enquire whether a failure to perform a duty is excusable in the circumstance and therefore not "neglect of duty" (which I might label the "neglect approach") but rather to enquire whether or not the circumstances were such that it was the duty of the person to do the act in question (the "duty approach"). If the circumstances, including his knowledge, made it his duty to act, then the omission to act would be a neglect of duty. If, because an officer was distracted or under stress, he forgot to act as his duty required, he would nonetheless be guilty of a neglect of duty, but the other circumstances would go in mitigation.⁴⁴⁵

4.47 On the other hand, the more commonly followed line of authority favours the 'neglect of duty' test. This approach is reflected in the decision of Torrington DCJ, sitting as the Police Tribunal in *Commissioner of Police v Matthews and Cooper*.⁴⁴⁶ There His Honour said of neglect of duty:

There must be an element of culpability or wrongfulness. It is distinct from civil negligence. Neglect of duty must have that additional element as some of us are born luckless, clumsy, thoughtless, inceptive (sic), irresponsible, with a bad memory and slow reaction time. Even those of us who have the best will in the world sometimes in our lives make careless mistakes.

⁴⁴¹ There are more than 1800 pages of Commissioner's Instructions, numbered 1-155.

⁴⁴² Police Service Regulation 1990, cl. 9(4).

⁴⁴³ P. J. Ryan, RCT, 19/11/96, p. 34555.

⁴⁴⁴ There is no room for flexibility in adherence to matters such as the Informant Management Plan or secondary employment, but by appropriate wording this can be made clear in the instructions.

⁴⁴⁵ See also *Commissioner of Police v Lauer & Cole*, unreported, Police Tribunal of NSW, 18 December 1990; *Commissioner of Police v Wilkinson*, unreported, Police Tribunal of NSW, Badgery-Parker DCJ, 11/86; *Commissioner of Police v Matthews and Cooper*, unreported, Police Tribunal of NSW, Torrington DCJ, 5/6/85.

⁴⁴⁶ Police Tribunal (5 June 1985). See also *Commissioner of Police v Moss* (27 August 1986); *Commissioner of Police v Hayes* (10 February 1987); *Commissioner of Police v Gamlin* (5 October 1983); *Commissioner of Police v Bate & Sawyer* (29 May 1985); *Commissioner of Police v Happlewhite* (14 November 1988), where the same approach was taken.

4.48 Under the existing legislative scheme, no adverse action can be taken against a police officer unless there is an admitted or established disciplinary charge. The application of a 'neglect of duty' test requiring an element of culpability and wrongfulness which takes the matter beyond an omission to carry out some aspect of duty which a reasonably competent officer would do, or the doing of something which a reasonably competent officer would not do, means that many officers whose behaviour falls short of a professional standard, escape reproach.

4.49 This Commission recommends abandonment of the present test of neglect of duty, whether or not the present proposal is taken up. The Service should be able to deal, on a managerial basis, with officers whose performance is inept, careless or not up to proper standard, without the need for 'proof' of culpability or wrongfulness.

Safeguards

4.50 Under the present system, the tactic of bringing a counter complaint against an internal investigator, or against an officer who made the initial complaint, is well entrenched. This has commonly had the effect of delaying the initial investigation and catapulting the investigator, or original complainant, into a long and arduous investigation themselves.

4.51 Common sense should prevail, again whether or not the present proposal is taken up. If, for example, the retaliatory complaint gives reasonable grounds for suspecting the motives of its maker, or is anonymous, it may well be appropriate for it to be dismissed without further inquiry or fast-tracked and in due course, depending on the original investigation, made the subject of a criminal charge against its maker if identified.⁴⁴⁷

4.52 Ownership of the process by the team which constitutes the relevant command is also important. In this regard the Local Commander could usefully consult with a small committee, nominated by the command, in the exercise of the managerial power. The membership of this committee should be changed regularly to:

- avoid any perception of a clique forming;
- enable as many members as possible to play a role in the process and to gain a better insight into its workings;
- emphasise the communality of the problem; and to
- enhance career development.

4.53 The system proposed would continue to depend upon the obligation of a police officer to answer questions put by the Local Commander or delegate which should be clearly enshrined in the Act.⁴⁴⁸ The current procedure involving a directive memorandum to respond to written questions should be sparingly used because of its potential to allow collaboration and fabrication. Generally it will be preferable for the Local Commander to conduct the interview and to ask searching questions designed to elicit the truth. Because the managerial system is quite separate from civil and criminal proceedings, the obligation to answer should be counter-balanced by a prohibition against the use of any answer, or derivative use of any answer, in civil (non-disciplinary) or criminal proceedings.⁴⁴⁹ The same should apply to anything said in the course of any interview conducted as a part of the managerial process, or in any conciliation, or in the course of a welfare interview or counselling.

⁴⁴⁷ See Volume II, Chapter 6 of this Report.

⁴⁴⁸ The foundation for a directive memorandum is the requirement to promptly obey all lawful instructions from those in authority. See Police Service Regulation 1990, cl. 9 (1) and Commissioner's Instruction 37.17. The *Police Service Act 1990* should make it quite clear that this requirement applies notwithstanding any tendency of the answer to incriminate, subject to the restriction mentioned later in the paragraph.

⁴⁴⁹ A similar provision exists under s. 137 of *Police Service Act 1990* for statements made in the course of a conciliation process.

4.54 It is only fair that the officer the subject of any inquiries know precisely the basis of any questioning. If it is taking place for the purpose of a criminal investigation, a standard caution would need to be delivered. Thereafter, the interview should continue free of the protection mentioned in the preceding paragraph. Where the questioning is for the purpose of a managerial inquiry, the officer should be reminded that any failure to answer, or to answer truthfully, could be reported to the Police Commissioner for consideration in relation to the dismissal power. Indeed, it should be regarded as an important consideration for the exercise of that power.⁴⁵⁰

4.55 As has sometimes occurred in the past, it is possible, with appropriate explanation, to move from criminal investigation into managerial inquiry or vice versa.⁴⁵¹ Current Commissioner's Instruction 37.12 should be modified to clearly reflect the desirability of proceeding with a managerial inquiry, even if there is a refusal to answer in the criminal investigation and even if the commander assesses that there is a probability that a criminal charge will later proceed.

Recording

4.56 The recording of information concerning the management of complaints and the retention of those records is of importance because:

- it is appropriate for proper staff management and promotion and transfer decisions, that as much information in relation to the performance of individual members (both that which is commended and that which is subject to adverse action) is retained by the Service as is possible, commensurate with fairness and its accuracy;
- such a record helps encourage consistency in decision-making;
- an overall recording system is needed so that trends and potential problem areas can be recognised, statistics compiled, and the system monitored; and
- in the case of a subsequent complaint, it is necessary for information to be available as to any prior managerial action.

4.57 Such a system would provide for:

- the holding of the information in a confidential file containing full personal details, including matters dealt with managerially, commendations, integrity declarations, and (subject to separate security) financial statements;⁴⁵²
- restriction of access other than as reasonably required by the PIC, Internal Affairs or Local Commander, for their purposes, or otherwise as might reasonably be required in connection with a promotion application, but subject to the Commissioner's authority for release of any financial statements;
- retention of the full file, without culling, although it would be expected that suitable discretion and common sense applied to ignore stale matters followed by a period of satisfactory service; and
- production to the member for inspection on request, except to the extent that it involves details of a current investigation or complaint not yet disclosed to that member. He or she should have the right to have noted on the file matters which are disputed.

⁴⁵⁰ See *Hartmann v Commissioner of Police*, unreported, NSW Supreme Court, Court of Appeal 14/3/97. Judgment of Cole JA with whom Handley and Powell JJA agreed, at pp. 17-18 of the print of the judgment.

⁴⁵¹ The Ombudsman has commented on the limitations of the directive memorandum, eg. NSW Ombudsman, *Annual Report Year Ended 30th June, 1985*, p. 136.

⁴⁵² See Volume II, Chapter 7 of this Report.

4.58 A difficult question arises as to whether, and to what extent, matters dealt with by the Welfare Section should find their way onto this file. The Commission considers it appropriate for the Welfare file to be kept separate and not made available, save in exceptional circumstances involving the suspicion of serious corruption or criminality, and then only upon the direction of the Police Commissioner.

INFORMING AND INVOLVING THE COMPLAINANT

4.59 Public confidence in the Service and in the integrity of its complaints system requires the process to be transparent. It must, as a consequence, include ways of:

- informing complainants of the progress of investigations and of any managerial or disciplinary outcome; and
- involving them in the resolution of appropriate complaints.

Involving Complainants in Complaint Resolution

Conciliation

4.60 As stated in the Commission's First Interim Report, conciliation should continue to be used by the Service and by the Ombudsman as a means of quickly resolving minor complaints.⁴⁵³ However, the process of conciliation is in need of improvement so far as concern persists that:

- this process has become formalised and rule-bound;
- it is no more than a form of damage control in which a formal apology is given by the Service, even though the officer involved has made no concession at all;
- it achieves little in the way of assisting police to modify their behaviour; and
- pressure is sometimes brought to bear upon the complainant to withdraw the complaint.⁴⁵⁴

4.61 In a recent review of police conciliation, the Ombudsman has recommended the following reforms:

- enhanced training of officers involved in conciliation (including establishing a small group of officers who are trained in more advanced dispute resolution techniques); and
- providing conciliators with the power to negotiate effectively (that is, increasing the options as to what conciliators can 'put on the table' during negotiations).⁴⁵⁵

The Commission endorses these recommendations, whether or not the present proposal is taken up, with the proviso that it should be the patrol commander or immediate delegate that conducts the conciliation as a way of ensuring that a proper managerial outcome eventuates. There should be no transference of this responsibility. The statutory requirement⁴⁵⁶ that conciliation be attempted in certain categories of complaint should be abolished in favour of permitting the Local Commander to initiate conciliation only in those matters where it is considered appropriate.

4.62 Further, where a conciliation process is adopted by a Local Commander, he or she should be astute enough to discover just what occurred by personally speaking to the complainant, the officer the subject of the complaint, other patrol members and witnesses. The matter should not be left in a situation where the participants 'agree to disagree' or where any compromise reached leaves the

⁴⁵³ RCPS, *First Interim Report*, February 1996, p. 102.

⁴⁵⁴ NSW Ombudsman, *Annual Report, Year Ended 30th June 1986*, Sydney, 1986, p. 190.

⁴⁵⁵ NSW Ombudsman, 'Police Conciliation - Update', A special report to Parliament under section 31 of the Ombudsman Act, May 1996, pp. 13-15.

⁴⁵⁶ *Police Service Act 1990*, s. 132.

underlying performance of the officer unredressed. Even though the complainant is left satisfied, for example, upon receipt of a personal apology from a member of the Service, it may still be necessary for other remedial action to be taken in relation to the officer to ensure that there is no repetition of the conduct which caused the problem.

Other Forms of Alternative Dispute Resolution

4.63 Several submissions have suggested other forms of alternative dispute resolution. For example, the Western Aboriginal Legal Service has suggested the implementation of a 'conferencing' model.⁴⁵⁷

4.64 This Commission shares the concerns of the AFP⁴⁵⁸ and the National Alternative Dispute Resolution Advisory Council⁴⁵⁹ expressed to the ALRC regarding the appropriateness of conferencing to police complaints, and notes that there have been a number of critiques of this kind of scheme as applied to juvenile offenders.⁴⁶⁰ This Commission does not support the general introduction of conferencing in relation to police complaints, but recommends the improvements to the current system of conciliation previously noted. There may be special cases where a Local Commander may feel that in all the circumstances conferencing might be valid. In such situations the initiative should not be stifled.

Reporting Investigations and Outcomes

4.65 Previous studies have found that complainants frequently do not seek legalistic responses or solutions when making a complaint,⁴⁶¹ but they do need to know as much as possible about the way particular decisions are reached and what they imply:

Something as simple as the provision of information about the rationale behind a particular police practice, or concerning the progress being made in a complaint investigation, are simple means whereby police and complaint investigators can provide accountability to persons who have brought a complaint.

4.66 In its submission to the Commission, the Western Aboriginal Legal Service also expressed concern about the lack of information which complainants receive in relation to the outcomes of complaints.

Unless there has been a specific complaint by a client through the Ombudsman, the effects on police officers who act in grave detriment to our clients' welfare is never reported back. Even in instances where there are reports we are informed that the officer will be paraded or that the matter will be conciliated, the effect on the officers of this activity is never reported back. It is necessary for the little used system of punishment to be more transparent. Most of the solicitors and clients of this Service are uncertain as to what is meant by paraded and are uncertain about the effect of such action on the officer concerned.⁴⁶²

4.67 Under the current legislation, the Service has an obligation to report to the Ombudsman, and the Ombudsman has the discretion to report to a complainant on the progress, and an obligation to report on the result of an investigation. The PIC has the discretion to report to the Parliament concerning an investigation and an obligation to report on a public hearing.⁴⁶⁴ In this Commission's view, the standard of any such report is very important in terms of ensuring complainant satisfaction since a failure to properly inform the complainant can only engender suspicion and mistrust.

⁴⁵⁷ Western Aboriginal Legal Service, Submission to RCPS for Final Report, RCPS Exhibit 2811C/2, p. 5. Conferencing is a form of alternative dispute resolution which has been used mainly as a diversionary measure in the juvenile justice system in New Zealand and, more recently, Australia. Under the model, offenders who are willing to admit the offence are offered the option of attending a conference rather than court. At a conference a mediator (who is in some places a police officer) chairs a meeting between a young offender and his/her supporters (family and friends) and the victim/s of the crime, who together work out a solution to the young person's offending behaviour. The aim of conferencing is to have the offender understand the consequences of their behaviour and to take responsibility for their actions (ALRC, *Integrity: But not by Trust Alone. AFP & NCA complaints and disciplinary systems*, Report no. 82, Commonwealth of Australia, 1996, p. 302).

⁴⁵⁸ ALRC, *Integrity: But not by Trust Alone. AFP & NCA complaints and disciplinary systems*, Report no. 82, Commonwealth of Australia, 1996, p. 302.

⁴⁵⁹ *ibid*, pp. 302-03.

⁴⁶⁰ See for example, C. Alder & J. Wundersitz (eds), *Family Conferencing and Juvenile Justice: The Way Forward of Misplaced Optimism?*, Australian Institute of Criminology, Canberra, 1994.

⁴⁶¹ A. J. Goldsmith, 'What's wrong with complaint investigations? Dealing with difference differently in complaints against the police', *Criminal Justice Ethics*, vol. 15, no. 1, 1996, p. 49.

⁴⁶² *ibid*.

⁴⁶³ Western Aboriginal Legal Service, Submission to RCPS for Final Report, RCPS Exhibit 2811'C/2, p. 5.

⁴⁶⁴ See ss. 155, 156, 160, Division 6, *Police Legislation Amendment Act 1966* by s. 17(8) of this Act a Category 1 Complaint to the extent that it is taken over by the PIC cannot be dealt with as a complaint under Part 8A of the Police Service Act so that the statutory reporting obligations of the Ombudsman do not apply.

Research and Reporting on Complaints and Disciplinary Outcomes

4.68 Public reports on complaints and disciplinary outcomes are an important means of ensuring accountability. The Service needs to provide greater attention to the provision and use of information gained in this way about police work. An analysis of complaints and disciplinary outcomes can:

- provide feedback about how police services are operating and the state of police-community relations;⁴⁶⁵
- assist in informing the Service on corruption prevention initiatives and education and training; and
- help ensure consistency of decision making.

4.69 In terms of evaluating the effectiveness of the new complaints and disciplinary system, if adopted, the Service or the Ombudsman should conduct research on the level of public satisfaction with the system.⁴⁶⁶ Such research should be repeated at regular intervals, for example, every two years.

IMPLEMENTATION OF THE SCHEME

4.70 Understandably there will be teething problems in any transition to the model proposed. There is a risk that the old ways of command and control will be perpetuated by the new managers, and that they will be reluctant to move away from a charge-based system. There is also a risk that individual police whose conduct is called into question will turn to the time-honoured response of denying all, and calling on their colleagues or the relevant Police Association for grim resistance.

4.71 To achieve proper implementation resources should be allocated and an infrastructure set up which would ensure that:

- a comprehensive education and training program for Local Commanders, involving experts from outside the Service, is introduced;
- the changes are clearly explained to all members of the Service;
- remedial training and mentoring centres are established; and that
- procedures are established to allow for the monitoring and review of the way Local Commanders discharge their new responsibilities, and if necessary, for their guidance.

4.72 As previously noted, the Commission recommends that the change be effected progressively. It involves a departure from tradition and entrenched practices that is too substantial for immediate introduction. It should await completion of further trialling with the Pilot, and careful preparation by the Service to ensure that Local Commanders and all other staff understand what is expected. The phased introduction which is envisaged could include the following:

- continuation of the Pilot for at least six months, and careful review of its progress and of any problems that arise;
- training during that period of Local Commanders in the strategies expected, and their exposure by way of example to the Pilot;
- amendment of the legislation:

⁴⁶⁵ A. J. Goldsmith, 1996, op cit, p. 51.

⁴⁶⁶ cf. T. Landau, *Public Complaints Against the Police: A View from Complainants*, Centre of Criminology, University of Toronto, 1994.

- to broaden the scope of outcomes that could immediately be imposed, without the need for establishing a criminal or departmental charge; and
- to introduce a Part into the Act, the commencement of which would await proclamation, providing for the matters outlined;
- encouragement of individual commanders, outside the Pilot Program, in conjunction with the Office of Internal Affairs and the Ombudsman, to apply the managerial approach to a progressively expanded set of circumstances, and to resort with less frequency to formal disciplinary charges; and
- overview of the process by the PIC and the Ombudsman, and report to the Minister, leading to an eventual proclamation of the new part of the Act when it is adjudged that the Service is sufficiently understanding and accepting of the system proposed for it to replace the current system.

4.73 If, in the unhappy event of the Service being unable to demonstrate an ability to make the fundamental change required, then benefits will still arise. The groundwork will have been laid within the existing system for greater resort to a managerial approach with less need for formal departmental charges. A shift in this direction could be considerably advanced by vigorous encouragement on the part of the Ombudsman, and by true support from the Police Associations. The latter is not likely to be forthcoming if the Associations are unable to place the collective interests of their members ahead of the interests of individual members whose conduct is called into question.

THE ROLE OF THE OTHER AGENCIES INVOLVED

4.74 The proposed scheme, if and when it is implemented, will have an effect on the role of other agencies presently involved in the complaints and discipline system. These agencies include the Office of Internal Affairs, the PIC and the Ombudsman.

Office of Internal Affairs

4.75 The devolution of responsibility to Local Commanders for management of the behaviour of those under their charge would alter the role of the Office of Internal Affairs of the Service. Whereas previously its obligation was to investigate every aspect of a complaint, subdivided into every possible issue identified, or later found to be arising, the responsibility for its management would now fall to the relevant Local Commander to resolve, in accordance with inquiries he or she makes, and an exercise of common sense and fair and sound management. Gone should be:

- the procedures that led to the person the subject of a complaint, and every conceivable witness, being formally interviewed, however minor the matter or insignificant the evidence might be;
- the voluminous files created by investigators;
- a lack of decision-making at lower levels of the hierarchy, manifested by the passing of files up the chain of command with recommendations and observations added at each resting point;
- long delays prior to the eventual formal resolution of matters as 'sustained' or 'not sustained', through a procedure more akin to that of a fact-finding tribunal dependent upon an assessment whether the complainant was to be believed in preference to the officer; and
- the regular preferment of departmental charges leading in most cases to proceedings in the Police Tribunal, GREAT, or both.

4.76 Under the regime proposed, the role of the Office of Internal Affairs in relation to matters left for management at command level would be confined to a support role, including:

- reference to the relevant Local Commander of any complaint received which is suitable for the new managerial approach;
- advice if needed;
- covert assistance if required to investigate whether the matter has more serious ramifications;
- resources and personnel to conduct integrity tests; and
- personnel and expertise to conduct any necessary investigations where it is inappropriate for the Local Commander or senior officers of the patrol to be involved, or to provide assistance with more complex inquiries.

4.77 Such support could be provided either by smaller Regional Internal Affairs Units, or by a central unit. There are advantages either way:

- the retention of reduced regional units could encourage more focused local knowledge; while
- transfer to a central unit would increase the overall intelligence co-ordination and facilitate tracking of suspect officers after they move to other areas.

On balance, the Commission prefers the latter option as Regional Internal Affairs units have not proved particularly productive in the past. However, if this option is taken, it will be necessary to maintain regional liaison officers and intelligence co-ordinators.

4.78 Beyond this support role, the task of the Office of Internal Affairs would be to:

- deal with Category 1 investigations not taken over by the PIC;
- conduct integrity tests and random tests for substance abuse;
- co-ordinate and establish intelligence bases on corruption within the Service;
- plan proactive investigations, in liaison with the PIC; and
- assist with the development of anti-corruption strategies and training for the remainder of the Service.

4.79 Irrespective of the introduction of the scheme proposed, it is vital that the Office of Internal Affairs be staffed by persons of the highest skill and integrity, and it should have priority in the selection of officers transferred to it. An important element in the reform process will be to foster the view that service in this office involves important work, and is a positive step in promotion to any high leadership position.

4.80 The Office of Internal Affairs would also benefit by employing staff seconded from other organisations, including police officers of high calibre from other Services, lawyers from the DPP or elsewhere, and accountants or others experienced in financial analysis, from both the public and private sectors. This staff should work in multi-disciplinary teams.

4.81 Similarly, irrespective of adoption of the scheme program the Office should continue to be resourced, as has occurred since its recent restructure, with:

- sufficient surveillance capacity of its own to carry out proactive investigations and integrity tests;

- sufficiently well-trained staff to carry out broad intelligence-based investigations rather than narrow reactive inquiries;
- proper information systems; and
- the capacity for skilled financial and intelligence analysis.

The PIC

4.82 The PIC currently has inherent power to take over the investigation of any complaint.⁴⁶⁷ Its role, however, is to focus on more serious matters, which are likely to lead to the bringing of criminal charges or to dismissal. Otherwise, its role should be to:

- monitor the progress of the new system of employee management;
- act in conjunction with the Office of Internal Affairs and monitor investigations into the more serious inquiries for which the Office assumes responsibility;
- exercise its coercive powers to assist the Office of Internal Affairs where that is expedient; and
- take over inquiries into police shootings or serious accidents where that is desirable to ensure impartial investigations.

The Ombudsman

4.83 The Ombudsman should play a vital role in the proposed model. Her office represents the interests of the members of the public in seeing that the Service deals properly and effectively with their grievances and in ensuring the maintenance of standards of integrity and fair dealing.

4.84 The Commission is of the view that the existing system for the reporting of complaints and supervision by the Ombudsman should continue. Complaints should be investigated and dealt with managerially rather than by a more formal process.

4.85 It is expected that the Office of the Ombudsman would:

- ensure that Local Commanders' decisions are appropriate;
- conduct random checks on the progress of non-reportable matters;
- report to the complainant on the outcome of any managerial action in reportable matters;
- react to any complaint by a member of the public that the management of any particular matter was ineffective or inappropriate, and carry out its own investigations as necessary;
- maintain close liaison with the PIC; and
- report to Parliament, in the same way that it does at present, in relation to matters concerning the complaint system, human resource issues and matters of service delivery.

CRIMINAL PROCEEDINGS

4.86 As must always be the case, the criminal justice system must run its course, irrespective of any disciplinary or behavioural management system. If a matter involving criminality on the part of a police officer arises, it should be dealt with in the same way as if a member of the public was

⁴⁶⁷ *Police Integrity Commission Act 1996*, ss. 70(3) and 70(4).

involved. Normally, it would be the Office of Internal Affairs or the PIC which would trigger the laying of criminal charges by referral of a brief to the ODPP.

4.87 Whatever happens in relation to criminal proceedings, a managerial decision will still be required in relation to any member who is the subject of them. Because the fact of the exercise of Commissioner's confidence power will not be admissible as evidence of guilt in a criminal trial, there is no reason why that process should await, or depend upon the outcome of the prosecution. The power is exercisable where, after duly informing himself, the Commissioner has lost confidence in the member, and that might be the case irrespective of the fact of acquittal in a criminal trial, which might fail for all kinds of reasons, including a perverse verdict, the unavailability of a key witness, exclusion of critical evidence on technical grounds, and the like. In some cases it might be appropriate to exercise the power of suspension, and to defer the decision for dismissal, but at the end of the day it would not be constrained by a 'not guilty' verdict.

CIVILIAN MEMBERS OF THE SERVICE

4.88 Currently, unsworn members of the Service are subject to Public Service disciplinary rules. The incongruity of a commander having to cope with two different systems if they take managerial action against members of that command, some of whom are sworn and others of whom are not, is obvious. The Service is moving towards homogeneity in this area. Whilst it is not appropriate to recommend that unsworn officers be immediately included in the new system, negotiations should commence to resolve any industrial issues that would otherwise delay implementation of the concept of a unified Service, including the availability of a single discipline and complaints system.

C. COMMISSIONER'S CONFIDENCE

EXERCISE OF POWER

4.89 There is now in force legislation which adopts the recommendations of this Commission, in its Second Interim Report, permitting the Police Commissioner to remove a police officer if he:

does not have confidence in (that officer's) suitability to continue as a police officer, having regard to the officer's competence, integrity, performance or conduct.⁴⁶⁸

4.90 The exercise of this power can be initiated by any one of the following:

- the Commander, Office of Internal Affairs;
- the Executive Director, Human Resources and Development;
- a Local Commander;
- the PIC;
- the NSW Ombudsman;
- the NSW Crime Commission;
- the ICAC; and
- a Royal Commissioner;

when information available gives rise to serious concern as to the competence, integrity or performance of an officer.

⁴⁶⁸ *Police Service Act 1990*, s. 181D (1).

4.91 Pursuant to a protocol⁴⁶⁹ established by the Police Commissioner:

- the initiating officer collates the pertinent material, develops a submission outlining the concern, and refers the papers to the Executive Director, Human Resources & Development, and to the Commander, Office of Internal Affairs;
- the two last mentioned officers jointly consult and advise the Commissioner whether there is sufficient information to proceed;
- if the Commissioner decides that Commissioner's confidence issues are identified, then the individual officer is given a show cause notice, provided with copies of the assembled material, and given 21 days to furnish a written submission along with any additional material the officer wishes the Commissioner to consider;
- if any rebuttal is contained in the submissions, further inquiries may be made before the matter is referred by the Executive Director, Human Resources & Development, to the Commissioner's Advisory Panel, constituted by a Deputy Commissioner and two independent members from a panel agreed to by the Service and the Associations;⁴⁷⁰
- the officer may elect to appear before the Commissioner's Advisory Panel to speak to the submission, and for that purpose may be assisted by a support person of their choice (but not a legal practitioner);
- the Commissioner considers the matter in the light of all the material before the Advisory Panel and their Report;

⁴⁶⁹ See Volume III, Appendix 28 of this Report.

⁴⁷⁰ This panel would be comprised of persons outside the Service experienced in managerial or industrial affairs.

- if to his satisfaction, the Commissioner's confidence issues are established, then removal of the officer is effected, and an advice as to the reasons for such determination is given;⁴⁷¹ and
- if the Commissioner determines that confidence has been lost then the matter is referred for such other action as may be appropriate.

4.92 The protocol including the ability of the Commissioner to appoint panel members should now be incorporated in the statute,⁴⁷² as it is now understood to be acceptable to the Associations. It is also appropriate for the statute to provide that this power and procedure replace all other common law or statutory rights of the Commissioner of Police to dismiss a police officer.

4.93 In the exercise of the managerial discretion involved, it is expected that similar considerations would apply to those identified by Fisher P, in an interlocutory judgment delivered during the course of hearing an application by Malcolm Bigg for relief against his alleged unfair dismissal from the NSW Police Service. Speaking of the discretion of the Commissioner of Police, under s. 181B,⁴⁷³ His Honour said:⁴⁷⁴

This discretion appears to be a managerial discretion to be considered in the same light as any other employer or his delegate might consider the desirability of an employee continuing in his service based upon the information the manager has before him. ... The issue arising out of the statutory provisions ... is not the issue of guilt or innocence of conduct beyond the law but rather, if it exists, between the conduct complained of and suitability for continued employment as a member of the police service.

... The issue in these proceedings relates not to proof of allegations of criminal conduct but to issues of fitness to continue in employment arising within a defined employment relation. The Acting Police Commissioner informs himself as required by Statute. His managerial responsibility is to ensure that only a trustworthy and adequately behaved employee should exercise police powers with respect to citizens of the State.

The argument about hearsay illustrates aspects of the problem. Any manager dealing with a potentially unsuitable employee will almost certainly be at least partly relying on hearsay forming part of his reasons for decision. The role of the employer is to manage, not to conduct a trial.

4.94 The introduction of dismissal for want of Commissioner's confidence reflects the spirit of the procedure already in place in the Australian Federal Police. It is predicated upon the circumstance that the Police Commissioner is obliged to maintain the integrity and reputation of the Service.⁴⁷⁵

4.95 At the end of the day it is the Commissioner who must take responsibility for inappropriate performance of the Service. It follows that it is he who should be able to maintain a team in whom he has confidence. This principle flows down through the ranks. A sergeant should not be required to lead those who are not worthy of the Commissioner's confidence, nor should an officer have to work with a colleague if that colleague is not deserving of the Commissioner's confidence. This Commission, accordingly, remains strongly supportive of the retention of this discretion, and of its exercise in a way that accords with the objective for which it was created.

SEVERANCE WITH DIGNITY

⁴⁷¹ *NSW Police Service Act 1990*, s. 181D(3).

⁴⁷² It is proposed that the panel would serve another function in relation to review of managerial action falling short of removal for loss of Commissioner's confidence.

⁴⁷³ *Police Service Act 1990*, s. 181B now repealed and replaced by s. 181D.

⁴⁷⁴ *Bigg v NSW Police Service*, unreported, Industrial Relations Commission of NSW, Fisher P, 26/11/96. His Honour confirmed this approach in delivering final judgment in the matter on 21/3/97

⁴⁷⁵ In the Minister's Second Reading Speech in Federal Parliament which led to the introduction of this provision, it was said: 'Clearly these are special circumstances. They are circumstances in which immediate action by the Commissioner is needed to maintain the integrity or the public reputation of the Australian Federal Police and where it is not appropriate that an outside tribunal should be able to remake the Commissioner's decision'. Commonwealth Parliament, *Senate Hansard*, 29/5/96, p. 1318.

4.96 Medical or hurt on duty severances have already been discussed.⁴⁷⁶ Compared with other severance benefits they can be very attractive options especially if there is a threat of early termination for other reasons such as disciplinary charges. The high incidence of officers going off sick immediately they become aware of internal investigations, and their subsequent departure with stress-related conditions, provides some indication of the potential for their abuse. In accordance with recommendations in the previous chapter,⁴⁷⁷ they need to be made more consistent with other provisions in the Public Service.

4.97 If the exercise of the Commissioner's confidence provision is unrelated to the criminal process and is managerial in nature, then it follows that the officer removed should be able to leave with dignity, taking such entitlements as have accrued during his or her service.

4.98 Under existing conditions of employment there are adverse consequences for an officer retiring before attaining 55 years of age in circumstances other than a medical discharge, the extent of which varies according to the date of the officer's recruitment and the superannuation scheme to which the officer belongs. No doubt this was crafted as an incentive to encourage people to stay until normal retirement age. With the changing face of employment patterns and modern approaches to management, the wisdom of this policy has been called in question. It does not recognise the circumstances that:

- people in other forms of employment change jobs frequently;
- employees in high-stress jobs are prone to burnout; and
- a tired or disenchanted officer can be a liability to the organisation if for no other reason than that they may block the promotion of more able and productive officers.

4.99 The Workforce 2000 agenda, and the current reform proposals are moving towards career paths which recognise that policing is not necessarily a lifetime career. Incentives are being developed to allow officers to depart the Service with severance benefits and/or portability of superannuation that reflect the time employed and are not drastically reduced because of early departure.

4.100 Against this background there is much to be said for not further penalising those officers who are removed by an exercise of the Commissioner's confidence provision, or who resign because of the likelihood of that procedure being invoked against them. In both cases they should be allowed to depart with the normal benefits available on resignation.

4.101 The reform process would also be facilitated if the targeted early retirement package introduced by s. 8A of *Police Regulation (Superannuation) Act 1906*⁴⁷⁸ could again be funded, or if provision was made for special redundancy severance for those officers whose service was no longer required.

4.102 Initiatives of this kind would effectively provide three options to the Commissioner in a case where an officer was no longer considered worthy of retention by the Service:

- the offering of a special redundancy severance or (in the case of those qualifying by age and length of service) an early retirement package,⁴⁷⁹
- inviting the officer to resign rather than face Commissioner's confidence proceedings,⁴⁸⁰ or

⁴⁷⁶ See Volume II, Chapter 3 of this Report.

⁴⁷⁷ *ibid.*

⁴⁷⁸ See Chapter 3, para. 3.236 et seq for details.

⁴⁷⁹ Under s. 8A of *Police Regulation (Superannuation) Act 1906*.

⁴⁸⁰ Provision should be made in the legislation to prevent such an action amounting to a constructive dismissal. To preserve review rights the officer would have to decline such invitations.

- institution of Commissioner's confidence proceedings.

4.103 Redundancy is not without its complications. There may well be officers caught by existing arrangements who would welcome the opportunity to move on with appropriate payment, but who have served with distinction and are not at risk of losing the Commissioner's confidence. They could justifiably regard the granting of benefits to the non-performing officers as inappropriate and as unfairly discriminating against them.

4.104 The answer is not to allow wholesale, early retirement on favourable terms. Budgetary considerations, and the fact that too many officers of value to the Service might be lost, precludes that approach. Any case which qualifies must be a specifically targeted one. Although there is some inequity inherent in the proposal, it is the view of this Commission that the balance tips in favour of the Commissioner being able to encourage those who are not up to standard to leave the Service if necessary by giving them some financial incentive akin to redundancy or early retirement. It is simply too detrimental to the reform process for the Service to:

- retain in its ranks officers who do not measure up to the standards of a professional service; or to
- provide an incentive for them to contest dismissal for the sole purpose of preserving their retirement benefits.

If they stay on it is unlikely they will be doing any effective work in return for their pay. To the contrary, it is more likely that they will be the cause of dissent, inefficiency and damage to the morale of the Service.

4.105 An associated issue arises as to the question whether a distinction should be made, in the payment of severance benefits, in the case of those who are suspected of benefiting financially from corrupt conduct. It is the view of the Commission that it is not appropriate to address this question in the context of severance payments because:

- a sufficient mechanism for recovery is provided by the proceeds of crime legislation and/or a civil action for recovery of money gained through a breach of public office; and
- moreover, superannuation has become so much an incident of standard employment packages that it should not be singled out as a separate item capable of being clawed back.

D. REVIEW OF MANAGERIAL DECISIONS

THE REVIEW PRINCIPLE

4.106 Any procedure for review of a managerial action needs to take into account the following facts:

- that such action is taken in the course of the effective administration of an organisation, and cannot depend upon, or be confined to matters that are capable of proof by legally admissible evidence;
- that not every such action can be allowed to be the subject of review, lest the organisation become paralysed in its operations; and
- that where review is permitted, it should involve more than a second-guessing of the original decision-maker and permit intervention only where good reason exists.

4.107 If a managerial process is to be adopted in place of the existing complaints and discipline system then there has to be a mutual accommodation:

- on the part of the Police Service, it means an abandonment of the punitive approach, and an acceptance of a new responsibility for retraining and preserving careers of individual officers; and
- on the part of the Associations and its members, it calls for an acceptance that the system should be less formal, and any right of review somewhat less extensive than its predecessor.

4.108 It would be pointless to have an informal system for the managerial resolution of complaints or inappropriate behaviour, only to have it susceptible to review via a legalistic process based on formal charges which, for all practical purposes, reverted to the current adversarial system.

4.109 This Commission endorses the principle that there should be an appropriate review of managerial decisions in matters of consequence. The following sections examine procedures for review which might be adopted in relation to decisions made by Local Commanders and in relation to dismissals based on the Commissioner's confidence provision.

REVIEW OF LOCAL COMMANDER DECISIONS

4.110 If the proposed managerial complaints and discipline system is adopted, then it will be appropriate to divide the relevant decisions into the two categories previously mentioned, dependent on their outcome, namely:

- those having limited consequences, when the Local Commander's decision should be non-reviewable; and
- those involving a more substantial detriment, which should be amenable to review.

4.111 In principle, the Commission and the submissions of the Ministerial Working Party⁴⁸¹ do not differ in recommending a system which creates a distinction between reviewable and non-reviewable decisions. A difference does, however, arise in relation to the nature and structure of the review proposed for the former category.

Ministerial Working Party

4.112 The Working Party proposes a system under which:

- a Local Commander, if satisfied that an officer has engaged in 'unprofessional conduct' which should attract a sanction within the reviewable category, would issue a notice of the action intended;
- if the officer considers the proposed action too harsh, he or she may seek an internal advisory review conducted locally and informally by a review panel, comprised of a neighbouring patrol commander and a peer officer;
- if the Local Commander and Review Panel disagree, the matter would be referred to the Executive Director, Human Resources and Development for decision;
- if the officer does not accept the decision then an appeal would lie to the Industrial Relations Commission (the IRC) which for the purposes of such a review would be comprised of a single member (not necessarily a judicial member) of a Special Police Panel;
- the review by the IRC would be determined 'according to the merit and justice of the case and without strict regard to precedent', with the Service putting its case first. According to the submissions of the Working Party:
 - if the findings of errant behaviour are challenged, the Service would have the burden of satisfying the IRC, on a balance of probabilities, that the officer had engaged in professional misconduct of the nature specified;
 - in reviewing the sanction, the IRC would consider whether the 'decision was harsh, or unreasonable in the circumstances' or whether 'the sanction was too severe';

⁴⁸¹ NSW Police Service, Report of the Ministerial Working Party on Police Disciplinary Procedures, April 1997, RCPS Exhibit 5999/50.

- if the IRC was not satisfied that the applicant had engaged in the alleged unprofessional conduct, it would quash the original finding and make a compensation order for any loss suffered;
- when reviewing the penalty, the IRC would have power to dismiss the appeal, quash or vary the decision, and make any necessary order for compensation.

4.113 The Royal Commission does not consider this procedure to be appropriate or to accord with the inquisitorial nature of a managerial complaint/disciplinary system.

4.114 First, a two-stage internal review is unnecessarily complex and causes delay for little return, particularly since the first stage is recommendatory only.

4.115 Second, the external review involves a mixture of concepts, in the form of:

- a *de facto* departmental prosecution in so far as it requires the Service to satisfy the IRC that the officer had engaged in professional misconduct; and
- an appeal *de novo* so far as the IRC is required to consider whether the decision was harsh or unreasonable, or the sanction 'too severe'.

4.116 Aside from these difficulties, the fundamental objection of this Commission to the external review is that, under the guise of a review, what is put forward is effectively a return to the current discredited system. That system already permits an officer to elect between accepting a departmental charge and penalty proposed by the Service, and requiring proof of the charge in the Police Tribunal, followed by appeal to either or both of the Review Division of the Tribunal or GREAT.

4.117 All that is changed is the identity of the tribunal and the introduction of a test that does not sit happily with the managerial system proposed.

Royal Commission Proposal

4.118 The Royal Commission proposes a system by which:

- the Local Commander would, on becoming aware of a relevant complaint or matter constituting possible professional misconduct, initiate an inquiry into the matter, carried out either locally or with the assistance of the Office of Internal Affairs;
- once the investigation was complete and a file assembled containing all relevant statements, interviews and the like, the Local Commander could, depending on the circumstances:
 - refer the matter to the PIC or Office of Internal Affairs for further inquiry or criminal prosecution;
 - initiate the Commissioner's confidence process;
 - deal with the matter on a simple managerial basis by an action within the non-reviewable category; or
 - notify the officer that he or she proposes to deal with the matter by an action within the reviewable category;
- where the latter course is proposed, a statement of the professional misconduct in question would be supplied to the officer who would then be given a copy of the investigation file and allowed an opportunity to present a submission and such additional material as he or she wished to the Local Commander, and speak to the submission;
- if dissatisfied with the Local Commander's decision, for which reasons should be given, an application for review would lie to the Commissioner's Advisory Panel previously mentioned. It would review the matter on the basis of the file before the Local Commander, after hearing from the officer if he or she so requested, and either approve the decision or substitute its own decision. For the Panel to interfere with the decision it would be necessary for the applicant to satisfy it that the Local Commander's decision was wrong or that the reviewable action was manifestly excessive, or both;
- the proceedings of the Advisory Panel should be informal and reflect those of a domestic administrative tribunal. No legal representation should be permitted, but an officer should be allowed someone other than a lawyer to assist. The tribunal should have the discretion to hear from witnesses if that were considered appropriate in the particular case. Anything said in these proceedings should receive statutory protection against use in any other proceedings, other than internal disciplinary proceedings or proceedings involving the exercise of the Commissioner's confidence provision. This protection should be conferred along with a protection against defamation; and
- for reviewable decisions short of removal for want of Commissioner's confidence there should be a stay of implementation of the decision pending resolution of the appeal.

4.119 No further right of appeal is recommended although if contrary to the view of this Commission, an application for review to the Industrial Relations Commission is permitted, then:

- it should be confined to a review on the material before the Commissioner's Advisory Panel similar to that countenanced by s. 191 of the *Industrial Relations Act 1996*, additional evidence or cross-examination being permitted only by leave granted on the same basis as

appropriate for review of Commissioner's confidence.⁴⁸² Resort to a full re-hearing would only constitute a return to the old disfavoured system.

- it should not be charge based, or become a reincarnation of the current form of prosecution for a departmental charge;
- it should be conducted by a single Judicial Member of the Industrial Relations Commission; and
- a provision similar to s. 128 of the *Evidence Act 1995* should apply.

REVIEW OF COMMISSIONER'S CONFIDENCE PROVISIONS

4.120 Because it entails cessation of employment, it is appropriate that there be a right of review of any decision made under s. 181D of the *Police Service Act* to dismiss a member of the Service.

4.121 In the Second Interim Report, this Commission recommended a form of review that would lie to the Supreme Court pending the possible establishment of a NSW Administrative Appeals Tribunal.⁴⁸³ The form of review recommended, and implemented in response to the Report, envisaged that appeals would be conducted in accordance with general administrative law principles,⁴⁸⁴ rather than involving a re-hearing on the merits. This would have allowed a review in respect of any decision made where there was:

- a failure to observe the procedures prescribed;
- an error of law;
- an absence of evidence or other material to justify the decision;
- a decision induced or affected by fraud;
- an exercise of the power that was improper, for example, because:
 - an irrelevant consideration was taken into account;
 - a relevant consideration was not taken into account;
 - the power was exercised for a purpose other than its true purpose;
 - the power was exercised in bad faith; and
 - the exercise of power was so unreasonable that no reasonable person could have so exercised it.

4.122 This provision met with considerable opposition from the Police Association, which insisted that nothing short of the ordinary unfair dismissal processes under the *Industrial Relations Act 1996* ('the IR Act')⁴⁸⁵ would suffice.

4.123 This matter has been the subject of round table discussions and the Commission has received various submissions on the topic. Reference was made in these submissions to the possibility that a police officer might be 'framed' by colleagues or criminals and that the Police Commissioner might base a decision on allegations which, although untrue, could not be subsequently challenged even if new or fresh evidence was obtained.

⁴⁸² See para. 4.137 supra.

⁴⁸³ RCPS, *Second Interim Report*, November 1996, paras. 5.1 - 5.9.

⁴⁸⁴ See *Police Service Act 1990*, s. 181D(6).

⁴⁸⁵ See especially, NSW Police Association, Submission to RCPS, 30/10/96, RCPS Exhibit 2809/123; K. Madden, Submission to RCPS, 22/11/96, Doc. 2529584-87; and NSW Police Association, Submission to RCPS re Commissioner's confidence provisions, 6/2/97, Doc. 2584419-43.

4.124 This Commission accepts that there may be occasions where, upon the tender of additional evidence, or the cross-examination of a witness, it might emerge that a s. 181D decision was reached upon an incorrect factual basis. The review process should not be such as to deny a remedy in these circumstances.

4.125 Some doubt attaches at common law⁴⁸⁶ as to whether, and in what circumstances, evidence not before an original decision maker can be introduced in the course of a review of the kind permitted under s. 181D(6). It is desirable that any residual uncertainty in this regard be clarified, but not in a way that so impinges on the exercise of the power as to deprive it of utility or frustrate the purpose for which it was granted.

4.126 In this regard, it must be carefully kept in mind that, in introducing a power to remove for want of Commissioner's confidence, the NSW Parliament has given to the Police Commissioner a power stronger than that found in the ordinary employer/employee relationship. The reasons for this have been identified in the Second Interim Report⁴⁸⁷ and reiterated in the Second Reading speeches and Parliamentary Debates concerning the present provision (s. 181D) and its predecessor (s. 181B).⁴⁸⁸

4.127 The clear purpose of the legislation has been to ensure that the Service can promptly and effectively rid itself of those officers whose criminality, corruption, wilful ineptitude or lack of integrity is such that they no longer deserve to remain members of it. In framing the legislation, Parliament properly had regard to:

- the deep-seated corruption and criminality uncovered by this Royal Commission;
- the substantial public interest in having a Police Service which the community can trust;
- the difficulties and delay experienced in the past in securing the dismissal of corrupt and wilfully non-performing police within an adversarial and disciplinary system that depended on criminal conviction or establishment of a serious departmental charge;
- the special powers vested in police which permit them to deprive others of their liberty, to subject them to lawful (even deadly) force, to enter their homes and to intrude into their private affairs, in a way and to an extent possessed by no other category of employee which together necessitate the need for a high level of trust and personal accountability;
- the need for managers, whilst acting fairly, to base decisions on considerations akin to reasonable suspicion rather than the exigencies of legal proof;
- the risk to the Service, and particularly to its honest members, posed by the retention of corrupt police who are likely to become empowered and even more dangerous than before if they are able to resist their removal through technical or legal reasons; and
- the need for the Commissioner of Police to have the authority which would permit him to take decisive control of a Service which has been lacking in morale, discipline and accountability.

4.128 In his Second Reading speech, the Minister for Police summed up the provision in these words:

⁴⁸⁶ See *Mendoza v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 405, 417 (per Einfield J) citing approvingly *Attorney General (Northern Territory) v Minister for Aboriginal Affairs* (1989) 23 FCR 536, 539-540 (per Lockhart J) cf *Surinakova v Minister for Immigration* (1991) 81 FCR 87,93. In relation to Administrative Decisions (Judicial Review) Act, s. 5(1)(h), see *Curragh Queensland Mining Ltd v David* (1992) 34 FCR 212, 223, 224. In relation to the ability to receive evidence not before the decision-maker, see also *Al-Mehdawi v Secretary of State for the Home Department* (1990) 1 AC 876, 901 (per Lord Bridge).

⁴⁸⁷ RCPS, *Second Interim Report*, November 1996, paras. 4.1 - 4.9.

⁴⁸⁸ NSW Parliament, *Hansard*, Legislative Assembly, 20/9/95, pp. 1183-87 and Legislative Council, 12/12/96, pp. 4683-93; Legislative Assembly, 13/11/96, pp. 5909-13; and 19/1/96, pp. 6147-57 & 6166-201, and Legislative Council 26/11/96, pp. 6475-88 & 6497-6509, 27/11/96, pp. 6608-32, 6642-44 & 6739.

This power is the cornerstone on which the new Police Service will be built. It signals the end of the road for both the corrupt and the non-performers, and a new beginning for the dedicated, hardworking and honest.⁴⁸⁹

4.129 It is a power that hardworking and honest members need not fear, and it has the inbuilt protections earlier noted⁴⁹⁰ which preclude its arbitrary exercise.

4.130 If the exercise of the Commissioner's power is to be of any utility, it is necessary that it be exercised:

- as a discretionary power;
- fairly, by reference to all the circumstances that a responsible employer in the position of the Police Commissioner would take into account, including the special considerations relating to policing and the NSW Police Service mentioned earlier;
- without technicality beyond that which ensures that the officer in question has a proper opportunity to know, and respond to, those matters which are of concern to the Commissioner.⁴⁹¹

4.131 Moreover, it is critical that any review authority:

- take into account the circumstances mentioned above, together with the fact that the protocol and procedure allows a member to be heard before the discretion is exercised;
- intervene only when good cause exists and not simply where, on the material before the Police Commissioner, it might have reached another decision;
- is governed by procedures which avoid any reversion to the previous legalistic and technical approach; and
- does not hear the matter *de novo* but is given the discretion in an appropriate case to permit a dismissed officer to adduce further material to prove that the decision was based upon wrong information.

4.132 The Commission is convinced that any appeal process to review a decision to remove for want of Commissioner's confidence, must be crafted to accommodate the special nature of the power to remove. It is not appropriate to simply transpose appeal procedures designed to accommodate the review of dismissal decisions in general employment, which do not depend on the retention of the Commissioner's confidence in an employee vested with far-reaching powers, nor follow a carefully constructed internal mechanism designed to ensure the fairness and correctness of the original decision.

4.133 In seeking to balance the interests involved, this Commission has given consideration to three options:

Option 1

- to empower the Supreme Court (or other Tribunal in which the review process was vested) to refer any *bona fide* dispute on the facts to the PIC for investigation and report, using its coercive power and general intelligence holdings.

Option 2

⁴⁸⁹ NSW Parliament, *Hansard*, Legislative Assembly, 13/11/96, p. 5912.

⁴⁹⁰ See para. 4.91 *supra*, ie. protocol and notification procedures in *Police Service Act 1990*, s. 181D(3).

⁴⁹¹ See *Police Service Act 1990*, s. 181 D(3).

- to retain s. 181D in its present form, but to remove the present subsection (6) and replace it by a subsection providing for a review to meet the nature of the decision reviewed. Essentially it would:
 - adopt the principles espoused by s.191 of the Industrial Relations Act (IR Act) and allow the review tribunal to mould its procedures and to make orders such as the Industrial Commission would make in unfair dismissal proceedings;
 - give recognition to the nature of the decision under s. 181D by substituting a ground relating to the validity of that decision in place of one depending on its being harsh, unreasonable or unjust;⁴⁹²
 - permit the review tribunal, by leave, to receive further evidence in addition to the material before the Police Commissioner if it considers that special grounds exist, and that the evidence would have been material to the original decision;
- such leave could be given, that is special grounds could be established, for example:
 - if the Court (or Tribunal) is satisfied that there is a real probability that the applicant can show that the Police Commissioner acted upon wrong or mistaken information⁴⁹³, or
 - if new or fresh evidence emerged after the Commissioner made his decision.⁴⁹⁴

Option 3

- to repeal s. 181D(6) and substitute for it the right of review arising under Chapter 2 of Part 6 of the *Industrial Relations Act 1996* (the IR Act) (which relates to unfair dismissals) as modified hereunder.

4.134 Option 3 was formulated by the Ministerial Working Party. It proposes, in essence, that:

- the review be conducted by a Judicial Member of a Special Police Panel;
- the grounds for review be 'identical to those' provided under 'Part 6', and the appeal as to the 'merit and fairness of the decision made, and the process followed';
- the evidence considered be that which is 'ordinarily available and necessary';
- the right to introduce evidence that was not before the Commissioner be 'limited' (although it does not explain the extent to which this should occur); and
- where the material relied on by the Commissioner includes information provided by the PIC, it should be admissible as *prima facie* evidence against the officer unless the officer has not been given the opportunity to test it before the PIC.

4.135 Option 1 has its attractions, but having regard to the other priorities of the PIC, practical considerations rule it out.

⁴⁹² *Industrial Relations Act 1996*, s. 84.

⁴⁹³ This would include showing that the information was brought before the Police Commissioner fraudulently or vexatiously.

⁴⁹⁴ This would involve applications of the same principles as adopted by the Court of Appeal in considering the allowing of fresh evidence on appeal: see *Akins v National Australia Bank* (1994) 34 NSWLR 155.

4.136 This Commission considers that Option 2 would achieve the objective of the legislation and extend fairness to an officer who can show that the true situation was misjudged by, or misrepresented to, the Police Commissioner. It has no difficulty with the review being transferred to the Industrial Relations Commission (the IRC), although it does not consider the Supreme Court, or for that matter an Administrative Appeals Tribunal (if created), to be inappropriate tribunals for the purpose of such review. What is vital is that the nature of the appeal and the powers of the reviewing body are carefully structured to accommodate the particular nature of the review.

4.137 For the purpose of the recommendations which follow, the assumption is made that the review would be carried out by the IRC. Whichever tribunal is selected, the Commission considers that the legislation governing the review should ensure (with suitable modifications) that:

- what is reviewed is the question whether the Police Commissioner's decision was valid, that is, sound, defensible and well-founded,⁴⁹⁵ having regard to the powers conferred by s. 181D of the *Police Service Act 1990* and the procedures required thereunder;
- the appellant retains the onus of establishing that the decision of the Commissioner that he no longer held confidence in the appellant was invalid;
- the procedure is such that the IRC would first receive the material before the Commissioner and the Commissioner's reasons, and the appellant would then present his or her case followed by any reply by the Commissioner;
- the review is conducted by a judicial member of the IRC;
- although the review is conducted by a judicial member, that member would not be sitting in 'court session', as that section is defined by the IR Act;⁴⁹⁶
- the application for review is made within 14 days of notification of the Commissioner's decision, subject to extension by order of the IRC;⁴⁹⁷
- the IRC gives priority to the determination of such application;
- conciliation⁴⁹⁸ is attempted, but if unsuccessful the same judicial member should not conduct the review;
- the dismissal remains in force pending determination of the review;
- once an application for review has been filed the Police Commissioner has the ability to set aside the decision and allow reinstatement followed by resignation of the officer if he sees fit;
- the proceedings are conducted with as little formality and technicality as possible, and without being bound by the rules of evidence;⁴⁹⁹ subject to the proviso that a provision similar to s. 128 of the *Evidence Act 1995* should be introduced in order to permit evidence to be given without exposing a witness to further use or derivative use of an incriminating answer;

⁴⁹⁵ In *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373 Northrop J, in speaking of a 'valid' reason for dismissal, said 'valid should be given the meaning of sound, defensible or well-founded. A reason which is capricious, fanciful, spiteful or prejudiced would never be a valid reason for the purposes of s.170 DE (1) of the *Industrial Relations Act 1988* (Cth). Advisedly the ground of validity is chosen as apt for this particular review rather than the harsh unreasonable or unjust ground applicable to unfair dismissal review under s. 84 of the *Industrial Relations Act 1996*.

⁴⁹⁶ *Industrial Relations Act 1996*, s. 151. Sitting in court session would attract the formal procedures of a court and the application of the rules of evidence.

⁴⁹⁷ cf. *Industrial Relations Act 1996*, s. 85(3).

⁴⁹⁸ *Industrial Relations Act 1996*, s. 86.

⁴⁹⁹ ie. in accordance with ss. 162 & 163 of the IR Act 1996..

- the materials before the Police Commissioner are admissible in evidence in their entirety, including the transcript of evidence and exhibits received from any other proceedings;⁵⁰⁰
- the use before the IRC is permitted of statements made, documents produced, or evidence given to any court, tribunal, Royal Commission or Standing Commission (including the PIC) notwithstanding the circumstances that the statements were made, or documents were produced or given under compulsion, or under objection, or were likely to incriminate their maker;⁵⁰¹
- the fact of refusal to answer questions in a managerial inquiry can be taken into account;⁵⁰²
- the IRC by leave can permit the reception of additional evidence, or the cross-examination of the maker of any statement or other material before the Police Commissioner only when satisfied that special grounds⁵⁰³ relevant to the valid exercise of the power exist. Special grounds might exist:
 - if the IRC was satisfied that there is a real probability that the applicant may be able to show that the Police Commissioner acted upon wrong or mistaken information;
 - if there is cogent evidence to suggest that the information before the Police Commissioner was unreliable, having been placed before him maliciously, fraudulently or vexatiously;
 - new or fresh evidence is available that might materially have affected that decision;⁵⁰⁴
- procedures similar to Rule 13A of the Supreme Court Rules are adopted to ensure that timely notice is given to the Tribunal and the Commissioner of the intention to seek leave to call additional evidence, and of the terms of that evidence;
- where leave is given to an appellant to adduce fresh evidence or to cross-examine any witness, the Police Commissioner also has the right to present any additional evidence that may be relevant to the exercise of his discretion to dismiss, subject to similar timely notice being given of the intention to call such evidence, and of its terms;
- neither the Police Commissioner, nor any member of his Advisory Panel, is examinable either orally or in writing in relation to the reasons for his decision;
- the nature of the review in this instance should be parallel to that presently in place to the full bench of the IRC described under s. 191 of the IR Act in that it should not merely substitute its decision on the matter, but must follow the principles applying to appeals from discretionary decisions whether or not further evidence is received.⁵⁰⁵

4.138 The legislation should further provide for the making of orders of the kind permitted, and with the limitations expressed, under s. 89 of the IR Act subject to:

- exception of the powers or jurisdiction relating to the threat of dismissal⁵⁰⁶ in recognition of the statutory regime exercisable under s. 181D of the Police Service Act; and
- the making of reinstatement or re-employment orders⁵⁰⁷ only where the Commission is satisfied that:

⁵⁰⁰ cf. *Bigg v NSW Police Service*, unreported, Industrial Relations Commission of NSW, 26/11/96.

⁵⁰¹ cf. *Hartmann v Commissioner of Police*, unreported, NSW Supreme Court, Court of Appeal, 4 March 1997; and the PIC Act s. 40(3).

⁵⁰² *Hartmann v Commissioner of Police*, supra.

⁵⁰³ cf. s. 191(2) IR Act 1996.

⁵⁰⁴ *Akins v National Australia Bank* (1994) 34 NSWLR 155.

⁵⁰⁵ *Big W Discount Stores v Donato* (1995) 58 IR 239.

⁵⁰⁶ IR Act 1996, s. 89(7). Under the definition the notice under s. 181D(3) of the *Police Service Act 1990* would amount to such a threat.

⁵⁰⁷ IR Act 1996, s. 89(1).

- a fair and reasonable Police Commissioner should, in all the circumstances, retain confidence in the officer; and that
- it is not contrary to the interests of the Service or the community, or impracticable, in all of the circumstances of the case, for the appellant to be reinstated or re-employed by the Service, as a police officer.

4.139 Finally, it would be appropriate for:

- it to be made clear that the grounds and principles relating to application under s. 84 of the IR Act have no relevance to this review;
- costs orders to be available;⁵⁰⁸ and
- the decision of the judicial member to be final,⁵⁰⁹ subject to appeal by leave only in accordance with Part 7 of the IR Act, and then only on a question of law.

4.140 Although Option 3 is the option advanced by the Working Party and by the Police Association, it is not readily compatible with the objective which Parliament sought to achieve by the introduction of s. 181D:

- under the IR Act, the review is a general one, involving a full re-hearing on the merits;
- the question which arises under Chapter 2, Part 6 is not whether the exercise of the right of dismissal was legal, or within common law/award rights⁵¹⁰ or legislative discretion, but simply whether the decision, viewed objectively, was 'harsh, unjust or unreasonable';⁵¹¹
- the notion of industrial fairness is, however, not at large as the reviewing tribunal must have regard to the interests of the Service and community sought to be protected by s. 181D. It is in this respect that a real tension exists, in the position sought to be secured by the Police Association. As Fisher P noted in referring to the submissions by the NSW Police Service in the Bigg application:⁵¹²

... industrial fairness has to be considered in the terms of the Statute and the Minister's explanation as to the reasons for the Statute. Industrial fairness in this case is not the same as in a normal public sector case. Parliament has said that this is an exceptional kind of case.

4.141 Moreover, as Fisher P observed⁵¹³ Parliament has expressed an intention to foreclose any argument that the dismissal power provided under s. 181D is of itself unfair, as it has expressly permitted dismissal to be achieved in this way. It follows that it would be inappropriate to permit an argument under Part 6 either that the procedure specified in s. 181D(3), or dismissal on the ground of loss of Commissioner's confidence, were of themselves unfair.⁵¹⁴

4.142 Additionally:

- the discretionary nature of the power reposed in the Police Commissioner;
- the statutory procedure ensuring full notice of the Commissioner's concern and opportunity for the police officer to reply; and

⁵⁰⁸ In accordance with the IR Act 1996, s. 181.

⁵⁰⁹ IR Act 1996, s. 179.

⁵¹⁰ *Loty & Holloway v Australian Workers Union* (1971) AR (NSW) 95 at 99.

⁵¹¹ In *Victoria v Commonwealth* (1996) 138 ALR 129 the High Court pointed out that a power to review a decision on the basis that it was harsh, unjust or unreasonable was broader than that contemplated by Article 4 of the International Convention concerning Termination of Employment at the initiative of the Employer. The Convention required, as a cornerstone, that the termination must be for a 'valid' reason. The Court pointed out that a termination may be a valid one, but the overall effect of the termination may be harsh, unjust or unreasonable.

⁵¹² *Bigg v NSW Police Service*, unreported, Industrial Relations Commission of NSW, 21/3/97, p. 7.

⁵¹³ *Bigg v NSW Police Service*, unreported, Industrial Relations Commission of NSW, 21/3/97, pp. 21-22.

⁵¹⁴ *Bigg v NSW Police Service*, unreported, Industrial Relations Commission of NSW, Fisher P, 26/9/96.

- the responsibility of the Police Commissioner for the officer's performance;

aggregate to take the process out of the area appropriate for review of unfair dismissals under the IR Act.

4.143 The Commission is firmly of the view that Option 3 with its transposition of principles of unfair dismissal review, does not accord with the legislative policy which underpins the Commissioner's confidence power. The argument that police should have the same rights of review for unfair dismissal as other employees is superficial and unsound:

- other employees are not subject to a Commissioner's confidence provision;
- their employment is of a very different kind; and
- they do not have the safeguard of a preliminary inquiry of the kind which precedes the Commissioner's decision.

4.144 In summary, Option 3 will not serve the interests of the community, the Police Service, or its honest members. Any debate on this issue should not be deflected away from the matters of principle addressed above, or the reasons for the existence of the Commissioner's power of dismissal.

E. THE POLICE TRIBUNAL AND GREAT

4.145 If the Commission's recommendations are accepted and implemented in full there would be no continuing role for the Police Tribunal or GREAT in relation to the hearing of matters arising out of the police complaints and discipline system. GREAT has other work to do and removal of this area of its jurisdiction would not affect its continued existence. Pending full implementation, of course, each body would be required to fulfil their functions under the existing system.

4.146 The Police Tribunal is given another role in conducting inquiries commissioned by the Minister.⁵¹⁵ In this case the Tribunal is constituted by the President sitting alone and has the powers of a Royal Commission. This Commission considers that the Minister's power to direct such an inquiry should be preserved, but sees no point in retaining a Police Tribunal limited to this function. The Commission recommends the empowerment of the Minister to appoint any nominated person to conduct an inquiry of the nature, and with the powers specified in s. 197 of the Police Service Act.

RECOMMENDATIONS

The Commission recommends that:

Complaints and Discipline System

- ◆ The current complaints handling and discipline system be replaced by a new system, the Employee Management System (EMS), that has as its primary objective the enabling of patrol and other Local Commanders to deal with complaints and take remedial action or impose sanctions on a managerial basis, without recourse to formalities such as the preferment of disciplinary charges and hearings (paras. 4.12 - 4.17), and contemplates three categories of complaint (para. 4.24).

⁵¹⁵ *Police Service Act 1990*, s. 197.

- ◆ Under the EMS, on becoming aware of possible misbehaviour, the Local Commander be empowered to initiate an inquiry and to take such action as is considered appropriate in all the circumstances focused, if possible, upon managerial or remedial measures but in the more serious cases action which may include:
 - imposition of a reviewable managerial sanction such as a fine, deferral of an increment, loss of seniority, reduction in salary, demotion (para. 4.33);
 - initiation of the Commissioner's confidence process (paras 4.33, 4.34, 4.118).
- ◆ A member who is dissatisfied with a reviewable sanction short of removal for loss of Commissioner's confidence has a single and final right to appeal to the Commissioner's Advisory Panel (para. 4.118).
- ◆ In the event that the last mentioned recommendation is not accepted and the view is taken that a further avenue of appeal should reside in an external tribunal, then such appeal be conducted by a single judicial member of the Industrial Relations Commission, with similar procedures to apply as those which apply in relation to appeals from decisions by the Commissioner under s. 181D to remove members for loss of confidence (paras. 4.119 - 4.121).
- ◆ The EMS be independent of the criminal justice system. The privilege against self-incrimination be abrogated for the purposes of managerial questioning notwithstanding that the privilege has been invoked for the purpose of official questioning in relation to a criminal investigation (para. 4.55).
- ◆ Information about complaints, allegations of misconduct and the way in which they are managed be comprehensively recorded. (paras. 4.56 - 4.57).
- ◆ The role of the Office of Internal Affairs extend to:
 - the investigation of Category 1 complaints deemed unsuitable for the Police Integrity Commission and the relevant Local Commander;
 - the conduct of integrity tests;
 - the provision of advice and support services to Local Commanders;
 - the co-ordination and establishment of intelligence bases on corruption within the Police Service;
 - planning proactive investigations, in liaison with the Police Integrity Commission;
 - the provision of assistance with the development of anti-corruption strategies and training for the Police Service (paras. 4.76 - 4.78).

- ◆ The role of the Police Integrity Commission extend to:
 - monitoring the progress of the EMS;
 - undertaking direct investigations into serious matters of corruption or police misconduct;
 - monitoring investigations by the Office of Internal Affairs into those matters which it retains;
 - exercising its coercive powers to assist the Office of Internal Affairs where expedient to do so;
 - taking over inquiries into police shootings or serious accidents where it is considered desirable to ensure an impartial investigation (para 4.82).
- ◆ The role of the Ombudsman continue by:
 - monitoring managerial actions taken by Local Commanders;
 - conducting random checks as to the progress of non-reportable matters;
 - as necessary carrying out investigations, and reporting to the complainant and to Parliament;
 - liaising closely with the PIC (paras. 4.83 - 4.85).
- ◆ The EMS apply to sworn officers only. However, negotiations between the Police Service, the Public Service Association and other relevant industrial organisations should be commenced as soon as practicable with a view to including all other members of the Police Service within the new scheme (para. 4.88).
- ◆ The EMS be implemented progressively by:
 - continuing the pilot program for a further six months and carefully reviewing any problems that arise;
 - training Local Commanders within the pilot program in appropriate management tools and strategies with a heavy reliance on external expertise;
 - fully involving all staff by careful and comprehensive explanation of the system and by way of membership of a consultative committee at patrol level;
 - encouraging Local Commanders outside the pilot program to gradually implement a managerial approach to complaints handling and discipline (para. 4.72).
- ◆ The Police Service or the Ombudsman conduct research on the level of public satisfaction with the new complaints handling and discipline system. Such research should be repeated at regular intervals, for example, every two years (para. 4.69).
- ◆ The Commissioner's Instructions be re-drafted so as to constitute consistent and practical guidelines for the exercise of professional discharge of office which concept should be at the basis of the complaints and discipline system and displace, for example, the present test for 'neglect of duty' (paras. 4.46 - 4.49).

Dismissal

- ◆ Sworn officers not to be removed from the Police Service except for loss of Commissioner's confidence (paras. 4.89 - 4.95).
- ◆ If funding is allocated, a system akin to redundancy payments and early retirement be available to the Police Commissioner to be invoked in selected cases (paras. 4.101 & 4.102).
- ◆ Members removed from the Police Service under s. 181D of the *Police Service Act 1990* for want of Commissioner's confidence have a right to seek a review of the Commissioner's decision (para. 4.120), in the nature of a determination of the validity of the Commissioner's decision, and conducted according to the procedural, jurisdictional and legal considerations set out at paras. 4.131 - 4.133.

Police Tribunal and GREAT

- ◆ Subject to commencement of the EMS the Police Tribunal be abolished (para. 4.145).
- ◆ Subject to commencement of the EMS police officers right of appeal to the Government and Related Employees Appeals Tribunal (GREAT) in disciplinary matters be abolished (para. 4.145).

Consequential Legislative Amendments

- ◆ The *Police Service Act 1990* be amended accordingly, *inter alia* by:
 - recognising the absence of any charge-based disciplinary proceedings;
 - empowering Local Commanders to take necessary actions under the EMS;
 - replacing the existing complaints categories in s. 162C with three categories of complaints as described in para. 4.24;
 - incorporating the protocol for exercise of the Commissioner's confidence power;
 - establishing a Commissioner's Advisory Panel with powers appropriate to the performance of functions recommended herein;
 - abolishing the requirement under s. 132 to attempt conciliation in favour of permitting the Local Commander to initiate conciliation only in those matters where it is considered appropriate;
 - permitting statements made during a conciliation or official questioning for managerial purposes to be admissible for the purpose of reviews of managerial action and decisions taken to remove officers for want of Commissioner's confidence;
 - repealing Part 9 Division 1 (discipline of members of the Police Service), save for those provisions which preserve the right of the Commissioner to take criminal or managerial action against members (see ss. 173(1), 173(2), 178(3), 179);
 - repealing Part 9 Division 2 (appeals to GREAT);
 - repealing Part 9A (appeals to the Police Tribunal) save for s. 197 which should be amended to enable the Minister to request any suitable person to conduct an inquiry of the kind formerly conducted by the Police Tribunal.
- ◆ Suitable amendments be made to the *Police Service Act 1990* and other relevant legislation (for example, the *Industrial Relations Act 1996*) to give effect to the mechanisms for review of

managerial action and decisions by the Commissioner under s. 181D for removal of the members from the Police Service.

- ◆ Commencement of amendments to the *Police Service Act 1990* giving effect to the EMS be deferred to a date to be proclaimed (that is, after the Police Integrity Commission and the Ombudsman have informed the Minister to the effect that it is appropriate that the amendments be implemented) (paras. 4.70 - 4.72).
- ◆ Relevant consequential amendments be effected to the Police Service Regulation 1990, the Police Department (Transit Police) Regulation 1989, the *Ombudsman Act 1974* and the *Government and Related Employees Appeal Tribunal Act 1980* to reflect the abolition of the Police Tribunal and the right of appeal to GREAT.

CHAPTER 5

CIVILIAN ADVISORY COUNCILS

5.1 In the First Interim Report the Royal Commission indicated that it intended to examine the role and future of the Police Board.⁵¹⁶ The result of this assessment was the conclusion, in the Second Interim Report,⁵¹⁷ that the Board was not the appropriate body to determine matters of appointment, transfer and contract renewal in relation to senior officers, and that to hasten the reform process these powers should be returned to the Commissioner, although linked to an impartial and objective assessment process. A conclusion was also reached that the dual involvement of the Service and the Board in police training and education was not helpful. As a result a recommendation was made for abolition of the Board.

5.2 The decision was not made lightly and attracted some criticism.⁵¹⁸ To some extent this was predictable, as the decision was seen as withdrawing civilian oversight, at a time when the Service had been exposed as lacking accountability and community confidence. The decision, however, was crucial to the future of the reform process that was already under way. It does not represent a lack of commitment to the need for civilian oversight and proper accountability mechanisms for the NSW Police Service. This chapter expands on the reasoning behind the abolition of the Police Board and considers the alternatives for community input, the need for which was also flagged in the Second Interim Report.⁵¹⁹

A. THE POLICE BOARD

CREATION OF THE BOARD

5.3 The Lusher Report set out to 'identify a structure which would meet the needs of police administration in New South Wales for many years into the future'.⁵²⁰ It concluded that:

- the administration of an organisation of the size of the Police Force (as it was then known) was 'beyond the capacity of one man';⁵²¹
- an input of specialised skills and creativity was required from outside the Force to assist in its administration and management;⁵²² and
- a Board was required to assist in the:
 - planning for and provision of a comprehensive and co-ordinated police service;
 - oversighting of the resources employed in the provision of this service;
 - provision of advice on policy relating to police matters, including law enforcement to the Minister;⁵²³
 - the implementation of the recommendations arising out of the Report.⁵²⁴

⁵¹⁶ RCPS, *First Interim Report*, February 1996, p. 130.

⁵¹⁷ RCPS, *Second Interim Report*, November 1996, pp. 10-13.

⁵¹⁸ From the Police Board itself (see RCPS Exhibits 2896/1 & 2896/3) and some media commentators, see eg. Editorial, *SMH*, 13/11/96, p. 18; Editorial, *The Australian*, 13/11/96, p. 16; G. Sturgess, 'Ryan has been set up to take the fall', *The Sun-Herald*, 17/11/96, p. 47; E. Whitton, 'Chief faces test of nerve', *The Australian*, 13/11/96, p. 2.

⁵¹⁹ RCPS, *Second Interim Report*, November 1996, pp. 13-14.

⁵²⁰ *Report by Mr. Justice Lusher of the Commission to Inquire into New South Wales Police Administration*, (E. A. Lusher Commissioner), Sydney, 1981, p. 775.

⁵²¹ *ibid*, p. 785.

⁵²² *ibid*, p. 785.

⁵²³ *ibid*, p. 791.

5.4 Justice Lusher rejected the establishment of a purely advisory⁵²⁵ or executive⁵²⁶ Board. He recommended a Board answerable to the Minister, which would have statutory responsibility for the following specific functions:

- Consideration and approval of Financial Management, including Budget Estimates, allocation of funds, accounting procedures and auditing programs, for property development and acquisition and use of major plant and equipment and priorities in the allocation of finances.
- Approval of a Police Force Inspectorate program along the lines indicated to be conducted by a joint staff of police and public servants under the control of a Superintendent to inspect all aspects of police management and administration. The Board to receive reports thereon.
- The development of personnel policies of the Force, particularly in the areas of:
 - recruit selection, transfers;
 - promotion;
 - training;
 - career planning and development.
- The approval of recommendations to the Minister for promotion of officers up to and including the level of the office of Superintendent.
- Selection and Recommendation to the Minister for appointments of all officers to the office of Senior Superintendent and above.
- To approve transfers at the level of Senior Superintendent and above.
- Reporting annually to the Minister and Parliament on the effectiveness and performance of the Police Force and on its own activities.
- To establish and operate with the assistance of the Police Force a Residential Police Academy.
- Approving new procedures and rules.
- Initiating and approving research into new policing methods and other research related to law enforcement generally.
- Approval of recommendations for the award of police honours and medals.
- To establish and control a Legal Branch to advise it and the Force on legal matters.⁵²⁷

5.5 Under Justice Lusher's proposal the Commissioner would retain sole responsibility for operational matters, but would be required to implement the decisions and policies of the Board, which he would have a role in formulating as one of its members.

5.6 The creation of a Police Board was actively opposed by individual members of the Service,⁵²⁸ the Police Associations⁵²⁹ and by Commissioner Lees.⁵³⁰ Notwithstanding this opposition, the Board was appointed with effect from 16 January 1984. The Board consisted of the Commissioner of Police

⁵²⁴ *ibid*, p. 791.

⁵²⁵ Mr. Justice Lusher rejected an advisory Board on the grounds that it would: be potentially ineffective if the Force opposed its new policy proposals; do nothing to resolve the difficulties between the Public Service and Police components of the administration; and simply be another unit in what was already considered a complex bureaucratic structure, *ibid*, p. 787.

⁵²⁶ Justice Lusher rejected an executive Board because of concern that it would be incompatible with the independence of the Police Commissioner and the Force in their duties related to law enforcement, *ibid*, p. 788.

⁵²⁷ *ibid*, pp. 792-93.

⁵²⁸ J. T. Jarratt, RCT, 1/2/95, p. 1358.

⁵²⁹ S. Brien, *Serving the Force: 75 Years of the Police Association of New South Wales 1921-1996*, Focus Publishing, Sydney, 1996, p. 168.

⁵³⁰ Response to the Report of the Inquiry into the New South Wales Police Administration, J. T. Lees QPM Commissioner of Police, RCPS Exhibit 6008, pp. 75-77.

as a full-time member, and two part-time members (one of whom was Chairman). The Board was made subject to the control and direction of the Minister in the exercise of its functions.⁵³¹

5.7 The model proposed by Lusher was not however fully implemented. Its role was more of an advisory nature, with the Commissioner retaining full responsibility for the management of the Force.⁵³²

CHANGES TO THE BOARD

5.8 The following changes were made to the Board after its establishment:

- upon the repeal of the *Police Board Act* in 1990 and the enactment of the *Police Service Act*, the Board acquired responsibility for the employment of Police Service Senior Executive (PSES) officers,⁵³³
- by amendment in 1991, membership of the Board was increased to a maximum of five members; the office of Chairman was made tenable either on a full-time or part-time basis, and provision was made for the appointment of between one and three part-time members;⁵³⁴
- upon enactment of the *Police Service (Inspector General) Act 1991*, provision was made for appointment to the Board staff of an Inspector General, an office later transferred to the Ministry for Police,⁵³⁵
- as a result of conflict between the Board and the Minister, and a review conducted by the Office of Public Management (OPM),⁵³⁶ the Board's general function to promote the improvement of the Police Service and to ensure the maintenance of an efficient and effective Police Service was removed from its charter in 1993, and the requirement that the Police Commissioner implement the Board's decisions was removed;⁵³⁷ and
- by the same legislative amendment in 1993, the Board's membership was increased from five to seven, the Police Commissioner's membership was altered to non-voting status, and the Director General of the Ministry for Police was added as a non-voting member.⁵³⁸

5.9 Due to these changes and a concomitant reduction in resources, the Board largely restricted its focus to the employment of PSES officers and to career development and training.⁵³⁹

EFFECTIVENESS OF THE BOARD

5.10 The Police Board provided two significant submissions⁵⁴⁰ to the Royal Commission in relation to its achievements, its deficiencies and its future. These submissions were generally critical of the extent to which it had been impeded over the years by lack of resources and by changes to its structure, powers and functions.

5.11 In the Board's submission it contributed to the following achievements:

⁵³¹ *Police Board Act 1983*, s. 5.

⁵³² Police Board of NSW, 'The Police Board of NSW - An Evaluation', May 1996, RCPS Exhibits 5368/6 & 2459/6, p. 12.

⁵³³ *ibid.*, p. 12. For industrial purposes, the Board became the employer of the PSES and each officer entered into a contract of employment directly with it. *Police Service Act 1990*, s. 41(1).

⁵³⁴ *Police Service Act 1990*, ss. 17(1) & 17A, as inserted by the *Police Service (Police Board) Amendment Act 1991*.

⁵³⁵ The transfer of the position of Inspector General took place when the Ministry was established in September 1992, Police Board of NSW, 'The Police Board of NSW - An Evaluation', May 1996, RCPS Exhibit, 2459/6, p. vi.

⁵³⁶ Office of Public Management, *Review - Police Board Secretariat*, 22/12/92.

⁵³⁷ *Police Service (Management) Amendment Act 1993*, Schedule 1.

⁵³⁸ Police Board of NSW, 'The Police Board of NSW - An Evaluation', May 1996, RCPS Exhibit 2459/6, p. 36.

⁵³⁹ *ibid.*, p. 37.

⁵⁴⁰ Police Board of NSW, 'The Police Board of NSW - An Evaluation', May 1996, RCPS Exhibit 2459/6; Police Board of NSW, 'The Future of the Police Board', Submission to the RCPS, RCPS Exhibit 5737/2.

- in the field of promotions, there was a move away from the old seniority based system to a merit system, and increased emphasis was placed upon the integrity of applicants;⁵⁴¹
- in relation to the PSSSES, it secured an emphasis on integrity in appointments, established effective performance review standards and procedures and maintained a high standard of behaviour among senior executives;⁵⁴² and
- in the field of police education and training, it secured the establishment of a residential Police Academy, the introduction of a new and extended form of recruit training (PREP), an improvement in the provision of continuing education to officers at higher ranks, and the establishment of the Police Education Advisory Council to advise the Board on curriculum development and the links between police training and the tertiary education system.⁵⁴³

5.12 Factors which the Board identified as impediments to its operations, and which the Royal Commission similarly accepts as having impinged on its effectiveness, included:

- the 'dubious, if not hostile'⁵⁴⁴ attitude exhibited by the Service whose reservations about it 'hampered its effective functioning',⁵⁴⁵
- opposition from the two Police Associations to the appointment of a full-time chairman and the move of the Board to NSW Police headquarters (the Avery building) in 1991;⁵⁴⁶
- the inability of the Board to ensure that it was kept properly informed by the Service;⁵⁴⁷
- reliance of the Board on the Service for advice about the performance of officers;⁵⁴⁸
- the fact that the Board's promotion recommendations were appealable;⁵⁴⁹
- the lack of power in the Board to discipline PSSSES officers;⁵⁵⁰
- possible conflict for Board staff after 1993 when the Director General joined the Board, in that staff were subject to the direction of the Ministry, but responsible for carrying out the directions of the Board;⁵⁵¹
- the transfer of the Inspector General position from the Board to the Ministry, and the 1993 statutory changes, which prevented the Board from addressing one of its expressed priorities - to 'closely monitor enhancements to the operational capability of the Service';⁵⁵²
- the expectation that it exercise responsibility for the supervision and promotion of career development and training without administrative control or a corresponding power to require implementation by the Commissioner;⁵⁵³
- the difficulties which arose in the relationship between the Board and Police Minister, which for example saw Minister Pickering in 1989 refuse to endorse a promotion recommendation

⁵⁴¹ Police Board of NSW, 'The Police Board of NSW - An Evaluation', May 1996, RCPS Exhibit 2459/6, pp. 60-62.

⁵⁴² *ibid.*, p. 64.

⁵⁴³ *ibid.*, pp. 64-67.

⁵⁴⁴ *ibid.*, p. 24.

⁵⁴⁵ *ibid.*, p. 17.

⁵⁴⁶ *ibid.*

⁵⁴⁷ *ibid.*, p. 71.

⁵⁴⁸ *ibid.*, pp. 30 & 45-46.

⁵⁴⁹ In 1990, the Chairman of the Board revealed that 22 patrol commanders initially rejected by the Board subsequently won their positions on appeal (Police Board of NSW, 'The Police Board of NSW - An Evaluation', May 1996, RCPS Exhibit 2459/6, p. 22.

⁵⁵⁰ *ibid.*, pp. 29 & 47.

⁵⁵¹ *ibid.*, p. 37.

⁵⁵² *ibid.*, p. 28.

⁵⁵³ *ibid.*, p. 38.

of the Board, and in 1993 move a motion to censure Chairman Thorley for failing to support him;⁵⁵⁴

- uncertainties connected with the limits of its statutory functions and the border of Ministerial responsibility relating, for example, to the extent to which communications about policy issues should have been channelled through the Board, and its power to require the Commissioner to inform it on matters relating to the effectiveness and efficiency of the Service;⁵⁵⁵
- the absence of qualitative or quantitative systems for monitoring whether decisions were implemented;⁵⁵⁶
- the lack of any specific corruption prevention function within the Board;⁵⁵⁷
- the absence of direct control over police management, or power to require the Commissioner to even consider its decisions - let alone implement them - which it considered to be an 'untenable position';⁵⁵⁸
- the absence of resources or powers to conduct investigations into the integrity of officers being considered for promotion;⁵⁵⁹
- the reduction of resources and functions from 1993 which restricted the Board's achievable purpose to the promotion of PSSSES officers and career development and training;⁵⁶⁰
- the moratorium on Public Service positions above the level of Grade 12 which prevented the appointment of PSSSES officers from April 1995;⁵⁶¹ and
- the necessary delay of promotions in the light of Royal Commission revelations until outstanding criminal or departmental charges were finalised.

5.13 In a supplementary submission to the Commission, the Board argued for the return of many of its initial powers and sought an expanded directory role which would have required the Police Commissioner to implement Board decisions.⁵⁶² It also argued for greater resources, its own budget and a separate office away from the Ministry.⁵⁶³

5.14 The central issue in relation to the Board was its vision that it should have a directory role, which would subordinate the Police Commissioner to its decisions in most aspects of management and administration (although not in operational matters), and the resources to match that role.⁵⁶⁴

5.15 This is a fundamental issue, and one which if implemented, will significantly impact on the independence of the Police Commissioner, and upon his ability to develop policy for the Service. Apart from the circumstance that the Commissioner is accountable and responsible for the performance of the Service, and should not be subject to ministerial or political influence, the major problems with vesting a directory role in the Board are that:

- appointments to the Board are within the power of the government of the day, thereby giving rise to a potential threat to the independence of the Police Commissioner;

⁵⁵⁴ *ibid.*, p. 32.

⁵⁵⁵ *ibid.*, p. 33.

⁵⁵⁶ *ibid.*, p. 28.

⁵⁵⁷ *ibid.* pp. 30 & 67-68.

⁵⁵⁸ *ibid.*, p. vi.

⁵⁵⁹ *ibid.*, p. 22.

⁵⁶⁰ *ibid.*, p. 37.

⁵⁶¹ Police Board of NSW, *Annual Report 1996*, p. 20.

⁵⁶² Police Board of NSW, 'The future of the Police Board', Submission to the RCPS, RCPS Exhibit 5737/2.

⁵⁶³ *ibid.*, p. 11.

⁵⁶⁴ *ibid.*, p. 10.

- a Board comprised of civilians, most of whom would hold office part-time, is not in the best position to be informed of, or aware of day-to-day needs of the Service, nor is it likely to be representative of the community;
- no other chief executive, corporation or government department of the size of the Police Service is subject to such direction or oversight by an external body;
- in order for it to carry out all the functions required to support a critical directory capacity the Board would need a significant increase in its staff and resources;
- its members would need to be involved in almost a full-time capacity; and
- the decisions of such a body if of a directory nature would almost certainly impinge on the operational capacity of the Service.

THE ABOLITION OF THE BOARD

5.16 In the Second Interim Report the Commission rejected the Board's submission that its future should be in directory capacity⁵⁶⁵ on the grounds that 'such a role cannot comfortably co-exist with the priority being afforded to the Police Commissioner in the management of and responsibility for the day-to-day activities of the Service'.⁵⁶⁶

5.17 The Royal Commission has carefully reviewed the Board's submissions, and the role it might occupy within the framework of the current reform process. It has concluded that in view of:

- the pressing need to provide the new Police Commissioner with the power to properly manage the Service, including the selection of a key management team which he can trust;
- the distinction which needs to be preserved between operational matters and policy;
- the strategies developed in this report; and
- the advantages of tapping into specific expert advisory committees,

an alternative approach is preferable, in which civilian input remains of an advisory nature only, and is provided by a body other than a Standing Police Board.

5.18 The Police Board was critical of the Second Interim Report, and concerned that its reasoning reflected unfairly upon its members, past and present.⁵⁶⁷ In order to clear up any misconception, a statement was made during the public hearings to the effect that:

- the decision did not attribute any blame to the Board for the problems of the Service;
- the purpose of the report was to identify the matters that needed to be attended to immediately to give the reform process impetus, and to empower Commissioner Ryan to take effective control of the Service and of its reform;
- the Commission recognised that the Board was not responsible for the PSSSES vacancies or the large number of police relieving in those positions, a policy decision having been made early in the hearings to freeze senior placements until Commission inquiries were further advanced; and
- the Report did not mean to imply any criticism of Board members past or present in relation to their ability or their performance.⁵⁶⁸

⁵⁶⁵ *ibid*, p. 10 (see para. 20 which submits that the Police Commissioner should be obliged by statute to implement the Board's decisions).

⁵⁶⁶ RCPS, *Second Interim Report*, November 1996, p. 13.

⁵⁶⁷ Police Board of NSW, Letter to the RCPS, 18/11/96, RCPS Exhibit 2896/1; Police Board of NSW, Letter to the RCPS, 11/12/96, RCPS Exhibit 2896/3.

⁵⁶⁸ Commissioner Wood, RCT, 18/12/96, pp. 35405-06.

5.19 In conclusion Justice Wood stated that:

I remain of the view that there should be a civilian advisory role for the Police Service. The precise form that should take, the composition of any committee or committees, and the role of such advisory bodies will be worked out in the final report.⁵⁶⁹

5.20 The establishment of a Police Board was an appropriate response to the deficiencies exposed by the Lusher Inquiry in the administrative structures of the Service. This Commission's focus has been on corruption which has exposed more far-reaching deficiencies. Many of the administrative and other problems that existed, when Justice Lusher completed his report, continue and are echoed in this Report despite the presence of the Board for more than a decade. The additional information which has emerged demands different solutions.

5.21 The justifications for civilian oversight of the Service as espoused by the Lusher Report however remain valid and relevant today. This Report proposes:

- an independent process to monitor and review the implementation of reforms arising out of the work of the Royal Commission, which is explained in Chapter 9 of this Volume;
- permanent arrangements for civilian consultation and advisory input, which is addressed in the remainder of this chapter; and
- operational oversight via the Police Integrity Commission and the Ombudsman.

B. ALTERNATIVE CIVILIAN ADVISORY PARTICIPATION

5.22 In recent times, community policing has emerged as a primary strategy for policing and crime prevention. The development of formal consultative arrangements between police and 'the community' is a central measure in the implementation of any such strategy.⁵⁷⁰ The origins of community policing and the push for improved police community consultation lie in the related principles that:

- effective policing requires co-operation with and from the community in which it takes place; and
- crime prevention cannot be effected solely by police services; the engagement of other agencies and the community itself being crucial to effective crime prevention.⁵⁷¹

5.23 The traditional notion of police community consultation involves 'beat' police familiarising themselves with local community members, developing an understanding of their needs and problems, and becoming involved in attempts to address local problems.⁵⁷²

5.24 Whilst there probably have been some communities with close ties with the local constabulary, and strong community norms which acted as a curb on behaviour, the opportunities for clear and continuing personal contact in modern urbanised society are few.

⁵⁶⁹ Commissioner Wood, RCT, 18/12/96, p. 35406.

⁵⁷⁰ S. James, A. Sutton & M-B. Engelhardt, *Review of the Barwon Police Community Consultative Committee*, A Report of Study Commissioned by the Victoria Police, Vicsafe, July 1993, p. 10; R. Sarre, 'The state of community based policing in Australia: Some emerging themes' in eds D. Chappell & P. Wilson, *Australian Policing: Contemporary Issues*, (Second Edition), Butterworths, Sydney, 1996, p. 31.

⁵⁷¹ S. James, A. Sutton & M-B. Engelhardt, July 1993, op cit, p. 10.

⁵⁷² The image of the avuncular 'bobby', with a deep knowledge of the local neighbourhood and its inhabitants, is an enduring icon of traditional community-based policing. S. James, A. Sutton & M-B. Engelhardt, July 1993, op cit, p. 10. Drawing on this image, the Fitzgerald Report urged a return to policing as a 'neighbourhood affair, where members of the community are familiar with locally based police officers and the officers and their families become part of the community', G. E. Fitzgerald, *Report of a Commission of Inquiry Pursuant to Orders in Council*, Queensland, 1989, p. 233.

5.25 As a result, over the past two decades there has been a movement in some countries for the establishment of more formal consultative mechanisms rather than informal contact with local police. The specific source of the drive towards the formalisation of police community consultation is generally attributed to the Brixton riots in England in 1981 and the recommendations of the judicial inquiry which followed.⁵⁷³

THE DEVELOPMENT OF POLICE COMMUNITY CONSULTATION IN ENGLAND AND WALES

5.26 In 1981 Lord Scarman was appointed to examine the causes of the Brixton riots. His inquiry concluded that they were in part due to a breakdown in police-public relations,⁵⁷⁴ and noted that:

If a rift is not to develop between the police and the public as a whole (not just members of ethnic minority communities), it is in my view essential that a means be devised of enabling the community to be heard not only in the development of policing policy but in the planning of many, although not all, operations against crime.⁵⁷⁵

The 'means' recommended was the statutory establishment of local police community consultative committees across England and Wales, comprising community representatives, local councillors and police officers.⁵⁷⁶

5.27 The *Police and Criminal Evidence Act* (PACE) which followed Lord Scarman's Report, created a legal responsibility for police authorities to consult with the public on policing.⁵⁷⁷ This has been since consolidated under the *Police Act*, which requires the Police Authority to make arrangements for obtaining:

- the views of the people in that area about matters concerning the policing of the area; and
- their co-operation with the police in preventing crime in that area.⁵⁷⁸

5.28 Following the introduction of PACE, the Home Office issued guidelines which recommended the establishment of formal Police Community Consultative Groups (PCCGs).⁵⁷⁹ In 1994, the *Police and Magistrates Courts Act* (PMCA) was introduced. Under this legislation, police authorities were given a responsibility for publishing an annual policing plan for their police area, including local policing objectives which must take into account the views of the public determined through consultation.⁵⁸⁰

5.29 Due to concerns that PCCGs were failing to attract broad community representation, some police authorities and forces began experimenting with other supplementary approaches to consultation and feedback, such as focus groups and surveys.⁵⁸¹

⁵⁷³ S. James, A. Sutton & M-B. Engelhardt, July 1993, op cit, p. 10; R. Sarre, 1996, op cit, pp. 31-32.

⁵⁷⁴ L. G. Scarman, *The Scarman Report: The Brixton Disorders, 10-12 April 1981*, Penguin, Harmondsworth, 1982.

⁵⁷⁵ *ibid*, para 5.56, p. 147.

⁵⁷⁶ *ibid*, para 5.69, p. 151.

⁵⁷⁷ D. Bull & E. Stratta, 'Police Community Consultation: An Examination of its Practice in Selected Constabularies in England and NSW, Australia', *Australian and New Zealand Journal of Criminology*, no. 27, 1994, p. 237.

⁵⁷⁸ *Police Act 1996* (UK), s. 96 quoted in R. Elliot & J. Nicholls, *It's Good to Talk: Lessons in Public Consultation and Feedback*, Police Research Series Paper 22, Police Research Group, Home Office, London, 1996, p. 1.

⁵⁷⁹ R. Elliot & J. Nicholls, 1996, op cit, p. 1.

⁵⁸⁰ *ibid*, p. 2.

⁵⁸¹ *ibid*, p. 1.

5.30 Three major criticisms of community consultative committees in England and Wales have been identified as being that:

- they can be passive, ineffective ‘talking shops’, with non-police members ill-prepared and lacking in sufficient information about policing, which do no more than provide an appearance of consultation;⁵⁸²
- they tend to be police-dominated in terms of the setting of the agenda, the presentation of viewpoints,⁵⁸³ the occupation of key positions and the selection of members;⁵⁸⁴ and
- they tend to be insufficiently representative of the wider community, particularly of the groups most often in conflict with the police (youth, unemployed, and ethnic minorities).⁵⁸⁵

5.31 Research in England and Wales has consistently found that community consultative committees are primarily representative of a preponderance of professional, middle class, white and 40+ age group⁵⁸⁶ and that such committees work least for groups and areas where they are most needed.⁵⁸⁷

5.32 Some of the problems encountered in relation to consultative committees in England and Wales may be attributed to the difficulties in identifying the relevant community, and each sub-community within it, and in securing a representative committee whose members can work together. Some complex issues arise:

What is meant by “community”? Is the community the entire city, a portion of the city, a neighbourhood, a city block, or the residents of a specific apartment house? Are the assumptions made about the degree of consensus that exists within a community, once it is defined, correct? Is it recognised that there are communities within communities? A comprehensive, institutional effort to build new relationships with the “community” carries with it some uniform expectations of what the police should elicit from a community. But a division of a precinct into areas will not necessarily produce groups of individuals with shared values that can be reinforced in ways that help control behaviour. Areas of cities requiring the greatest amount of police attention are usually those in which there are no shared norms and little sense of community.⁵⁸⁸

⁵⁸² R. Reiner, ‘Myth versus modernity: Reality and unreality in the English model of policing’, Paper presented to the international conference on ‘Police systems and police co-operation in Europe’, 1992, p. 20, quoted in D. Bull & E. Stratta 1994, op cit, p. 238.

⁵⁸³ eg. see R. Sarre, 1996, op cit, p. 37; D. Bull & E. Stratta, 1994, op cit, p. 241.

⁵⁸⁴ UNSW Police Policy Research Unit, Police and the community: the necessity for change, Submission to RCPS, August 1996, RCPS Exhibit 2809/112, p. 64.

⁵⁸⁵ G. Hughes, “‘Consumerist policing’: Community consultation and the accountability of the police in contemporary Britain’, *Socio-Legal Bulletin*, vol. 6 (Winter), 1992, pp. 15-16.

⁵⁸⁶ R. Elliot & J. Nicholls, 1996, op cit, p. 10.

⁵⁸⁷ ‘The “consumers” of the initiatives are rarely what we may term the “conflict groups” which Scarman wished to reach’, G. Hughes, “‘Consumerist policing’: Community consultation and the accountability of the police in contemporary Britain’, *Socio-Legal Bulletin*, vol. 6 (Winter), 1992, pp. 15-16.

⁵⁸⁸ H. Goldstein, *Problem-oriented Policing*, McGraw-Hill Publishing, New York, 1990, p. 25.

5.33 In late 1995, the Home Office Police Research Group was tasked with conducting research aimed at identifying best practice in public consultation and feedback arrangements in policing.⁵⁸⁹ At the outset, the study identified the seven main aims of police community consultation as viewed by the key stakeholders (police authorities, police forces and the public):

- reaching a broad and representative sample of the population;
- identifying public priorities to influence annual policing plans;
- identifying public priorities for immediate action and/or divisional plans;
- providing the public with information on policing;
- developing partnerships with the public;
- obtaining rapid police action on public concerns; and
- obtaining information from the police.⁵⁹⁰

5.34 The conclusion reached was that because of their diversity, no single consultation mechanism will satisfy all seven aims.⁵⁹¹ In addition to police community consultation groups, it was recommended that police forces should utilise social research methods, including surveys, focus groups and consumer panels, and informal networking, both on an individual and group basis.⁵⁹² The Home Office encouraged police forces to view their consultation arrangements not as a series of individual mechanisms, but as a 'consultation package'.

POLICE COMMUNITY CONSULTATION IN NSW

5.35 Following the Scarman Report, other countries including Australia, were quick to establish similar models of formal police community consultation.⁵⁹³ In NSW, community policing was adopted by the then Police Force in 1986-87 as its 'principal operational strategy'.⁵⁹⁴ Community consultation was seen as central to a successful community policing strategy:

Community-based policing is primarily concerned with the prevention of crime and social disorder through the co-operative efforts of police and the community. The fundamental theme of community-based policing is to deliver an improved police service by establishing an effective communication network between police and the community.⁵⁹⁵

Community Relations Bureau

5.36 By the mid-1980s, the Force had established a Community Relations Bureau.⁵⁹⁶ The Bureau consisted of three sections, one of which comprised special units, designed to improve police community consultation with specific groups. They included:

- the Police/Aborigine Liaison Unit: its objective was to 'encourage co-operation between police and the Aboriginal community'. Positions for police Aboriginal liaison officers were also established.⁵⁹⁷ In evidence before the Commission, former Police Commissioner John Avery described the role of the police Aboriginal liaison officers as follows:

⁵⁸⁹ R. Elliot & J. Nicholls, 1996, op cit, p. 2.

⁵⁹⁰ *ibid*, pp. 5-8.

⁵⁹¹ *ibid*, p. 8.

⁵⁹² *ibid*, pp. 29-40.

⁵⁹³ S. James, A. Sutton & M-B. Engelhardt, July 1993, op cit, p. 11.

⁵⁹⁴ NSW Police Department, *Annual Report 1986-1987*, p. 6. The concept of community policing had been progressively introduced from 1984 onwards.

⁵⁹⁵ NSW Police Force, *Annual Report 1987-88*.

⁵⁹⁶ NSW Police Department, *Report of the NSW Police Department 1984-85*, p. 33.

⁵⁹⁷ J. K. Avery RCT, 6/12/94, p. 111.

The officers, for a start, were to get out there and relate and listen to the Aboriginal community and bring their concerns back in a more considered way so that we could have a better understanding and incorporate them in policy; to deal also...with concerns that they had and there were a number of things [specific to the different areas that were conducted]...and also to liaise with police officers in towns where there was a substantial Aboriginal population and try and mitigate differences and issues which were problems.⁵⁹⁸

- the Ethnic Liaison Unit: the purpose of this unit was to focus on:
 - communication (for example, assistance to police officers to learn community language skills to enhance communication);
 - education (including the provision of training to police to meet the specialised needs of an ethnic community); and
 - employment (strategies to increase the number of people recruited from different ethnic backgrounds);⁵⁹⁹
- the Gay Liaison Unit: this unit was formed in 1984-1985, and established a police/gay liaison group to meet regularly, and publish pamphlets;⁶⁰⁰
- the Community Relations Co-ordinator (Youth Liaison): the co-ordinator was appointed in March 1985 to 'promote a more constructive and positive relationship between police and youth'.⁶⁰¹

Customer Councils

5.37 In addition to establishing liaison units for groups with special needs, a form of broader community consultation was established by the Service through Customer Councils (previously called Community Consultative Committees).⁶⁰²

5.38 Customer Councils were first established at patrol level in 1988, 'to provide a consultative process between the general community and Patrol Commanders'.⁶⁰³

5.39 Regional Customer Councils were first established in 1992 as 'a tool to help police do a more effective job in the community's expectation of their right to consultation, information, feedback and acceptable standards of service'.⁶⁰⁴

5.40 There is also a Customer Councils State Co-ordinating Group, chaired by the State Commander, which meets on a needs basis to respond to issues raised by region commanders.

5.41 Customer Councils are stated to have benefits so far as they:

- allow police to work together with the community on proactive policing;
- allow police to become part of the community's formal and informal networks;

⁵⁹⁸ J. K. Avery RCT, 6/12/94, p. 111.

⁵⁹⁹ NSW Police Department, *Report of the NSW Police Department 1984-85*, p. 35.

⁶⁰⁰ The 1987-88 Annual Report noted that for the first time there had been no complaints to the Gay Liaison Officer, the Police-Gay Liaison Group or the Anti-Discrimination Board from members of the gay community about the police (NSW Police Department, *NSW Police Annual Report 1987-88*, p. 57).

⁶⁰¹ NSW Police Department, *Report of the NSW Police Department 1984-85*, p. 35.

⁶⁰² In 1992, the NSW Premier, John Fahey, launched a whole of Government initiative aimed at developing a 'sharp customer focus' throughout the public sector. Under the initiative, agencies were required to develop and publish a guarantee or charter of service and to establish customer councils, which were suggested to provide an important link between agencies and their clients (see Office of Public Management, Documents re establishment of Customer Councils, RCPS Exhibit 5999/59. As part of its response to this initiative, the NSW Police Service changed the name of Community Consultative Committees to Customer Councils and established Regional Customer Councils.

⁶⁰³ NSW Police Service, 'Customer Councils: Guidelines on the role and scope of Region and Patrol Customer Councils', March 1995, RCPS Exhibit 5999/28, p. 1.

⁶⁰⁴ *ibid*, p. 1. Regions have the option of forming two Councils (one metropolitan and one country).

- act as a forum for police to voice opinions about situations or issues of concern which community groups might be in a position to alter and vice versa;
- provide police with feedback during the development of programs and policies which affect the community.⁶⁰⁵

5.42 The Service has been largely responsible for selecting the public participants in the Customer Councils.

- In relation to Patrol Councils, it states that:

Ideally [they] should be a mixture of residents who are representative of the community in terms of age, ethnicity and Aboriginality; people who work in the area, people who have an interest or contribution considered worthwhile, and representatives of government and non-government agencies and service and community organisations.⁶⁰⁶

- In relation to Region Customer Councils it states:

Regions should identify their major customer groups and include experience or involvement with an identified group as part of the selection criteria.⁶⁰⁷

The selection of Council chairpersons has been left to the Service:

Chairpersons are nominated by Council members and approved by Patrol or Region Commanders⁶⁰⁸

⁶⁰⁵ ibid.

⁶⁰⁶ ibid, p. 3.

⁶⁰⁷ ibid.

⁶⁰⁸ ibid.

5.43 The Patrol Customer Councils are described by the Service as having objectives to:

- provide commanders with a direct forum with representatives of the local community so their operations are enhanced and levels of customer satisfaction may be assessed;
- provide the local and regional community with the opportunity to participate in community-based policing.⁶⁰⁹

They are constituted as advisory bodies which do not have any decision-making authority.⁶¹⁰ In general their focus is limited to issues over which the Service has 'direct responsibility and control', and to local policing issues over which patrol and region commanders have jurisdiction (not 'global' or State-wide issues).⁶¹¹ It is expected, however, that 'should a *new* issue be identified which does have State-wide implications, it can be forwarded through the command structure to the State Commander'.⁶¹²

5.44 The focus of the Region Customer Councils is to:

- assist the Region Commander in ensuring that the overall concerns of the respective geographic community and its major customer groups are identified and that they are given an opportunity to provide input to the regional planning process;
- support the needs and activities of the Patrol Customer Councils in their region;
- provide feedback to Strategy and Review on the development of new programs and policies which affect the community.⁶¹³

5.45 The effectiveness of the Customer Councils in NSW has not been subjected to the same degree of external scrutiny, and evaluation, as has occurred with the committees in England and Wales,⁶¹⁴ although similar criticisms have been raised in suggesting that they are no more than public relations exercises, providing a facade of community consultation and input into policing.⁶¹⁵

5.46 The concept of community policing in New South Wales has been poorly defined and the extent of its implementation is debateable.⁶¹⁶ In that setting it is hardly surprising if, as seems to be the case, the aims of Customer Councils have not been clearly articulated.

5.47 The Service commissioned an evaluation of Customer Councils in 1993 which found that whilst some worked well, others had significant shortcomings.⁶¹⁷ The review found that the most significant success factor for these groups was the commitment of the patrol commander.⁶¹⁸ Where patrol commanders were enthusiastic about the initiative and tasked the councils to perform specific functions, they were effective; conversely, where commanders had little time for such arrangements, they failed. The review concluded that the groups worked best when they possessed an 'action focus', that is, when they were clearly task-oriented and focused their resources and their networks on achieving a specific result.⁶¹⁹

Other Consultation Mechanisms

⁶⁰⁹ *ibid.*, p. 1.

⁶¹⁰ *ibid.*

⁶¹¹ *ibid.*

⁶¹² *ibid.* (emphasis in original).

⁶¹³ *ibid.*, p. 2.

⁶¹⁴ NSW Police Service, Workforce Agenda, Research Paper: The future of policing, 22/5/96, RCPS Exhibit 2466/6, p. 35.

⁶¹⁵ M. O'Connor, 'Community policing in NSW', *Legal Services Bulletin*, vol. 13, no. 2, April 1988, pp. 52-55.

⁶¹⁶ NSW Police Service, 'Workforce Agenda: The future of policing', RCPS Exhibit 2466/6, 22/5/96.

⁶¹⁷ NSW Police Service, 'Evaluation of Community Consultative Committees: Summary Report' (conducted by Corporate Impacts Pty Ltd), July 1993, RCPS Exhibit 5999/60.

⁶¹⁸ *ibid.*, p. 13.

⁶¹⁹ *ibid.*, pp. 11 & 14.

5.48 Several other forms of community consultation/feedback arrangements are in place in NSW. Together they constitute a patchwork of strategies including:

- community attitude surveys;
- focus groups;
- neighbourhood (and similar) watch groups;
- safety audit groups; and
- liaison officers for specific social groups.

C. MODEL FOR REFORM

5.49 In its Second Interim Report, the Commission highlighted the importance of police community consultation as an integral part of the Service's community policing strategy:

There is a need to create an effective mechanism for broad-based community consultation and input at Patrol level. The Royal Commission wishes the Service to explore various local and overseas models for such consultation. While there are some examples of these already in existence, as well as special purpose consultative committees, there is a need to ensure that the community has a genuine opportunity to contribute in respect of issues of service, integrity, visibility, and the like ...

The Royal Commission also sees advantage in exploring the possibility of the Police Commissioner having access to a small band of representatives able to meet with him as part of a Commissioner's Advisory Group. Although this group would not have statutory recognition, and would be advisory only, significant matters arising from Patrol consultation could be placed on its agenda.⁶²⁰

5.50 In his evidence, Commissioner Ryan acknowledged that Customer Councils have operated with variable success.⁶²¹ He expected that in future, community consultation should occur at two levels:

- Patrol level; and
- Commissioner level.

5.51 At patrol level he expected that each patrol should have 'a robust community council truly reflective of the community which that patrol is responsible for policing'.⁶²² The performance of patrol commanders he foreshadowed would be assessed in relation to the success of community consultation in their area of command.⁶²³

5.52 In addition, Commissioner Ryan said that he needed: '... a group of people whom I can turn to and discuss my ideas about policing from a strategic sense.'⁶²⁴ He referred to the recently established Police Aboriginal Council and the Police and Ethnic Communities Advisory Council as examples of the type of advisory bodies he had in mind.⁶²⁵ Commissioner Ryan stated that in addition to these special needs councils, he required community advice in relation to:

- management issues, including human resources, accounting, management planning, objective setting, performance measures, quality assurance and so on; and
- community concerns about policing generally.⁶²⁶

⁶²⁰ RCPS, *Second Interim Report*, November 1996, p. 13.

⁶²¹ P. J. Ryan, RCT, 19/11/96, p. 34558.

⁶²² *ibid.*

⁶²³ *ibid.*

⁶²⁴ *ibid.*

⁶²⁵ P. J. Ryan, RCT, 19/11/96, pp. 34558-59.

⁶²⁶ *ibid.*

5.53 In developing a suitable model, it is necessary to incorporate the following key features:

- Openness: the Service needs to be open in its dealings with the community and responsive to their needs;⁶²⁷
- Recognition of social diversity: this is critical in a multi-cultural society such as NSW;
- Clearly articulated purposes: without identifying and communicating the purpose and objectives of consultation, little will be achieved;
- Recognition of the need for different consultation mechanisms to meet different aims in different localities: again, this is critical for a Service which polices a community which is partly urban and partly rural and in many cases, richly multicultural; and
- Evaluation, review and modification: communities and their needs change over time and consultation mechanisms must be altered accordingly.

Taking these matters into consideration, the Commission proposes the following model which broadly reflects the objectives of Commissioner Ryan to achieve consultation at patrol level and at a higher level.

PATROL LEVEL CONSULTATION

5.54 The experience with community consultation groups in England and Wales has demonstrated that committees which set out to be representative of the total community are rarely effective, and that consultation mechanisms should be adapted to particular purposes and local needs.

5.55 The Royal Canadian Mounted Police (RCMP) has had a similar experience. In 1995 it reported upon the effectiveness of community consultative groups as part of its review of the implementation of community policing.⁶²⁸ They were found to be ineffective and unproductive in many instances:

- a common concern was that the mandate, roles and responsibilities of the groups were not well understood, defined or explained;
- police and community members each pointed to the difficulties of formal committees and suggested that they would have preferred the use of informal networks for consultation, especially in rural areas;
- membership of the groups was found to be unrepresentative of the broad community, and members often expressed dissatisfaction with the lack of direction and group focus; and
- a key factor in many communities was an absence of serious crime and/or social issues that might serve as motivation for their continued participation.⁶²⁹

5.56 The review team reported that the RCMP directive that each detachment establish a consultative group,

... was viewed by [police officers] as just another example of a headquarters directive with no apparent consideration of the demographics and culture of individual communities. There was very little flexibility in the policy and, therefore, detachments complied by assembling people whether there was a demonstrated need or not.⁶³⁰

⁶²⁷ 'An openness by the police to the ideas and inputs of the community they serve is an integral part of change which will occur both in terms of community confidence and acceptance; and, in accountability of those who are intended to be at the forefront of society's protection', UNSW Police Policy Research Unit, 'Police and the community: the necessity for change', S Submission to RCPS, August 1996, RCPS Exhibit 2809/112, p. 81.

⁶²⁸ RCMP, Audit, Evaluation and Corporate Services Directorate, 'Community policing review report', January 1995, RCPS Exhibit 5737/4.

⁶²⁹ *ibid.*, p. 6.

⁶³⁰ *ibid.*, p. 6.

As a result it found that:

- many consultative groups were struggling to survive;⁶³¹
- their effectiveness was essentially a matter of pot luck - productive and effective groups were directly attributable to the leadership of the commander and the individual officers and citizens involved.⁶³²

5.57 The Commission has taken careful note of these experiences and of the successes which some specifically targeted groups have had in New South Wales in dealing with local problems.⁶³³

5.58 Although recognising that the development of suitable community consultation is very much a matter for the Service, this Commission suggests that careful consideration be given to a program in which:

- an audit/review is made of formal consultative arrangements currently in place in each patrol;
- each patrol identifies for itself the problems and the outcomes specific to its area which would benefit from consultation. This should be carried out in conjunction with the Region Commander to ensure that the patrol approaches the task in a way that is consistent with overall Service goals and objectives;
- each patrol develops, in the light of this review, the mechanisms most suitable for meeting its needs and aims, for example, continuation of Customer Councils, establishment of short-term committees to address specific issues, establishment of a standing committee for community groups with special needs, community safety audits, surveys, and focus groups;
- an effort is made to involve local government and local groups such as the Chamber of Commerce, in such councils or committees, in recognition of their central interest in crime prevention and control, and their ability to marshal community support and to provide policing support through council rangers and the like;⁶³⁴
- a mechanism is created for regular review and evaluation by the Region Commander of the consultation arrangements in place in each patrol. This is important in terms of avoiding the problem of 'sand box' policing,⁶³⁵ whereby a fragmented focus on local issues may obscure issues which transcend local areas. Central oversight should also allow for the development of case studies which may illustrate best practice, and assist other patrols in improving their own consultation packages; and
- arrangements are put into place so that the Police Commissioner can be kept informed of the outcomes of patrol consultation, report on them in the Police Service Annual Report and refer issues arising to the higher level consultation groups outlined below.

HIGHER LEVEL COMMUNITY CONSULTATION

⁶³¹ The Home Office similarly found in its review of police community consultative groups in England and Wales that meetings were often poorly attended: 'commonly, the public number in the low tens, and there have been cases where they have been outnumbered by the officials present. R. Elliot & J. Nicholls, 1996, op cit, p. 10.

⁶³² RCMP, Audit, Evaluation and Corporate Services Directorate, 'Community policing review report', January 1995, RCPS Exhibit 5737/4, p. 7.

⁶³³ eg. in the country town of Murwillumbah, a consultative committee was formed in 1994 to deal with the problem of homeless children living in public places. As a result of the work of this committee, accommodation and staffing for a youth refuge was acquired, and the number of children sleeping in public areas, and the number of associated public complaints has declined. UNSW Police Policy Research Unit, 'Police and the community: The necessity for change', Submission to RCPS, August 1996, RCPS Exhibit 2809/112, pp. 67-69.

⁶³⁴ UNSW Police Policy Research Unit, 'Police and the community: The necessity for change', Submission to RCPS, August 1996, RCPS Exhibit 2809/112, pp. 67-69.

⁶³⁵ B. N. Leighton, 'Visions of community policing: rhetoric and reality in Canada', *Canadian Journal of Criminology*, July/October 1991, p. 509.

Advisory Councils for Groups with Special Needs

5.59 In addition to the Police and Ethnic Communities Advisory Council, and the Police Aboriginal Council chaired by the Police Commissioner and comprising senior members of the Service and representatives of peak ethnic and Aboriginal organisations, the Service has established other consultative committees or working parties which are chaired by senior executives. These include:

- the Victim Standing Committee;
- the Child Protection Inter-agency Committee;
- the State Commander's Gay and Lesbian Working Party; and
- the State Commander's Youth Working Party.⁶³⁶

5.60 The existence of these committees or working parties is consistent with the shift of focus of Advisory Councils to a problem-oriented role. The Commission accordingly supports their retention and expansion, as necessary, if further community groups with special needs emerge.

5.61 Additionally, the Commission recommends that:

- the Service give consideration to entering into formal Memoranda of Understanding (MOUs) with such committees in order to ensure that the purposes, desired outcomes, procedures for the conduct of meetings and so on are clearly understood by all members and the broader community; and
- the progress and outcomes of committee work be reported upon in some detail in the Police Service Annual Report.

Advisory Councils for Strategic Advice

5.62 A high level community advisory council could provide considerable assistance to the Commissioner in bringing independent advice, creativity and a broader community perspective to policing issues. There are two main options:

- the establishment of an on-going council comprising representatives with demonstrated expertise in relevant fields, for example, management, finance, justice, criminology, human resources, and education and training; and
- the establishment of a pool of people with expertise in relevant fields from which committees could be formed on a needs basis.

⁶³⁶ NSW Police Service, Community Consultation - Reform of the NSW Police Service, RCPS Exhibit 5999/28, Doc. 2548917.

Option 1: Strategic Police Community Advisory Council

5.63 Under this option, a standing Council would be formed, chaired by the Police Commissioner and composed of community members selected on the basis of their experience or expertise and including members of agencies such as the PIC, the ICAC and the Ombudsman. The central function of the Council would be to provide strategic advice on issues related to policing in NSW.

5.64 Under this option, the Council would perform an advisory function, be supported by a secretariat and issue reports (public or confidential) on its consideration of issues. The Police Service should report in some detail upon the work of the Council in its Annual Report.

5.65 The strength of this approach is that:

- it would establish a multi-disciplinary group of people who could develop a working relationship through their regular participation in meetings and associated activities;
- as a standing body, the Council could maintain oversight of the whole system; and
- such a group could act as an independent check on the power of the Police Commissioner.

5.66 The weakness is that:

- in relation to many issues, there would be only one Council member with expertise in the relevant field, which could lead to ill-informed or biased debate;
- an ongoing committee may be more likely to lose focus and momentum;
- it involves a degree of formality and size that may make it unwieldy; and
- it is likely to attract political appointees.

Option 2: Pool of Community Experts to Provide Strategic Policing Advice

5.67 Under this option, a pool of people with expertise in relevant fields would be established, from which separate committees could be formed on a needs basis, chaired by the Commissioner or his representative, to address particular issues. Committees could be multi-disciplinary in nature or composed almost entirely of experts from a particular field, depending on the issue.

5.68 Again it would be appropriate for the committees to be supported by a secretariat within the Service, and to exercise an advisory function only. Reports (public or confidential) would be expected from the committees and the Service would similarly report in some detail upon their work in its Annual Report.

5.69 The strength of this approach is that:

- it would establish specialised committees to work on specific issues, which would be better informed and more focused than a standing multi-disciplinary Council;
- different committees could be formed simultaneously to consider different issues, which could be a more effective approach in providing advice to the Service.

5.70 The weakness of this approach is that some fragmentation might occur in that the committees would not possess oversight of the whole system.

5.71 This Commission is of the view that the second of these options would provide the better solution. What is required is a means by which the Police Commissioner can access people who are successes in their own right, have relevant expertise, are not politically aligned, and who would

accept the appointment as altruistic citizens for the purpose of assisting police to service the community to best advantage.

5.72 That is best achieved by focusing the Advisory Committees on specific matters of importance to the Service. Within such a framework they are likely to be able to provide a prompt response, and develop a strong working relationship, free of sectional or political pressures.

5.73 It would be appropriate to remunerate the members on a modest time consultancy or allowance basis, at their option, and depending on the extent of commitment involved. It would also be appropriate for the members of the Advisory Committee to be appointed by the Police Commissioner in consultation with the Minister, and for each Committee to include one member of the Ministry for Police. Minutes of their meetings should be provided to the Minister.

5.74 One such Committee which the Commission considers should be established as soon as possible is an Advisory Committee on Police Education, to examine the important matters identified in Chapter 3 of this Report.⁶³⁷

5.75 Later in this Report⁶³⁸ the Commission examines the need for ongoing oversight and review of the reform process. This is regarded as a critical part of the package needed to bring about radical change to the Service, which although driven from within, must be subject to external monitoring, assistance and modification if it falters at any step. The recommendations which this Commission makes are set forth in that section of the Report.

⁶³⁷ See Volume II, Chapter 3 of this Report.

⁶³⁸ See Volume II, Chapter 9 of this Report.

RECOMMENDATIONS

The Commission recommends:

Local Consultation

- ◆ A review be undertaken within each patrol to examine:
 - its existing community consultation arrangements; and
 - the problems and outcomes specific to its area that would benefit from community consultation (para. 5.58).
- ◆ In the light of such review, each patrol commander, in consultation with the region commander, put into effect such form of Community Consultative groups or strategies for community feedback as best meet its needs (para. 5.58).
- ◆ In establishing such arrangements there be close consultation with local government and other bodies such as the local Chamber of Commerce, to ensure that there is effective community contribution to local policing (para. 5.58).
- ◆ The effective establishment and use of community consultation be regarded as an important aspect in the ongoing assessment of the performance of patrol and regional commanders (para. 5.58).
- ◆ Patrol commanders report to the region commanders and to the Police Commissioner on the use of community consultation in their patrols, and the Commissioner report on this matter in the Annual Report to the Minister (para. 5.58).

High Level Community Consultation

- ◆ The Service retain the existing Standing Consultative Committees (paras. 5.59 - 5.60).
- ◆ A secretariat be formed to support these Committees (paras. 5.64 & 5.68).
- ◆ The Police Commissioner report on an annual basis to the Minister in relation to the working of these Committees (paras. 5.61, 5.64 & 5.68).
- ◆ In addition the Commissioner establish specific advisory committees as appropriate, in consultation with the Minister, comprised by experts in the relevant fields (paras. 5.62 - 5.70).
- ◆ The Commissioner establish as an urgent priority, a Standing Advisory Committee on Police Education (para. 5.74).

- ◆ The members of the Advisory Committees be appointed by the Police Commission in consultation with the minister, each Committee to include one member of the Ministry for Police (para. 5.73).
- ◆ The Committees keep minutes of their meetings, and forward copies of these minutes to the Minister (para. 5.73).

CHAPTER 6

INTERNAL WITNESS SUPPORT PROGRAM

A. HISTORY

6.1 A review of the efficacy of the Internal Informers Policy⁶³⁹ of the Service (as it was then known) was made an express term of reference of this Royal Commission.⁶⁴⁰ The current scheme, introduced in 1995, has brought considerable change in the arrangements for the support of internal informers, now called internal witnesses.⁶⁴¹

THE INTERNAL INFORMERS POLICY - 1994

6.2 In June 1993 the Police Service began to develop a program, previously lacking, to provide support for internal witnesses. At that time the ICAC Milloo investigation was looking at the cases of several whistleblowers, including Sergeant Kimbal Cook who gave an account of significant harassment following his report of the misconduct of colleagues.⁶⁴²

6.3 The Internal Informers Policy was launched in February 1994. Its aims were to:

- ensure that all police are aware of, and have access to, the support processes available for internal informers;
- ensure all officers and commanders are aware of their responsibilities with regard to internal informers;
- improve the understanding of the need for police to be aware of the conduct of their colleagues.⁶⁴³

An 'internal informer' was defined as:

Any person employed or engaged by the Police Service who, of his/her own volition, provides information alleging corruption, maladministration, substantial waste, or other misconduct by another member of the Police Service.⁶⁴⁴

6.4 The policy required all information supplied by an internal informer to be passed on to the Commander, Professional Responsibility whereupon:

- the Office of Professional Responsibility would identify and give consideration to the informer's interests; and
- the Commander, Professional Responsibility, became responsible for ensuring that the internal informer was allocated a mentor and case officer, and was referred to the Internal Informers Support Group.

⁶³⁹ Internal witnesses are alternatively referred to as 'whistleblowers' and 'internal informers'. As the preferred term is now 'internal witnesses' this chapter will use that term unless referring to the situation prior to the current Internal Witness Support Program or where the term 'whistleblower' is appropriate in the circumstances.

⁶⁴⁰ Letters Patent, 13/5/94, sub para. (e).

⁶⁴¹ C. J. Smith, Statement to RCPS, 24/9/96, RCPS Exhibit 5785.

⁶⁴² Assistant Commissioner J. Jarratt's directive calling for the preparation of a draft policy on whistleblowers was written on a memorandum concerning an application made by Kimbal Cook for reimbursement of expenses incurred in relation to the security of himself and his family. The previous day the ICAC had served a Notice on the Police Service asking for details of policy and guidelines concerning the subject matter of the Cook application. - Assistant Commissioner J. Jarratt, Notice No. 352 of 1996 and response dated 30/4/96, RCPS Exhibit 5791.

⁶⁴³ C. J. Smith, Statement to RCPS, 24/9/96, RCPS Exhibit 5785, Annexure 1, J. M. Bennett Consulting Services P/L, *Final Report - Post Implementation Review of the NSW Police Service Internal Informers Policy*, January 1995, Appendix A, NSW Police Service, *Internal Informers Policy*, p. 5.

⁶⁴⁴ *ibid*, p. 5.

6.5 The introduction of the Internal Informers Policy was commended by the ICAC Commissioner Ian Temby in the Second Volume of his Report.⁶⁴⁵ He recommended that it be evaluated at the end of 1995. Shortly after the publication of that Report this Commission was established. In the course of the debate in May 1994, which led to the establishment of this Commission, continuing concerns were voiced about the treatment of 'whistleblowers'.⁶⁴⁶ In particular, Independent MP Mr John Hatton questioned Police Service treatment of several internal witnesses and the effectiveness of the Internal Informers Policy.

THE BENNETT REVIEW

6.6 In late 1994, the Police Service undertook a review of the effectiveness of the Internal Informers Policy. A firm of consultants, J. M. Bennett Consulting Services Pty Ltd, was engaged to conduct a survey and to report.

6.7 As part of the review process:

- a telephone survey was conducted of 100 randomly selected Service personnel.
- a questionnaire was mailed to 50 registered internal informers (only 18 responded); and
- a questionnaire was mailed to 42 mentors and 40 case officers (48 responses were received).

The results of this evaluation were published in January 1995.⁶⁴⁷

6.8 The key findings published in the Executive Summary of the Bennett Review were as follows:

- Just over half the general police service personnel are aware of the existence of the Policy. Their understanding of its aims is superficial, and the level of interest is low;
- The support provided under the Policy ... has failed to meet the expectations of the majority of registered internal informers. Many have experienced continuing harassment ... have not received adequate moral support from their commanders and in some cases their requested anonymity had not been preserved. They also dislike being called "internal informers";
- The support provided by nominated mentors and case officers ... in the main, consisted of listening and empathy. Whilst this support has been valued, the opportunity (and expectation) exists for more proactive initiatives to be taken by support personnel;
- A number of problems occurred due to a generally poor level of communication between internal informers, support personnel and the Office of Professional Responsibility. Clear communication procedures have not been established, and the satisfaction of internal informers has not been monitored. This was due in large part to the under-resourcing of the Policy unit;
- The Office of Professional Responsibility faces a conflict of interest between its responsibility to investigate complaints and its role in managing the support of internal informers;
- Some internal informers are critical of the speed and effectiveness of the investigation into their complaints, and these views are exacerbated by the fact that they were generally kept in the dark. Regular briefing on the progress of the investigation is one of their strongest needs; and
- The effective implementation of the Policy presents a formidable challenge. The Commissioner and Deputy Commissioner have an important role to play in establishing the credibility of the Policy, by giving it their strong personal support and endorsement.⁶⁴⁸

⁶⁴⁵ ICAC, *Investigation into the relationship between Police and Criminals, Second Report*, ICAC, April 1994, pp. 62-65.

⁶⁴⁶ NSW Parliament, *Hansard*, 11/5/94, pp. 2286-97.

⁶⁴⁷ C. J. Smith, Statement to RCPS, 24/9/96, RCPS Exhibit 5785, Annexure 1, J. M. Bennett Consulting Services P/L, *Final Report - Post Implementation Review of the NSW Police Service Internal Informers Policy*, January 1995.

⁶⁴⁸ *ibid*, p. i.

THE INTERNAL WITNESS SUPPORT PROGRAM - 1995

6.9 As a result of the Bennett review a new policy was introduced in March 1995, the significant changes including:

- transfer of the administration of the policy from the Professional Responsibility Command to the Human Resources Command;
- change of the title 'internal informer' to 'internal witness' and broadening of the definition of internal witness to include persons who provide information alleging corrupt, or other wrong conduct, while being questioned as part of an investigation;⁶⁴⁹
- change of the title of the policy to the Internal Witness Support Program;
- establishment of an Internal Witness Support Unit (IWSU); and
- fast tracking in appropriate cases by the Office of Professional Responsibility of the investigation of information provided by internal witnesses.

6.10 An Internal Witness Advisory Council was also established to provide advice on the development and maintenance of the program. Membership of the Council includes representatives from the Ombudsman, the St James Ethics Centre, Whistleblowers Australia Inc., and the ICAC.

6.11 Support has been supplemented by the availability of a corruption hot line with a 1800 number, and by the establishment of Professional Standards Councils within a large number of patrols. If implemented properly, each provides an avenue for practical advice and guidance in dealing with potential matters of concern.

6.12 The broadening of the definition of 'internal witness' was sensible. The present policy embraces not only whistleblowers in the conventional sense, but also provides encouragement for those who may otherwise have been reluctant to inform on their colleagues even when drawn into an internal investigation. It has been commonplace for police to lie in the course of internal inquiries in order to protect fellow officers. It can take considerable courage to withstand the pressure not to do so. Officers who are truthful in the course of internal inquiries, and who thereby disclose their knowledge of corrupt practices involving others, are deserving of the support of the Service.

6.13 In broad summary, where a person now qualifies as an internal witness, the procedures applicable and the support available involve the following:

- the commander of the IWSU is notified of each internal police complaint. Once a complainant is assessed as being an internal witness the file is allocated to a case officer within the Unit. The case officer makes contact with the witness and briefs him or her about the program and the Unit;
- the case officer seeks any further information so that a full assessment can be made of the complainant's suitability for assistance under the program;
- the commander of the IWSU sends a report to the Executive Director, Human Resources notifying the complainant's status under the program. Staff are not placed on the program without their consent;
- the case officer asks the witness to nominate a mentor and a support officer. The mentor is a senior officer available to provide support and positive reinforcement to the witness. The support officer provides support to the witness at the work location. In cases where the

⁶⁴⁹ *ibid*, pp. 5-7.

witness prefers support to be provided solely by the IWSU, a case officer within that Unit assumes the role;

- the proposed mentor and support officer are briefed about the program and provided with briefing notes by the IWSU case officer. They are encouraged to make an informed choice about whether they are willing to take on the role;
- support officers and mentors submit 'command line file notes' directly to the IWSU case officer;
- the IWSU maintains a computer file on all registrants. The computer system used within the IWSU is secure and confidential;
- each file is reviewed periodically at which time the case officer makes personal contact with the witness; and
- there are also regular reviews to ensure that the Unit is tailoring its response on a needs basis.

The Unit has thus far shown itself able to respond promptly to concerns raised by internal witnesses and to provide practical support.

B. THE COMMISSION'S INQUIRIES

THE PERSPECTIVE OF THE INTERNAL WITNESS

6.14 The Commission approached the investigation of this area of its terms of reference conscious of the fact that many registrants, under the previous Policy, were sensitive to preserve their confidentiality. A number had been unhappy with the designation 'internal informer' which they considered pejorative. In some cases they feared that their identification as internal informers would lead to reprisals and harassment. Some felt they had merely done their duty in reporting misconduct and did not wish further attention focused on them.

6.15 In the light of these concerns, the Commission proceeded to address this term of reference by first examining the files of all registrants under the Policy and then by repeating the exercise per registrant under the current policy. In appropriate cases, contact was made with the individual and consent to an interview sought.

6.16 At the date of the commencement of the Internal Witness Support Program in March 1995, there were 55 persons who were, or had been, registered as internal informers under the original Internal Informers Policy. Thirty seven of these officers were interviewed by the Commission. Eight were called to give evidence orally and the statements of 25 were tendered as confidential exhibits.⁶⁵⁰ The files of all registrants under the Internal Informers Policy are confidential exhibits.⁶⁵¹

6.17 Thirty registrants under the current Internal Witness Support Program were interviewed by Commission staff and 22 gave oral evidence at Commission hearings. A number of officers who gave evidence before the Commission as to their knowledge of corrupt conduct involving colleagues also came to be registered under the new program. In such cases the trigger for their registration was the assistance they provided to the Commission, and it is this circumstance that explains the relatively larger number of registrants under the present program, who gave evidence orally.

⁶⁵⁰ NSW Police Service Internal Informers Files, RCPS Exhibit 5786'C'.

⁶⁵¹ *ibid.*

6.18 An expectation of police which emerged from Commission inquiries was of becoming:

- ostracised at work and excluded from social functions;⁶⁵²
- the butt of practical jokes and/or malicious destruction of property;⁶⁵³
- the subject of threatening and offensive letters and telephone calls;⁶⁵⁴
- the subject of payback complaints often of a trivial kind, brought by officers under investigation or their associates or by the Service itself, seemingly as an institutional response to any embarrassment caused;⁶⁵⁵ or
- confined to meaningless work, transferred, or given the worst rosters.⁶⁵⁶

6.19 Several internal witnesses also described to the Commission their very real fears that:

- if they found themselves in trouble on duty, they would not receive assistance from other police;⁶⁵⁷
- the information they provided would not remain confidential, with the result that it would soon leak back to those whose misconduct they reported,⁶⁵⁸ and
- their reputation would follow, if not precede them in any subsequent posting.⁶⁵⁹

6.20 As a consequence of these very practical considerations, and of a general acceptance of the proposition that 'blowing the whistle' on other police was seen as an act of irretrievable treachery and disloyalty, most witnesses expected that they would never be free of the consequences of doing so, and that as a 'misfit', even if they survived the immediate stress of the internal inquiry, they would eventually be forced out of the Service or effectively frozen at their current rank in unfulfilling work. If there needed to be any independent or further verification of the evidence received in relation to the foregoing, it was supplied by the many letters, submissions and telephone calls received anonymously from members of the Service who refused to supply their names out of fear of the consequences.

6.21 The damaging effect that past deficiencies in the management of internal witnesses has had on the Service cannot be overstated, nor can the risks, seemingly unappreciated, which such deficiencies pose for those members, otherwise honest, who have in the past declined to speak up. In summary, silence in those circumstances is a stance that:

- places self interest above all;
- taints the reputation of the Service;
- jeopardises the safety of the officer who comes into contact with a criminal who has been stood over or let down by a corrupt member of the Service, one time too many;
- exposes otherwise honest police to the risk of external complaint and subsequent involvement in a stressful internal inquiry;

⁶⁵² D. L. Locke, RCT(U), 8/5/96, pp. 2297-98; CP2, RCT(U), 18/4/96, p. 1687; HW1, RCT, 8/12/95, p. 17301; W. Hatfield, RCT(U), 25/9/96, p. 7478; P. G. Dunkley, RCT, 20/2/95, p. 1993.

⁶⁵³ JR, RCT(U), 16/7/96, p. 5380; M. B. Feeney, RCT(U), 10/7/96, pp. 5159-60.

⁶⁵⁴ JR, RCT(U), 16/7/96, p. 5382; C. B. Mooney, RCT, 24/2/95, pp. 2363-64 & 8/3/98, pp. 3139 & 3161-62.

⁶⁵⁵ D. L. Locke, RCT(U), 8/5/86, pp. 2279-86; H, RCT(U), 17/5/96, pp. 2804-13; K. C. Jurotte, RCT(U), 26/6/97, p. 4263; M. B. Feeney, RCT(U), 10/7/96, pp. 5164-65; Investigation Report of Inspector A. W. Dick, into allegations made by and against Senior Sergeant K. C. Jurotte, 20/4/94, RCPS Exhibit 5500.

⁶⁵⁶ D. L. Locke, RCT(U), 8/5/96, p. 2272; K. C. Jurotte, RCT(U), 26/6/96, p. 4256.

⁶⁵⁷ DD, RCT(U), 31/5/96, pp. 3742-43.

⁶⁵⁸ AW, RCT, 10/4/96, p. 23227; T. D. Haken, RCT, 9/10/95, p. 14326.

⁶⁵⁹ WS13, RCT, 29/2/96, p. 20960; R. C. Shepherd, RCT, 12/11/96, pp. 34173-74.

- is not overlooked by the corrupt who can only gain confidence that they are unlikely to be detected in their wrongdoing; and
- has possibly been the single most important brake on internal investigations to date, it having been accepted philosophy that it is virtually impossible to gain the assistance of honest police let alone to turn and use a corrupt officer against other police.

ASSESSMENT OF THE 1994 POLICY

6.22 It was because of the importance of this term of reference, notwithstanding the earlier ICAC Inquiry, the Bennett Review and the 1995 changes, that the Commission was keen to identify by reference to the earlier Policy the practical problems likely to be encountered with any policy for the protection of internal informants.

6.23 Generally speaking it emerged that this policy did not achieve its objective of providing support and positive reinforcement to internal witnesses. Many registrants interviewed by the Commission described a feeling of alienation from the organisation as a result of their actions. The needs of each differed widely from case to case, depending on individual circumstances and personality. However, the most conspicuous needs were for:

- more personal contact at an early stage;
- greater support from supervisors at patrol level; and
- support from the hierarchy, so that the internal witness might feel that his or her action had been noted and appreciated by the organisation.

6.24 Many internal witnesses felt as though they had been left out on a limb in an organisation which did not appreciate people who spoke out and rocked the boat. For many the notion of being labelled an 'informer' or 'whistleblower' caused additional stress. They were nervous about their name being on a list and the use to which such a list could be put in the organisation. These fears could have been dispelled had there been:

- more personal contact in the initial stages; and
- an explanation given to registrants on the policy, its background, objectives and benefits.

Neither occurred. Instead the policy was viewed by the registrants as no more than a hollow gesture, the work of faceless administrators.

6.25 Some registrants informed the Commission that they were placed on the policy without their knowledge. For them the receipt of the survey sent out by Bennett Consulting in November 1994 as a part of the review process was the first inkling they had of being included within it.⁶⁶⁰

6.26 Many registrants under the original policy, particularly those in country patrols, reported that they were given no choice as to who their mentor would be. Frequently they were senior officers from other towns whom they had never met.⁶⁶¹

6.27 Some of those who were aware that they were on the program reported there was virtually no communication from the Service prior to the delivery of the survey.⁶⁶²

6.28 It also appeared that, even in the case of those registrants who were aware they had been put on the program, no consultation took place as to whether they actually wanted to be registered as an 'internal informer'.⁶⁶³

⁶⁶⁰ Statements of internal informers/witnesses, RCPS Exhibit 5789C.

⁶⁶¹ *ibid.*

⁶⁶² *ibid.*

6.29 Many registrants reported no contact from their mentors and case officers.⁶⁶⁴ This was not necessarily the fault of the mentors and case officers as they were not given sufficient instruction about their responsibilities. Some received telephone instruction or pamphlets and nothing more by way of guidance as to the role they were to perform. This was not adequate. Advice about the aims and objectives of the policy was lacking all round.

6.30 The receipt through the post of the Bennett survey proved an affront to many of the registrants who were alarmed:

- first, that correspondence identifying them as internal informers was sent through the ordinary post, in some cases incorrectly addressed;⁶⁶⁵ and
- second, that they were asked to answer a series of very personal questions and return the questionnaire, not to Professional Responsibility, but to a firm of independent consultants.

6.31 Many registrants did not respond because of fears about confidentiality or because of resentment at the impersonal way the subject was being handled.⁶⁶⁶

6.32 It is important that the lessons of these deficiencies are learned and that the IWSU continues to receive a level of support sufficient to enable it to maintain personal contact with registrants, and the capacity to intervene quickly and effectively on their behalf when the need arises. It is also important to recognise that the wish of registrants for confidentiality is very strong and must be approached on a common sense basis.

PROBLEMS TO BE ADDRESSED

The Police Culture and Internal Witnesses

6.33 There was a body of evidence to suggest that, most of all, internal witnesses fear harassment and ostracism as a result of reporting the misdeeds of their colleagues. While the Commission has no doubt that this fear is genuine, and is part of the folklore of the Service, it is the fact that not all internal witnesses are subjected to harassment. Of the 24 registrants under the original Internal Informers Policy who supplied statements to the Commission, half reported no harassment or victimisation as a result of their actions.⁶⁶⁷

6.34 The Commission does not consider there is any basis for concluding harassment of registrants is any more widespread under the present policy. Indeed, there are indicators that it is lessening.⁶⁶⁸ In a number of instances where harassment was evident, early intervention by the IWSU appeared to have achieved a satisfactory result.⁶⁶⁹

6.35 The most common forms of harassment reported to the Commission were 'silent treatment'⁶⁷⁰ and ostracism at the station; stopping conversations and leaving the meal room when the informer walked in. Less common, but not unusual, were the drawing of cartoons and the writing of offensive messages on station noticeboards, toilet walls or documents. Also, a number of informers reported requests by colleagues to be rostered on different shifts because they did not wish to work with the informer. Less frequently, property was damaged or stolen at stations. There were two reported instances of serious damage to motor vehicles.

⁶⁶³ *ibid.*

⁶⁶⁴ *ibid.*

⁶⁶⁵ *ibid.*

⁶⁶⁶ *ibid.*

⁶⁶⁷ *ibid.*

⁶⁶⁸ See the evidence of a number of young police codenamed CP1-CP6 called before Commissioner Urquhart on 18/4/96.

⁶⁶⁹ Statements of internal informers/witnesses, RCPS Exhibit 5789C.

⁶⁷⁰ G. J. Wheadon, RCT, 21/2/95, p. 2109.

6.36 In most instances this form of harassment could have been prevented by an exercise of leadership on the part of commanders who should have taken strong action when they became aware of harassment taking place. The former policy imposed a clear responsibility upon commanders to offer support and protection to internal witnesses. They were required to maintain an environment in which officers might come forward as internal witnesses and receive the support and protection of their superiors.⁶⁷¹

6.37 It was, however, evident that some commanders were quite unaware of those responsibilities or, at best, indifferent in carrying them out. Chief Inspector Wladimir

⁶⁷¹ C. J. Smith, Statement to RCPS, 24/9/96, RCPS Exhibit 5785, Annexure 1, J. M. Bennett Consulting Services P/L, *Final Report - Post Implementation Review of the NSW Police Service Internal Informers Policy*, January 1995, Appendix A, NSW Police Service, *Internal Informers Policy*.

Golowenko, who has spent years working in internal investigations, offered an explanation for the lack of leadership in this area:

They wanted to have a foot in each camp ... They wanted to be seen as being with the majority view ... outwardly [they] appeared to be in some way supporting the whistleblowers, I think the reality was that ... It was a show thing and the real true feeling was that they still shared the view of the majority and were part of that culture.⁶⁷²

6.38 In recent years Mr Golowenko considered that there had been a change for the better in the attitude to internal witnesses, particularly in respect of serious offences. However, in his opinion there remained a very strong negative view towards those who bring to notice lesser forms of corruption.⁶⁷³ His assessment as to the existence of a more positive climate today received support from the six young officers registered under the current Internal Witness Support Program who gave evidence of their experiences after reporting misconduct by more senior officers.⁶⁷⁴

6.39 The debilitating effect of silent disapproval of colleagues should not be underestimated. Former Detective Senior Constable Deborah Locke described it this way:

It's an ongoing thing - ... Continually going into the Police Credit Union is a stressful situation for me ... I don't know who I'm going to run into - People hear rumours. I'm seen as a dog, someone who has spoken out, and it's not what you do with the culture in the police force.⁶⁷⁵

6.40 It was of such a force that Detective Sergeant Peter Gallagher, an experienced Internal Affairs investigator, said that he would not expect a probationary constable to ever speak out against a senior officer.⁶⁷⁶

6.41 These perceptions gained support from the accounts of some of the internal witnesses interviewed by Commission staff. Thus one sergeant stated:

There was one sergeant at the station who ostracised me as a result of the matter and he encouraged a number of constables to do the same. This made it very difficult to perform my duties as a supervising sergeant because I simply did not have the loyalty of my staff. I know some constables approached the roster sergeant and asked not to work with me and the rosters were changed accordingly. Offensive remarks about me were written on the walls of the toilet and at one stage the sergeant in question told me I was "Nothing but a shithead".⁶⁷⁷

Medical Discharge

6.42 Inspector Wayne Chapman (retired) was attached to the IPSU between May 1988 and May 1992 and worked with several internal witnesses. It was his evidence that, generally speaking, they ended up being medically discharged from the Service:

Well, I think that's just the culture. I think, once you do something like that, you can never be trusted again. That's the attitude of - no-one wants to work with an informant.⁶⁷⁸

6.43 As noted below, the Commission examined the cases of former Detective Senior Constable Deborah Locke and Senior Sergeant Ken Jurotte. Both brought to attention significant matters of wrongful conduct and both were deserving of the full support and encouragement of the Service. Both have since been medically discharged. This was also the fate of Sergeant Kimbal Cook. Another detective who gave evidence before the Commission implicating fellow officers in corrupt conduct has since been on prolonged sick leave and is now an applicant for medical discharge.

⁶⁷² W. Golowenko, RCT(U), 10/5/96, p. 2471.

⁶⁷³ W. Golowenko, RCT(U), 10/5/96, p. 2473.

⁶⁷⁴ See Volume I, Chapter 4 of this Report.

⁶⁷⁵ D. L. Locke, RCT(U), 8/5/96, p. 2298.

⁶⁷⁶ P. Gallagher, RCT, 5/4/95, pp. 5075-76.

⁶⁷⁷ Statements of internal informers/witnesses, RCPS Exhibit 5789C.

⁶⁷⁸ W. R. Chapman, RCT(U), 10/5/96, p. 2460.

6.44 Officers of integrity, drive and ability have tended to find that the pressures of being identified as an internal witness, and the resulting harassment and isolation, have led to an inability to continue their careers as police officers. This is a significant drain on the Service and a poor return for the investment in training an officer who has positively demonstrated integrity. It underscores the need to acknowledge the importance of the Internal Witness Support Program and Unit.

Payback Complaints

6.45 There was evidence that internal witnesses are at risk of being the subject of 'payback' complaints and disciplinary charges. Often these might be relatively trivial in nature,⁶⁷⁹ but sometimes they have far-reaching implications for the career of an officer.

6.46 The case of Ms Deborah Locke and Detective Senior Constable Harry Neyenhuis provides a graphic illustration of this. Ms Locke made a complaint about aspects of management of the Fraud Squad including the alleged abuse of travel allowances. Afterwards, she and Mr Neyenhuis, who was believed to have submitted an anonymous and supportive complaint, each became the subject of a complaint that they had similarly submitted a false travel allowance claim.⁶⁸⁰ The complaint was sourced to a former inspector who had been dismissed from the Service for improper associations with criminals, and who was the subject of allegations by Ms Locke as to an improper relationship with serving police. The complaint was made years after the events to which it related.⁶⁸¹ The officer handling the investigation acknowledged that it appeared to be a 'payback'.⁶⁸² Ultimately the Service determined not to proceed with any departmental charges against either Ms Locke or Mr Neyenhuis arising out of the travel allowance allegation.

6.47 It was not until 18 months after the complaint was made, however, that Ms Locke was advised of this outcome.⁶⁸³ In the meantime, it appears that the complaint and the delays in its investigation led to Ms Locke abandoning any hope of continuing a career in the Service.

6.48 The consequences for Mr Neyenhuis were similarly severe. In addition to the complaint concerning the travel allowance, he became the subject of an allegation relating to representations he had made in connection with the award of a Churchill Fellowship. This matter was the subject of a protracted investigation. The complaint was found sustained and Mr Neyenhuis was charged before the Police Tribunal. His Honour Judge Cooper, in dismissing the charges against Mr Neyenhuis some years later, observed:⁶⁸⁴

In fairness to the respondent, I should say at the outset, that I find both of the charges not proved. I would, however, go further in this particular case. The evidence establishes that the respondent is a person who has better than average ability and capacity within his work in the Police Service. The mere fact that two such serious allegations are made could affect his future career within the Service. To my mind it would be a shame if this were to occur, particularly as in my view, the charges are not merely not proved, I am satisfied beyond reasonable doubt that they are unfounded.⁶⁸⁵

6.49 In Mr Neyenhuis' case the impact of these complaints operated to the detriment of his career, causing him to lose the opportunity of appointment to the Fraud Enforcement Agency, a specialised unit for which his training had equipped him, and almost certainly delayed his promotion.

6.50 Apart from the capacity of such payback complaints to delay promotion, in the end they may be the final straw that brings a career to an end. These consequences are not unappreciated by the

⁶⁷⁹ eg. those made in relation to Senior Sergeant Jurotte - see paragraphs 6.65 - 6.99 of this chapter.

⁶⁸⁰ Report of Detective Inspector P. Neave, 30/6/94, RCPS Exhibit 5279.

⁶⁸¹ D. L. Locke, RCT(U), 8/5/96, p. 2283 - the complaint was made in January 1994 and related to events in October 1990.

⁶⁸² Report of Detective Inspector P. Neave, 30/6/94, RCPS Exhibit 5279, p. 6.

⁶⁸³ Letter from Assistant Commissioner G. Schuberg to Deborah Locke, 6/7/95, RCPS Exhibit 5280/3.

⁶⁸⁴ *Commissioner of Police v H. Neyenhuis*, Cooper DCJ, Police Tribunal of NSW, 22/11/95, RCPS Exhibit 5369.

⁶⁸⁵ *ibid.*

corrupt. Unless the Service has the capacity to react quickly and decisively it risks being used as a tool in their resistance to it.

6.51 The new IWSP has sought to deal with the issue of payback complaints. The Commander of the Unit has reported that:

Procedures have now been implemented concerning complaints against Internal Witnesses. When notified of such a complaint the Commander IWSU liaises with the Office of Internal Affairs Assessment Officer and the Office of the Ombudsman. A further assessment is then conducted taking into account all the circumstances in order to put in train the appropriate course of action. The course recommended includes the complaint being declined from the outset or preliminary inquiries conducted in preference to a full investigation into the matter.⁶⁸⁶

This approach is to be commended. Each case should be examined in the light of its own circumstances. The fact that a person is an internal witness should not provide an immunity against valid complaints. There should, however, be a ready means of disposing with vexatious complaints, and the making of such a complaint should activate the Commissioner's Confidence provisions.⁶⁸⁷ In some instances, it is appropriate to have regard to the fact that few will be motivated to come forward and report serious misconduct if to do so is to invite a microscope being taken to their past. In such cases it is appropriate to have regard to the greater public good in the exposure of major misconduct than instances of relatively minor transgressions.⁶⁸⁸

6.52 This is also a matter that invites a major shift in Service thinking and management of internal inquiries along the lines followed by the Royal Commission. In the past the Service has been distinctly uncomfortable in allowing any form of corrupt conduct to continue so as to permit a broad-based proactive investigation to occur. As soon as evidence has been gathered sufficient to charge an officer usually for a relatively minor even disciplinary offence, it has intervened and ended the investigation. Almost never has it contemplated rolling an officer, or offering any form of undertaking, inducement, or indemnity to expose a network of serious corruption.

6.53 This Commission takes the view that the Service should now be prepared, in consultation with the PIC, to employ these more innovative techniques as part of a carefully planned strategy that takes into account:

- the possibility of waiving prosecution for lesser criminal offences;
- the provision of witness protection and witness support while the matter is under investigation, or for so long as required; and
- dismissal or permitted resignation, or managerial intervention of an assisting witness, depending on the circumstances and seriousness of the case.

6.54 So far as any concern has been entertained in the past that Internal Affairs officers or commanders might themselves be accused of misconduct and subject to disciplinary charges or, worse, for not acting quickly or for suggesting favourable treatment for any individual officer, the independent participation of the PIC in developing an appropriate proactive inquiry should dispel such fears.

EFFICACY OF THE CURRENT POLICY

6.55 In making an assessment of the effectiveness of the former and current policies, the Commission derived considerable assistance from a most impressive witness, Detective Senior Constable Mark Feeney.⁶⁸⁹ As a detective attached to a suburban patrol, he had observed a series of

⁶⁸⁶ C. J. Smith, Statement to RCPS, 24/9/96, RCPS Exhibit 5785, p. 18.

⁶⁸⁷ *Police Service Act 1990*, s. 181D.

⁶⁸⁸ This was a matter acknowledged by Assistant Commissioner Nixon in the course of her evidence, RCT, 12/12/94, p. 429.

⁶⁸⁹ M. B. Feeney, RCT(U), 10/7/96, pp. 5138-96.

incidents which had led him to conclude that some detectives attached to the Licensed Dealers' Unit of the Major Crime Squad South had corrupt associations with pawnbrokers. He compiled a report setting out his observations and submitted it to his superiors. It came to be investigated by Professional Responsibility. Thereafter he suffered a degree of harassment including being subjected to a 'payback' complaint contemporaneously with the investigation, and his car was vandalised.⁶⁹⁰ His career stalled for a time as a result of his role as an internal witness. He also experienced a number of problems with the old program.

6.56 A number of the specific problems Mr Feeney faced have now been addressed, and he said that there had been a 100% improvement in the level of support provided to him by the new Internal Witness Support Unit. A practical illustration of this was the evidence he gave concerning his transfer. Sometime after the investigation of his complaint was completed an officer who had served in the Licensed Dealers' Unit won a promotion to a position in his patrol. There was no suggestion that this officer had been a party to any corrupt arrangement, however, it was understandable that Mr Feeney might feel uncomfortable at the prospect of reporting to that officer. He raised his concerns with the IWSU and it was able to arrange his prompt transfer to another station.

6.57 Similar instances of the IWSU arranging for the transfer of internal witnesses at short notice were reported to the Commission.⁶⁹¹ It is practical support of this kind which is important if the new program is to maintain its credibility. Apart from Mr Feeney, the majority of the remaining registrants from the original policy expressed satisfaction with their treatment under the current program.

Sanction

6.58 The need for a sanction to back up the current program is obvious. There is a legislative scheme, but it is not clear that there is an appropriate level of awareness of it. Two provisions are in point:

- Clause 32 of the *Police Regulation 1990* makes it a disciplinary offence for an officer to subject another to any detriment in retaliation for the first mentioned officer reporting misconduct in accordance with his or her duty to do so; and
- Section 206 of the *Police Service Act 1990*⁶⁹² makes it a criminal offence for a police officer to take detrimental action against another officer if that action is substantially in reprisal for the officer making an allegation of misconduct or criminal activity about one or more police officers.

6.59 Section 206 is in similar terms to section 20 of the *Protected Disclosures Act 1994*. The latter Act offers protection to public officials who make voluntary disclosures of corrupt conduct and maladministration within public authorities. Police officers are subject to a duty to report instances of misconduct.⁶⁹³ In this respect the introduction of section 206 ensures that they receive equivalent protection to that now afforded to other public official 'whistleblowers'.

6.60 So far as the Commission is aware, no officer has been charged with a disciplinary or criminal offence under either Clause 32 of the Regulations or section 206 of the Act, and it is doubtful whether their existence is widely known within the Service.

6.61 The Commission recommends that steps be taken to publicise within the Service, a clear understanding that payback complaints and harassment of internal witnesses can attract criminal sanctions and invocation of the Commissioner's confidence provisions.

⁶⁹⁰ M. B. Feeney, RCT(U), 10/7/96, pp. 5159, 5164-65. Although the offender has not been identified in respect of the latter incident, an inference is certainly open that it, too, was a reprisal.

⁶⁹¹ CP2, RCT(U), 18/4/96, p. 1688.

⁶⁹² This provision was introduced by amendment in December 1996.

⁶⁹³ Police Service Regulation 1990, cl. 30.

Reward

6.62 A further question which has been addressed in relation to the current policy is whether or not an officer should receive some form of official recognition for reporting the suspected misconduct or corruption of another officer. This is a vexed question:

- there is merit, on the one hand, in appropriate cases for formal recognition to be given for the actions of internal witnesses;
- on the other hand, a number of internal witnesses have expressed the view that they should not be given any special award or advantage for acting in accordance with their duty.⁶⁹⁴

6.63 The differing circumstances of each case, including the personalities of the individual informers, their motives and wishes, make it difficult to devise a set of criteria which takes all relevant factors into account and delivers an appropriate form of recognition. There is the additional risk should a system be established which is regarded as conferring some benefit on the recipients (such as a Service award or enhanced prospects in applications for promotion), that people would seek to take advantage of it (by making unfounded or vexatious allegations). It would be very hard to devise criteria to preclude such manipulation. It would not be appropriate, for example, to confine recognition to those cases where the allegations were found 'sustained'.⁶⁹⁵

6.64 The Commission takes the view that responsibility for providing formal recognition or awards to internal informers should be left with the Internal Witness Support Unit and dealt with by recommendation to the Commissioner on a case by case, discretionary basis. However, as a matter of principle, the Commission considers it desirable that at least the fact of such assistance be recorded and taken into account as part of any integrity assessment, and that the internal witness be notified by a senior officer that the assistance is acknowledged and appreciated by the organisation.

C. SENIOR SERGEANT KEN JUROTTE - A PARADIGM CASE

6.65 The case of Senior Sergeant Ken Jurotte is selected for special mention and specific findings⁶⁹⁶ since it throws a spotlight on:

- the manner in which an officer regarded in some quarters as a 'whistleblower' was treated by the Service; and
- the problems faced by an officer who came to the Service with a racial background other than white Anglo-Saxon.

Bourke Patrol

6.66 Mr Jurotte, an Aboriginal police officer, was promoted to the rank of Senior Sergeant and appointed as the Patrol Tactician at Bourke in November 1989. There he met and married Linda, an Aboriginal woman whose family came from the Bourke area. Mr Jurotte was believed, wrongly, to have leaked the 'black face' video to the press. This video showed two police officers at a country dance wearing black face-paint with nooses around their necks.⁶⁹⁷ There was an Internal Affairs investigation into the 'black face' incident.

⁶⁹⁴ Statements of internal informers/witnesses, RCPS Exhibit 5789C; M. B. Feeney, RCT(U), 10/7/96, p. 5176.

⁶⁹⁵ The complaints of ethical officers made for good reason may in some cases be found not sustained, eg. Detective Senior Constable Feeney's complaint.

⁶⁹⁶ Having regard to the Commission's intention to make specific findings in this instance, a draft of this section of the Report was provided to those with an interest to respond to it, and their comments invited.

⁶⁹⁷ The 'black face' video was screened on the ABC-TV's Four Corners program on 12/3/92.

6.67 In the aftermath of this investigation, Mr Jurotte submitted a complaint on 3 April 1992 in which he alleged that both he and his wife had been the subject of racial discrimination and harassment by certain police attached to the Bourke patrol. This complaint was investigated by Chief Inspector Frank McGoldrick. In a report dated 21 September 1992, a number of aspects of the complaint were sustained.⁶⁹⁸ Mr Jurotte had in the meantime been transferred to Wilcannia as the Patrol Commander on 12 May 1992. This was at the direction of the then Commissioner of Police. The McGoldrick report was reviewed by the Ombudsman whose findings were somewhat more critical than those of the internal inquiry.⁶⁹⁹

Wilcannia Patrol

6.68 On 29 February 1993 Inspector Dennis Percy, Manager of the Service's Equal Employment Opportunity Branch, submitted a report concerning the matter. He observed that Mr Jurotte's complaint appeared to be the first instance in which disciplinary action had been initiated over racial harassment in the workplace.

6.69 Inspector Percy went on to express concerns as to the welfare of Mr Jurotte and his wife and to recommend that they be given whatever assistance or support might be available from the Employee Assistance Branch.⁷⁰⁰ It does not appear that any such support was given, nor is there any evidence that Inspector Percy's report was drawn to the attention of region or district command.

6.70 On 5 July 1993 Detective Chief Inspector Don Grace visited Wilcannia to explain why the Service had taken so long to inform Mr Jurotte of the outcome of the investigation into his complaint about racial harassment at Bourke. Mr Jurotte had known Mr Grace for a number of years. When Mr Grace inquired how he was getting on at Wilcannia Mr Jurotte told him of the difficulties he was experiencing with District Command, specifically his belief that the Barrier District Commander resented his appointment, and that there was resistance to him by District Command and local staff arising out of the Bourke matter. Mr Grace sought advice from the officer in charge of Internal Affairs and advised Mr Jurotte that these further concerns, outlined in a record of interview that day, would be initiated as a formal complaint.⁷⁰¹

6.71 Three days later Chief Inspector Gary Matthews, then Staff Officer with the Police Internal Affairs Branch, recorded that Mr Grace was most concerned about the situation at Wilcannia, and had recommended that a senior executive officer should be nominated to remedy any managerial problems, to prevent further harassment and to endeavour to effect a conciliation with Mr Jurotte.⁷⁰²

Conciliation

6.72 The conciliation recommended by Mr Grace was carried out by Detective Chief Superintendent Rod Harvey. Mr Jurotte agreed not to press his complaint on the basis that his concerns were brought to the attention of the incoming Region Commander and that the District Commander and his staff were spoken to concerning the lack of support he perceived he had suffered.⁷⁰³

6.73 The Acting District Commander and all his staff duly signed a statement acknowledging that there was a perception that adverse comments had emanated from their office adversely impacting

⁶⁹⁸ Investigation Report of Chief Inspector F. McGoldrick, 21/9/92, RCPS Exhibit 5391.

⁶⁹⁹ NSW Ombudsman, *Provisional Report re Wilcannia*, RCPS Exhibit 5391/36, p. 2.

⁷⁰⁰ Report of Inspector D. Percy to Assistant Commissioner Education and Training, 1/2/93, RCPS Exhibit 5527.

⁷⁰¹ K. C. Jurotte, RCT(U), 25/6/97, pp. 4166-67; documents concerning the conciliation of the complaint made to Detective Chief Inspector D. Grace, RCPS Exhibit 5487; Investigation Report of Inspector A. W. Dick, into allegations made by and against Senior Sergeant K. C. Jurotte, 20/4/94, RCPS Exhibit 5500, Attachment 137, Record of Interview with Senior Sergeant K. C. Jurotte, 5/7/93.

⁷⁰² Briefing note prepared by Chief Inspector G. Matthews, 8/7/93, RCPS Exhibit 5487/2.

⁷⁰³ Documents concerning the conciliation of the complaint made by Senior Sergeant K. C. Jurotte to Detective Chief Inspector D. Grace, 5/7/93, RCPS Exhibit 5487.

on the Wilcannia Patrol, and pledging their support for the patrol.⁷⁰⁴ The document expressing the unanimous support for the Wilcannia Patrol was signed by members of District Office between the 22 and 26 July 1993.

6.74 On 21 July 1993 Assistant Commissioner William Galvin, the incoming Region Commander, received a briefing about Mr Jurotte. At that briefing it appears he was given to understand that Mr Jurotte was not competent to command Wilcannia. Among the persons from whom he received advice at that briefing was the Acting Barrier District Commander, a signatory to the 'support declaration'. Mr Galvin apparently saw nothing unusual about the Acting District Commander on the one hand signing the declaration as part of the conciliation process and, on the other hand, advising that Mr Jurotte was incompetent to hold his command.⁷⁰⁵

6.75 As part of the conciliation process Mr Jurotte agreed to an 'independent' audit of his patrol. Part of his earlier complaint to Mr Grace had been the unusually high number of audits to which his patrol had been subject.⁷⁰⁶ He appears to have entertained the hope that an independent audit might be to his advantage.

6.76 The audit report issued on 25 August 1993 was critical of Mr Jurotte's management of the Wilcannia Patrol and recommended that he be relieved of his command until appropriate remedial action was carried out to bring the patrol to an acceptable level of productivity and competency.⁷⁰⁷ The approach to this audit adopted a subjective qualitative analysis,⁷⁰⁸ based to a large degree on interviews with Mr Jurotte's subordinates, many of whom were known to resent him. A useful insight into the way Mr Jurotte may have been viewed by some of his staff was given in evidence before the Commission by Inspector Adrian Dick who conducted the subsequent investigation into allegations made by and against Mr Jurotte:

The police were more concerned with the fact that if there was a confrontation, they were required by Ken Jurotte's approach to walk away from it and the arrest would be done by appointment the next morning. The young police, in particular, saw it as a form of cowardice on Jurotte's part. Whilst it's not enumerated and I don't think the word is used in there, but certainly they said he was gutless and that was their view of their Commander.⁷⁰⁹

6.77 Nineteen members of the Wilcannia community were interviewed as to their perceptions of the quality of policing under Mr Jurotte's command. Sixteen of these were members of the white community. No reference appears in the audit report to the views of a delegation of 25 people, 23 of whom were Aboriginal, who called to speak with the auditor and to offer their support for Mr Jurotte.⁷¹⁰

6.78 Having decided that an audit was to be carried out on the Wilcannia Patrol one might have expected that the Police Service would ensure that the audit process was such that it would address matters as fundamental to the health of the patrol as financial management and the pattern of crime and policing, having regard to reported crime and clear-up rates. Mr Jurotte claimed to have reduced the level of violent confrontation between police and members of the Aboriginal population. In a town such as Wilcannia with a high Aboriginal population, an investigation of the accuracy of this claim would have been of value. The audit process was such, however, that these considerations were not addressed. Instead, it concentrated on some matters that bordered on trivial, for example, an adverse finding was drawn from the circumstance that the flag was not flying over the police station and that Mr Jurotte did not enforce the *Dog Act*.

⁷⁰⁴ Memorandum prepared by J. Laycock, 22/7/93, RCPS Exhibit 5487/5.

⁷⁰⁵ W. J. Galvin, RCT(U), 9/7/96, pp. 5051-52.

⁷⁰⁶ Investigation Report of Inspector A. W. Dick, into allegations made by and against Senior Sergeant K. C. Jurotte, 20/4/94, RCPS Exhibit 5500, Attachment 137, Record of Interview between Chief Inspector D. Grace and Senior Sergeant K. C. Jurotte, RCPS Exhibit 5500/142.

⁷⁰⁷ Compliance and Administrative Audit of Wilcannia Patrol, July 1993, RCPS Exhibit 5491, p. 9.

⁷⁰⁸ *ibid*; F. J. A. Brame, RCT(U), 2/7/96, p. 4663.

⁷⁰⁹ A. W. Dick, RCT(U), 4/7/96, p. 4810.

⁷¹⁰ F. J. A. Brame, RCT(U), 2/7/96, p. 4671.

6.79 On 26 August 1993 the Region Commander, Assistant Commissioner William Galvin, relieved Mr Jurotte of his command.

Loss of Command

6.80 After he was relieved of his command, Mr Jurotte wrote a letter to the Commissioner of Police detailing his history both at Bourke and Wilcannia, and complaining that he had been treated unfairly.⁷¹¹ This was initiated as a complaint in accordance with the Part 8A of the *Police Service Act 1990*. Inspector Adrian Dick, of North West Region Internal Affairs, was assigned to investigate this complaint together with a number of associated complaints.

6.81 Mr Dick identified 23 'issues' for investigation and noted a further 32 'matters arising'. The 'issues' and 'matters arising' embraced complaints by and against Mr Jurotte. Mr Dick recommended that 22 departmental charges be preferred against him for misconduct and neglect of duty including, for example, that he had disregarded the *Dog Act 1966*. He further recommended that Senior Constable Graeme Black, who had been strong in his support of Mr Jurotte, be charged with one count of neglect of duty. Only one complaint was found sustained in respect of any person in the 'anti-Jurotte' camp. This concerned a 'matter arising' in relation to a sergeant who had failed to notify the Police Service of the fact of the service on him of court process. All other 'issues' and 'matters arising' identified from the complaints made by Mr Jurotte were found not sustained.⁷¹²

Ombudsman Inquiry

6.82 The then Ombudsman, Mr David Landa, determined to conduct his own investigation into the decision to relieve Mr Jurotte of his command at Wilcannia and associated matters.⁷¹³ This investigation led to:

- a finding that the Police Service had behaved unreasonably in not providing adequate support to Mr Jurotte as an internal witness, and in relation to the circumstances leading to the decision to relieve him of his command at Wilcannia;⁷¹⁴
- a recommendation that an apology be given to Mr Jurotte by the Service and that it take steps to monitor and support his future career;⁷¹⁵ and
- a recommendation that a review be conducted by a senior officer to determine what management action should be taken in relation to those officers whose conduct had adversely impacted on Mr Jurotte.⁷¹⁶

6.83 Prior to settling the terms of the Final Report dated 15 May 1996, which contained findings and recommendations, the Ombudsman consulted with the Minister for Police. The Service agreed to act on the Ombudsman's recommendations and Acting Deputy Commissioner Beverley Lawson was asked to convey the Service's apology to Mr Jurotte, and to carry out the management review.⁷¹⁷

6.84 Subsequently, apparently in the light of the circumstance that this Commission proposed examining Mr Jurotte's case as part of its inquiry into the internal informers policy, the Service resolved not to implement action in accordance with the Ombudsman's recommendations.⁷¹⁸

⁷¹¹ K. C. Jurotte, Submission to Commissioner of Police re incidents at Bourke and Wilcannia, 24/10/93, RCPS Exhibit 5495.

⁷¹² Briefing note prepared by Inspector A. W. Dick dated 5/5/94, RCPS Exhibit 5522.

⁷¹³ NSW Ombudsman, *Report of the Office of the Ombudsman concerning complaints by Senior Sergeant K. C. Jurotte about the conduct of police*, 15/5/96, RCPS Exhibit 5504.

⁷¹⁴ *ibid*, pp. 120-21.

⁷¹⁵ *ibid*, p. 121.

⁷¹⁶ *ibid*, p. 122.

⁷¹⁷ *ibid*, pp. 121-22.

⁷¹⁸ Letter from Acting Deputy Commissioner B. Lawson to the Ombudsman, 14/6/96, RCPS Exhibit 5505/4; Mr Finnane QC, RCT(U), 28/6/96, p. 4440.

Post Wilcannia

6.85 In the meantime Mr Jurotte was transferred to Grafton as an 'overstrength unit'. There was little useful work available to him in this role. After making strenuous efforts to obtain a permanent position he was appointed to the newly created position of Section Commander, Grafton Highway Patrol. This appointment came within days of the setting up of this Royal Commission and just after Mr Jurotte had been interviewed by the ABC-TV's '7.30 Report' concerning his experiences at Wilcannia.⁷¹⁹ He had not had any experience in this line of policing.

6.86 In June 1994 Mr Jurotte was issued with traffic infringement notices charging him with driving an unregistered and uninsured vehicle. He denied the allegations and elected to defend them at the Local Court. The fact of the issue of the notices was leaked to the local media and featured on a radio talk-back program. When the case came on for hearing the Service offered no evidence and the charges were dismissed.⁷²⁰ Distressed by what he considered to be shabby treatment, Mr Jurotte gave an unauthorised interview to the media after the court hearing. This led to departmental charges being laid against him for breach of the Commissioner's media policy.⁷²¹ Ultimately, following receipt of the Ombudsman's draft report of the results of the further investigation into the treatment of Mr Jurotte at Wilcannia, the Service determined not to pursue the charges nor any of those charges recommended by Mr Dick in his report.⁷²² By then it was too late. The laying of the charges relating to the breach of the media policy was the last straw. Mr Jurotte ceased active duty and took a period of sick leave.⁷²³ He was medically discharged from the Service in June 1996.

6.87 Even though evidence in relation to this topic was completed by 10 July 1996, the Service has still not apologised to Mr Jurotte. The Service settled Mr Jurotte's claim before the Equal Opportunity Tribunal on 22 February 1996.

Conclusions

6.88 There are a number of disturbing features in this case, arising out of the circumstances that:

- at the time of his discharge Mr Jurotte was one of a very small number of senior Aboriginal police officers. He was the only Aboriginal patrol commander,⁷²⁴ and in many circles his promotion was seen as an exceedingly positive step;
- his complaint about racial discrimination at Bourke was the first instance of such a matter having been brought to notice;
- racism was understood to be a reality among some police serving in the western region of the State;
- Mr Jurotte's initial complaints had led to disciplinary action being taken against some serving police; and
- in a show of support for him, Commissioner Lauer had taken the unusual step of appointing Mr Jurotte to a patrol commander's position, by-passing the usual channels of selection.

6.89 In combination these circumstances underline the imperative that the Service not only provide a clear show of support for Mr Jurotte, but also provide that support.

⁷¹⁹ K. C. Jurotte, RCT(U), 26/6/96, p. 4259.

⁷²⁰ K. C. Jurotte, RCT(U), 26/6/96, pp. 4276-80.

⁷²¹ Notices of Proposed Penalty re departmental charges for failure to comply with the Commissioner's media policy, dated 21/12/95, RCPS Exhibit 5509.

⁷²² K. C. Jurotte, RCT(U), 26/6/96, p. 4288.

⁷²³ K. C. Jurotte, RCT(U), 26/6/96, p. 4291.

⁷²⁴ D. Peters, RCT(U), 5/7/96, p. 4945.

6.90 Further, it is a matter of concern that the Service proceeded with the conciliation of Mr Jurotte's complaint. It was incongruous to do so in the circumstances outlined. The conciliation operated to stop any further investigation of Mr Jurotte's complaint. It was by no means clear to the Commission that a fair-minded investigation of such complaint would have found him to be incompetent.

6.91 The audit was similarly open to question in relation to:

- the approach taken;
- its impartiality;
- the selection of persons interviewed; and
- the evidentiary support for its findings.

6.92 The Ombudsman in his report noted:

What is disturbing about Inspector Dick's approach is that, in identifying highly specific and often inappropriate issues of complaint, he ultimately ignored the real concerns which Senior Sergeant Jurotte had about his treatment - that the factors underlying this treatment were racism and adverse identification as a whistleblower.⁷²⁵

There is force to this criticism. The Ombudsman also observed that some reservations were held as to Mr Dick's impartiality in the conduct of this investigation.⁷²⁶ The examination of Mr Dick before the Commission served to underline those reservations.

6.93 Assistant Commissioner Galvin in his response to the Ombudsman's draft report, and before this Commission, sought to maintain the correctness of his decision to relieve Mr Jurotte of his command. In his response to the Ombudsman's draft he stated:

There is an attempt to discount the overwhelming support for the decision to move Senior Sergeant Jurotte. Attempts are made to make light of considered opinions and determinations by experienced senior personnel about a matter, which did not just come to light in August 1993 ...⁷²⁷

6.94 A number of present and former officers to whom Mr Galvin's comments in his response to the draft report of the Ombudsman appear to have been directed, were called to give evidence before the Commission. Their evidence did nothing to undermine the force of the Ombudsman's findings.

6.95 Mr Jurotte gave evidence that he maintained his patrol within budget, and that he adopted an approach to policing which had led to a decrease in violent confrontations between police and members of the community. He said that he had established effective liaison with members of the Aboriginal community at Wilcannia.⁷²⁸ There was no credible evidence to dispute these claims. Further, he appears to have attempted to introduce a style of policing designed to reduce the numbers of Aboriginal people held in custody. Where possible he adopted an approach of 'arrest by appointment'.⁷²⁹ This was in keeping not only with recommendations of the Royal Commission into Aboriginal Deaths in Custody, but also in line with the Police Service's Aboriginal Strategic Plan.⁷³⁰

6.96 In these circumstances the continued failure of the Police Service to recognise the lessons to be learned from the Jurotte case and to offer the apology recommended by the Ombudsman is a matter of concern.

⁷²⁵ NSW Ombudsman, *Report of the Office of the Ombudsman concerning complaints by Senior Sergeant K. C. Jurotte about the conduct of police*, 15/5/96, RCPS Exhibit 5504, pp. 114-15.

⁷²⁶ *ibid*, p. 112.

⁷²⁷ *ibid*, pp. 108-09.

⁷²⁸ K. C. Jurotte, RCT(U), 25/6/96, p. 4157; and 23/5/96, pp. 3156, 3150-51.

⁷²⁹ K. C. Jurotte, RCT(U), 23/5/96, pp. 3148 & 3157.

⁷³⁰ D. Peters, Statement to RCPS, 26/6/96, RCPS Exhibit 5526, Attachment E.

6.97 It is ironic in these circumstances that Chief Inspector Frederick Brame, in his audit report, after recommending that:

Senior Sergeant Jurotte be relieved of his command until appropriate remedial action is taken out to bring the patrol to an acceptable level of productivity and competency ...

went on to recommend that the Police Service:

immediately conduct a program to promote professionalism and awareness in police, as to the needs and culture of the Aboriginal community.⁷³¹

6.98 The case reveals in a striking fashion:

- the traditional institutional reluctance to support an officer who was suspected of having caused 'trouble' to the Service, in bringing to light matters of potential embarrassment; and
- the utter failure of a disciplinary system based on 'issues' and 'matters arising' which was not only unduly formal and dilatory, but likely in the result to miss the very substance of the matter in issue.

6.99 In summary, the Service lost an experienced police officer who had apparently pursued his career quite satisfactorily until the events at Bourke which arose in the aftermath of the screening of the black face video. He was one of a small number of senior Aboriginal police with operational experience. He was stationed in a town with a very high Aboriginal population. He appears to have endeavoured to implement an approach to policing in conformity with that favoured by the Royal Commission into Aboriginal Deaths in Custody, and adopted in the Police Service's Aboriginal Strategic Plan. In all these circumstances, the Service should have made every effort to provide support and encouragement, rather than embroil him in continuing inquiry and disciplinary proceedings.

D. CONCLUSIONS

6.100 There can be little doubt that the Police Service failed to provide the support and protection promised in the Internal Informers Policy launched in February 1994. Many of the registrants on that policy reported to the Commission that they felt the policy had done nothing for them, and that there was little appreciation from the Service for the stand they had taken in speaking out against corruption. The findings of the Commission in relation to the original policy were matched by those of the Bennett Review which led to the establishment of the 1995 Internal Witness Support Program.

6.101 The transfer of the program away from the Professional Responsibility Command to the Human Resources Command was a logical and positive move, allowing the former to concentrate on the investigation of complaints while entrusting the welfare of the internal witnesses to the Command responsible for transfer and welfare issues. This also removed the potential for any conflict of interest in the event of payback complaints. The indications are that under the leadership of Chief Inspector Carolyn Smith, the IWSU has largely addressed the problems of the past and is providing an appropriate level of support and assistance to internal informers.

6.102 The evidence shows that there has been a long-standing and strong cultural resistance to reporting misconduct by fellow officers. In the past management has failed to take effective measures to counter this. It is essential that internal witnesses receive support not only from the Internal Witness Support Unit, but also at the patrol level. Active measures must be taken by patrol commanders and supervisors to detect and deal decisively and swiftly with instances of harassment and ostracism of internal witnesses. A failure to do so should be viewed seriously, and prima facie should be reason for loss of command.

⁷³¹ Audit Report - Wilcannia Patrol, RCPS Exhibit 5491/3.

6.103 It is important that the Commissioner shows active support for the Internal Witness Support Unit, *inter alia*, by ensuring that, in appropriate cases internal witnesses receive formal recognition for their role.

6.104 Proper emphasis should be given in the training of police both at entry level and in specialist courses thereafter, not only to the availability of the Internal Witness Support Program, but also to the circumstance that harassment of internal witnesses is unacceptable, may constitute a criminal offence, and may activate the Commissioner's confidence provisions. It needs to be made plain that there is no room in the Police Service for those who would seek to isolate and punish internal witnesses. On the contrary, at every step, strenuous efforts must be taken to end the code of silence, to underline the risks it poses to police, and to emphasise the benefits for all in removing those officers who are given to corrupt and unacceptable practices, and who are likely to place honest police in an unenviable and difficult position when faced with pressure to participate in a cover-up. As such it needs to be dealt with as a component of the integrity and ethics programs that are to be built into PREP and all development courses.

6.105 Similarly, the bringing forward of complaints should be encouraged through use of the hot line, and by the newly-formed Professional Standards Councils. In this regard the overt support of the Police Association is essential. That support has not been forthcoming in the past, since the Associations have been seen to side more with the officers to whose aid they have come when they are the subject of an internal inquiry or prosecution and whose legal defence they have funded.

6.106 Importantly, it is the responsibility of patrol commanders to reinforce ethical behaviour on a daily basis and to foster an environment in which police are not fearful of reporting corrupt conduct.

RECOMMENDATIONS

The Commission recommends:

- ◆ The Commissioner of Police show active support for internal witnesses both through his participation in the Internal Witness Advisory Council and by providing recognition to internal witnesses in appropriate cases (para. 6.103).
- ◆ The Internal Witness Support Unit maintain its ability to provide personal contact and needs-based follow-up with registrants and that the staffing levels within the Unit be periodically reviewed to ensure that they are sufficient to meet demand (paras. 6.13 & 6.32).
- ◆ There be wide publicity within the Police Service of the fact that the making of 'payback complaints', together with other forms of harassment of internal witnesses, (i) will invoke the Commissioners' confidence provisions of the *Police Service Act 1990*, and (ii) constitute a criminal offence (para. 6.61).
- ◆ Patrol commanders (or other supervisor where the internal witness is not patrol based) be required to provide appropriate support for internal witnesses, and be made aware that failure to take steps to prevent the harassment of an internal witness may constitute grounds for removal from command (para. 6.102).
- ◆ The assistance of an internal witness be recorded and taken into account as part of any integrity assessment (para. 6.64).
- ◆ Internal witnesses be formally notified by a senior officer that the assistance provided was acknowledged and appreciated by the Service (para. 6.64).
- ◆ Proper training be provided for police at PREP and in subsequent courses concerning the Internal Witness Support Program and need for its support (para. 6.104).
- ◆ The Service employ a more flexible approach to permit the use of internal witnesses in proactive investigations (paras. 6.52 - 6.53).

CHAPTER 7

INTEGRITY MEASURES (I) CRIMINAL INVESTIGATIONS

7.1 In the First Interim Report, the Royal Commission flagged its interest in various measures related to the criminal investigation process which might help reduce the incidence of corruption or misconduct within the Service.

7.2 Following the receipt of further submissions the Royal Commission is now in a position to develop some final recommendations in relation to these matters. It is considered that their implementation, as part of the overall reform process, will assist in:

- discouraging corruption;
- empowering honest police to avoid being compromised or suborned into breaches of duty by dishonest officers; and
- detecting corrupt practices and misconduct when they occur.

A. CRIMINAL INVESTIGATION PROCEDURES

INTRODUCTION

7.3 Criminal investigations are a high-risk area for corruption. The work involved affords police both the temptation and opportunity to engage in the corrupt acts identified earlier in this Report. The need for re-examination of police investigative methods in a way that might ensure greater professionalism and accountability was identified in the Commission's Second Interim Report.⁷³²

7.4 The need for reform in this area had been identified well before this Royal Commission. In May 1993, the ICAC and the Service commenced a joint project aimed at minimising corruption in the management of criminal investigations and prosecutions. This was followed by the second report of the ICAC on the investigation into the relationships between police and criminals (Milloo).⁷³³ It concluded that action was necessary in relation to five key management areas and recommended a number of steps including setting a framework of policy and standards which should apply to criminal investigation work.⁷³⁴

7.5 In response to the ICAC recommendations, various working parties or task forces were formed by the Service. Relevantly, a task force to provide a Comprehensive Review of Criminal Investigation (Task Force CROCI) was established in March 1995 to 'report on the nature and scale of critical issues effecting criminal investigation'.⁷³⁵ In its first phase, Task Force CROCI released five issues papers.⁷³⁶

7.6 Not all of the recommendations made in these papers were consistent as they were prepared by separate teams. Notwithstanding, it is significant that all CROCI teams identified the lack of effective supervision as a major problem for crime investigation, and agreed that many types of

⁷³² RCPS, *Second Interim Report*, November 1996, p. 17.

⁷³³ ICAC, *Investigation into the Relationship Between Police and Criminals*, Second Report, April 1994.

⁷³⁴ *ibid*, pp. 30-31.

⁷³⁵ NSW Police Service, *Comprehensive Review of Criminal Investigation*, 25/9/95, RCPS Exhibit 1280'C', p. 1.

⁷³⁶ Information management as it relates to investigations, operations, and intelligence, human resource planning; accountability and audit; and criminal investigation and the judiciary, NSW Police Service, *Comprehensive Review of Criminal Investigation*, 25/9/95, RCPS Exhibit 1280'C'.

investigations could be handled by uniformed police who have been poorly served in the past in terms of their training and supervision.⁷³⁷

7.7 Another significant conclusion of Task Force CROCI, confirmed by the work of this Royal Commission, is that the historical approach to criminal investigation which has kept it separate from other activities within the Service, has led to the formation of an investigative power base and engendered a sense of elitism amongst detectives.⁷³⁸ This has been enforced by the Service providing high pay and allowances to detectives and giving undue status to the detection of crime.⁷³⁹

7.8 In Commissioner Ryan's blueprint for reform⁷⁴⁰ it was stated that there would be an immediate focus on criminal investigations:

There have already been a number of reviews. While they are of value, they have generally been inward-looking and self serving. This current review will be done in stages and cut through the issues.⁷⁴¹

This Commission agrees with Commissioner Ryan's assessment of past reviews, and adds that they have tended to lose momentum and direction once written reports were released.

7.9 Terms of reference have been established for the new Criminal Investigations Review.⁷⁴² Within these terms the review team has identified four core issues essential to developing lasting reform:

- the strategic position the Service should take in responding to crime;
- the program required to implement a blueprint for criminal investigation reform;
- the integration of criminal investigation with all other facets of operational policing; and
- the development of world's best practice for criminal investigation.⁷⁴³

7.10 A critical element of this review will be building a structure that best co-ordinates and spreads the work of crime detection between patrols and task forces at local level, and involves the crime agencies or their equivalents in the more specialised and difficult investigations into serious crime. The review is scheduled for completion on 14 July 1997.

7.11 In addition, the Service has planned and, in several cases, commenced other relevant projects concerning:

- case management;
- quality of briefs;
- informant management;
- letters of comfort;

⁷³⁷ *ibid*, p. 4. A survey of 16 patrols by CROCI showed that non-detective officers investigated 75% of robbery, 77.3% of steal motor vehicle, 81.4% of stealing, and 52.1% of break enter and steal cases (p. 22).

⁷³⁸ *ibid*, p. 29.

⁷³⁹ *ibid*, pp. 29-30.

⁷⁴⁰ P. J. Ryan, Commissioner of Police, 'Reform of the New South Wales Police Service - Phase 1' Prepared for Paul Whelan, Minister for Police and the RCPS, 19/11/96, RCPS Exhibit 2820.

⁷⁴¹ *ibid*, pp. 2-3.

⁷⁴² The terms call for review and recommendations on the adoption of best practice principles and methods to combat, prevent and contain crime and also support victims of crime; the nature and scope of crimes confronting police and the community; how to ensure the Service integrates risk management in development of criminal investigation practices, procedures and policy; the extent to which current disparate reviews into criminal investigation provide direction to the management of criminal investigation; how to ensure the recruitment and training of those working in criminal investigation reflects best practice; the disposition and organisation of resources engaged in the investigation of (serious) crime; how to ensure a new approach to criminal investigation integrates all critical elements of the Service into a united and mutually understood effort; and the preferred ways of managing to achieve high levels of performance with integrity as well as appropriate performance measures and feedback. *ibid*, p. 49.

⁷⁴³ J. Jarratt, Deputy Commissioner (Specialist Operations), NSW Police Service, Letter to the RCPS, 7/3/97, RCPS Exhibit 5999/41.

- search warrants;
- electronic recording of interviews with suspected persons (ERISP);
- alternatives to arrest;
- hand-held tape recorders; and
- charge management.⁷⁴⁴

7.12 In relation to training of police for criminal investigations, the Service has:

- as an interim measure, adopted the National Competency Standards for criminal investigation, which were recently approved by all police commissioners in Australia;⁷⁴⁵ and
- decided to incorporate investigative training in the PREP program to ensure that all police have a crime investigation capacity.⁷⁴⁶

7.13 Additionally, in order to improve supervision and management, proposals are under way to deploy a duty officer (inspector), assisted by sergeants providing front line supervision, at each metropolitan patrol 24 hours per day, to be responsible for all police on duty including detectives.⁷⁴⁷

7.14 In developing these initiatives it will be important to:

- involve experienced field supervisors and duty inspectors in random inspections during operations and interviews to check integrity,⁷⁴⁸
- place greater emphasis on the collection of physical evidence and surveillance, and less reliance on the evidence of criminal informants and confessions;
- train officers who have criminal investigation experience and demonstrated integrity in the role of supervisors; and
- work towards greater involvement of uniformed officers in investigative work, from the commencement of their careers in the Service, preserving the task force and squad concepts for key investigations requiring special expertise.

This is critical in securing an end to the investigative power base and elitism of detectives which has encouraged their reluctance to submit to supervision, and their group cohesion.

7.15 These initiatives are welcome. It is too early to make any assessment of their effectiveness, and indeed many will be still in development when this Final Report is delivered. Several matters which attracted attention during the Royal Commission, are mentioned hereunder.

RECOMMENDATIONS

The Commission recommends:

- ◆ Improvement of criminal investigations procedures by:
 - pursuit of the current NSW Police Service review (paras. 7.09 - 7.10);

⁷⁴⁴ P. J. Ryan, Commissioner of Police, *Reform of the New South Wales Police Service - Phase 1*, 19/11/96, RCPS Exhibit 2820, pp. 50-53.

⁷⁴⁵ *ibid.*, p. 49.

⁷⁴⁶ *ibid.*

⁷⁴⁷ *ibid.*, p. 20.

⁷⁴⁸ It is clear from evidence received by the Commission that officers involved in corruption or misconduct were likely to fear 'dive-bombing' (spot checks - see Glossary) by supervisors.

- the involvement of experienced field supervisors and duty inspectors in random inspections, during operations and interviews, to check professional performance and integrity (para. 7.14);
- greater emphasis on the collection of physical evidence and surveillance, and less reliance on the evidence of criminal informants and confessions (para. 7.14);
- the training of officers who have criminal investigation experience, and proven integrity, for the role of supervisor (para. 7.14);
- greater involvement of uniformed officers in investigative work (para. 7.14); and
- training of uniformed officers, and of PREP students in criminal investigation skills (para. 7.14).

B. PROCESS CORRUPTION

7.16 The widespread process corruption identified by the Commission flourished in an environment of:

- poor investigative practices;
- lax supervision;
- insufficient emphasis in formal training and, in the field, on the unacceptability of police breaking the law to secure convictions; and
- long-standing acceptance within the CIB and specialist squads of the notion that the end justifies the means.

7.17 A positive and sustained program is required in which it is clearly brought home to all police that:

- the Service does not expect convictions to be obtained other than as the result of due process;
- police are as much bound by the law as all other citizens and that it is their duty to uphold the law rather than circumvent it;
- an officer who engages in process corruption is:
 - not entitled to retain the Commissioner's confidence;
 - potentially compromised for all time and liable to prosecution for perjury or conspiracy to pervert the course of justice, and to civil damages;
 - of no value to the Service operationally because of the likelihood of his or her evidence being challenged in every case; and
- bringing the wrong person to court means that the true offender remains free.

7.18 Viewed dispassionately and regardless of the motives that sometimes underline its exercise, process corruption constitutes a gross distortion of police powers, and is destructive of the good reputation of the Service. Action must be taken for its elimination.

CONSOLIDATION OF POLICE POWERS

7.19 An initiative worth consideration, in the event of new legislation being introduced to replace the *Police Service Act 1990*, would be:

- the inclusion of a procedural code regulating the manner in which police powers are exercised; and
- the attachment of a schedule listing all enactments in which powers are given to police.

Legislation along these lines was recommended by the CJC in Queensland in 1993.⁷⁴⁹ The first of these matters is addressed in more detail hereunder.

7.20 The advantages of such a consolidation are that it would:

- help strike a proper balance between the need for effective law enforcement and the protection of individual rights;
- assist in ensuring clarity in areas where uncertainty exists, and reduce the possibility of abuse of powers through ignorance; and
- assist in the training of police.

THE EXECUTION OF SEARCH WARRANTS

7.21 The Service approved Standard Operating Procedures for the Execution of Search Warrants in January 1997, which require the:

- appointment of an exhibits officer with responsibility to record items seized on a property seizure/exhibit form, and to label, package and maintain personal control of them;
- presence of a video operator to film the execution of search warrants;
- photographing of exhibits *in situ*;
- presence of independent observers at searches;
- recording of all movements of exhibits after seizure; and which permit
- the occupier to have an opportunity to view and sign the property seizure/exhibit form.⁷⁵⁰

The need for these procedures was obvious in the light of the evidence called at this Royal Commission, and the initiative is commended.

7.22 Other measures which should be considered by the Service include:

- a requirement that the independent observer be a non-Service observer in cases where large amounts of cash or drugs are expected to be located; and
- save in cases of urgency, the preparation of a written operational proposal before any application for a search warrant, accompanied by confirmation by a supervisor of the reliability of the information on which it is based and of the regularity of the field activities proposed.

ELECTRONIC RECORDING OF POLICE-CITIZEN CONVERSATIONS

7.23 Although it is strongly arguable by reason of section 5(3)(a) of the *Listening Devices Act 1984* that express consent is not required to record any conversation between a police officer and a suspect during the execution of a search warrant, or indeed on any occasion during the performance

⁷⁴⁹ CJC, *Report on a Review of Police Powers in Queensland*, CJC, 1993, p. 107.

⁷⁵⁰ NSW Police Service, Standing operating procedures for the execution and recording of search warrants, 18/2/97, RCPS Exhibit 5999/95.

of police duties, it is desirable that the matter be placed beyond doubt by amendment of section 5 of that Act.

7.24 The privacy argument, sometimes advanced to the contrary, lacks all validity in view of:

- the material interest of the police officer and civilian in having an accurate and incontrovertible record of the conversation;
- the discouragement of aggressive or unfair conduct by a police officer, and of the manufactured complaints by a civilian, each of which is unlikely when it is known that the exchange between them is recorded;
- the inadmissibility of the conversation in evidence unless preceded by an official caution (once suspicion is entertained),⁷⁵¹ the occurrence or absence of which caution would appear on the tape; and
- the election available to a civilian to remain silent or speak if informed that an audio record of the conversation is being made.

7.25 The Commission recommends:

- amendment of Section 5 of the Listening Devices Act accordingly;
- introduction by the Service of hand-held recorders to overtly record all dealings with suspects before formal interview;⁷⁵²
- as an adjunct to this the Service adopt a policy of overtly recording all official dealings with members of the public, whether suspects or not; and
- the abandonment of the pro forma and meaningless current procedure for the 'adoption' of records of interview, and its replacement by a thorough and professional check by a duty inspector, or custody officer, of the regularity of the arrest and interview.

SUMMARY

7.26 The measures introduced by the Service to improve interview and search warrant procedures have the capacity to reduce the opportunity for police to load, verbal and otherwise engage in process corruption, and to engage in opportunistic or systematic theft. Neither provides an ironclad guarantee, since it is always conceivable that in the case of an interview the suspect will be assaulted, or offered an inducement before the interview begins or during a break. It is similarly possible that in the case of a search the observer or other personnel deployed to secure integrity will themselves be corrupt, or that something untoward will occur out of their sight and hearing.

RECOMMENDATIONS

The Commission recommends:

- ◆ Legislative consolidation of police powers:
 - providing a procedural code regulating the manner in which police powers are exercised (para. 7.19); and

⁷⁵¹ s. 139 of the *Evidence Act 1995* deems statements made or things done during questioning of persons under arrest, or official questioning of persons who are not under arrest, to have been obtained improperly if a caution was not delivered to the effect that the person being questioned 'does not have to say or do anything but that anything the person does say or do may be used in evidence'.

⁷⁵² See section on Electronic Surveillance in this chapter.

- attaching a schedule listing all enactments in which powers are given to police (para. 7.19).
- ◆ The use of additional precautions in relation to the execution of search warrants, including:
 - the use of civilian observers in cases where large amounts of cash or drugs are expected to be located (para. 7.22); and
 - save in cases of urgency, the preparation of a written operational proposal before the application for any search warrant, accompanied by confirmation by a supervisor of the reliability of the information on which it is based and of the regularity of the field activities proposed (para. 7.22).
- ◆ Amendment of Section 5 of the *Listening Devices Act 1984* to permit all dealings between police and citizens to be electronically recorded (para. 7.25).
- ◆ The use of hand-held recorders to record official conversations with members of the public (para. 7.25).
- ◆ The supply of hand-held recorders to investigators to record dealings with suspects before formal interview (para. 7.25).
- ◆ The abandonment of the current procedure for the ‘adoption’ of records of interview, and its replacement by a check by a duty inspector or custody officer of the regularity of the arrest and interview (para. 7.25).

C. EXTERNAL INFORMANT MANAGEMENT AND REWARDS

7.27 External informants are often said to be an invaluable law enforcement resource, in that:

- their use facilitates a proactive approach to policing;⁷⁵³
- they are particularly valuable in the investigation of 'victimless' crimes, exposing offences associated with drugs, gaming and vice which may otherwise go undetected,⁷⁵⁴ and
- they provide a cost-effective means of gathering intelligence.⁷⁵⁵

7.28 The management of informants and the payment of associated expenses and rewards, however, has been demonstrated to be a high-risk corruption area due to the circumstances that:

- effective informants most often come from criminal communities or are associated with those communities and are not necessarily reliable or credible;
- a degree of association often in covert circumstances and an establishment of mutual trust is necessary if police are to obtain information from informants;
- confidentiality is always important in relation to dealings with informants because of the risk to their personal safety;
- informants almost always expect something in return for the information they provide, for example financial rewards or indemnity from prosecution;
- sometimes informants have motives which are other than altruistic, for example animosity, revenge, or elimination of competitors;
- often informants misuse their relationships with police to build their own power bases;
- some police, similarly, use informants to enhance their own reputations, and may be uncaring as to whether or not the person identified by an informant is the true offender so long as it enhances their arrest rate;
- the information supplied by informants is easy to fabricate and difficult to corroborate; and
- frequently the informant is known to be actively involved in ongoing criminal activity, to which a blind eye is turned in return for information, an occurrence which can leave the informant with the impression that he or she has a 'green light'.⁷⁵⁶

7.29 Notwithstanding these risks, banning the use of informants is not a realistic option.⁷⁵⁷ What is necessary, however, for all law enforcement agencies, is an effective informant management program which ensures that the risks associated with the use of informants are minimised. The Royal Commission has examined this aspect of investigations in considerable depth because:

- the existence of inappropriate relationships between police and criminals was identified early as a major cause for the emergence of corruption; and
- the Service has tried very hard to introduce best practice guidelines for the management of informants, but with only limited success.

⁷⁵³ M. Maguire & T. John, 'Intelligence, Surveillance and Informants: Integrated Approaches', Police Research Group, Crime Detection and Prevention Series: Paper No. 64, Home Office, London, 1995.

⁷⁵⁴ H. Mount, 'Criminal Informants: An administrator's dream or nightmare', *FBI Law Enforcement Bulletin*, vol. 59, 1990, pp. 12-16.

⁷⁵⁵ *ibid.*

⁷⁵⁶ See Glossary.

⁷⁵⁷ ICAC, *Police Informants: A Discussion Paper*, May 1993, RCPS Exhibit 5469, p. 4.

7.30 Regulation of the relationships between police and informants was first imposed on NSW police officers by the introduction of a Police Instruction in late 1986.⁷⁵⁸ This was amended shortly afterwards with the introduction of the Informant Reward Plan in September 1987.⁷⁵⁹ In August 1992, the Registered Informant Management Plan was introduced.⁷⁶⁰ With each change the procedures became tighter, but they failed to significantly prevent the misuse of police-informant relationships.

7.31 In May 1993, the ICAC released a discussion paper on the 'Nature and Management of the Relationship Between Police and Their Informants'.⁷⁶¹ It was followed by the release of a jointly produced Informant Management Plan (the Plan), in March 1994.⁷⁶²

THE INFORMANT MANAGEMENT PLAN

7.32 The 'paramount principles' for an effective informant management system were identified in this plan as 'control, accountability and evaluation'.⁷⁶³ It specified that:

- an informant is a Service resource and not the property of any individual officer;
- all police officers who deal with informants must be accountable;
- each step in the informant management process should be supervised and documented;
- provision of rewards to informants, whether monetary or otherwise, should be monitored and regulated; and that
- the relationship with the informant, its management, and the quality and use of information provided should be regularly and objectively assessed.⁷⁶⁴

7.33 The Plan provided for the establishment of eight local registers to be maintained by each of the four Region Commanders, and by the Commanders of the State Intelligence Group, the Task Force Group, the Drug Enforcement Agency, and the Special Branch. A central computerised register was required to be maintained by the Commander, State Intelligence Group. Each registrar of a local register was required, at regular intervals, and at least once every three months, to forward by hand to the Commander, State Intelligence Group details of registered informants to be included on the central register.⁷⁶⁵

7.34 The Plan provided for a tiered management structure, involving registration of an informant by the controlling officer, known as the 'case officer', and supervision by a nominated and a senior supervisor.

7.35 The Plan required a 'pre-registration assessment' including an assessment by the case officer's supervisor of 'the strength of the personality of the case officer against that of the prospective informant'.⁷⁶⁶ Following registration, all contact between the informant and case officer was to be regulated by the nominated supervisor.⁷⁶⁷

7.36 Under the Plan, all contact (not just physical meetings) with informants was required to be 'reported, documented and subject to supervision'. For this purpose, a Contact Advice Report (CAR) was required, including:

⁷⁵⁸ Police Instruction 65A, RCPS Exhibit 5456.

⁷⁵⁹ NSW Police Service, *Informant/Reward Plan*, September 1987, RCPS Exhibit 5458.

⁷⁶⁰ NSW Police Service, *Registered Informant Management Plan*, August 1992, RCPS Exhibit 5457.

⁷⁶¹ ICAC, *Police Informants: A Discussion Paper*, May 1993, RCPS Exhibit 5469.

⁷⁶² This plan was prepared by the ICAC and the Service jointly. NSW Police Service, *The NSW Police Informants Management Plan*, March 1994, RCPS Exhibit 1113'C'.

⁷⁶³ *ibid*, p. 1.

⁷⁶⁴ *ibid*, p. 1.

⁷⁶⁵ *ibid*, p. 6.

⁷⁶⁶ *ibid*, p. 8.

⁷⁶⁷ *ibid*, p. 10.

- details of the contact made including any promise made or undertaking given by the case officer;⁷⁶⁸
- an outline of the intelligence provided by the informant;⁷⁶⁹
- the case officer's assessment of this intelligence;⁷⁷⁰ and
- any other pertinent comments.⁷⁷¹

7.37 Each CAR was to be reviewed by the supervisor and the senior supervisor and retained on the Informant Management File (IMF).⁷⁷² The case officer and the supervisor were required to determine any appropriate dissemination of the information received.⁷⁷³

7.38 The supervisor was required to review the IMF every three months, and every six months the senior supervisor was required to conduct a review of the relationship, and its product and management.⁷⁷⁴ They would then decide whether or not the informant should continue to be utilised by the Service.⁷⁷⁵

7.39 All applications for, and grants of, benefits were to be recorded on the IMF, and on the local and central registers. The provision of monetary rewards and commendations was to be considered by the Reward Evaluation Advisory Committee (REAC). Letters of assistance (or letters of comfort) were required to be co-signed by the case officer and the senior supervisor.⁷⁷⁶

7.40 The Plan required an audit by relevant commanders of the local registers at least once every 12 months, followed by a written report to the State Commander.

7.41 Notwithstanding the comprehensive safeguards and the careful planning which went into the preparation of this Plan, the evidence before the Commission revealed significant non compliance, and the continuing abuse of informant relationships for corrupt purposes. In summary, it revealed that:

- there was an astounding lack of knowledge of the Plan with numerous witnesses saying that they had received insufficient training on its operation,⁷⁷⁷ thought it too complicated, or did not understand it.⁷⁷⁸ Some officers said that they had not even read it;⁷⁷⁹
- some officers asserted an almost proprietary interest in their informants and in the information they provided, notwithstanding the instruction that informants are the property of the Police Service and not of any specific officer;
- in many cases the relationship formed was inappropriately close, making it difficult to keep control of an informant;⁷⁸⁰
- often, corrupt meetings and dealings with informants occurred under the guise of a legitimate informant contact, being in truth occasions for:

⁷⁶⁸ *ibid*, para. 11.9.

⁷⁶⁹ *ibid*, para. 11.9.

⁷⁷⁰ *ibid*, para. 11.9.

⁷⁷¹ *ibid*, para. 11.9.

⁷⁷² *ibid*, para. 11.11 & appendix 6.

⁷⁷³ *ibid*, para. 13.1.

⁷⁷⁴ *ibid*, para. 14.7.

⁷⁷⁵ *ibid*, appendix 8.

⁷⁷⁶ *ibid*, p. 13.

⁷⁷⁷ *eg. see* T. A. Griffiths, RCT, 3/11/95, p. 15993; T. Eastwood, RCT, 3/11/95, p. 15957; P. Young, RCT, 25/1/96, p. 18933.

⁷⁷⁸ *eg. see* T. Eastwood, RCT, 3/11/95, pp. 15951-53; T. A. Griffiths, RCT, 3/11/95, pp. 15992-93; G. S. Richardson, RCT, 22/1/96, p. 18609; P. Young, RCT, 25/1/96, pp. 18933-39.

⁷⁷⁹ P. Young, RCT, 25/1/96, pp. 18935-37.

⁷⁸⁰ *eg. see* M. L. Bigg, RCT, 9/5/95, pp. 6683-84; KX11, RCT, 13/6/95, pp. 8564 & 8638; R. J. McDougall, RCT, 18/10/95, pp. 15019-25; T. J. Kelly, RCT, 28/6/95, p. 9403; W. J. Eade, RCT, 11/12/95, p. 17362.

- the release of confidential information;
 - the supply of false letters of assistance;⁷⁸¹
 - the acceptance of protection money;⁷⁸²
 - the receipt of stolen goods;⁷⁸³
 - the supply of drugs (in exchange for information);⁷⁸⁴
 - the recycling of drugs;⁷⁸⁵ and
 - the sharing of rewards and allowances;⁷⁸⁶
- some officers also used the relationships to further process corruption, sometimes with the encouragement of the informant to eliminate a competitor;
 - many officers seemed disinterested or unwilling to attempt to understand the Plan, or, worse still, regarded it as an unworkable interference with their investigative work;
 - many officers did not complete CARs,⁷⁸⁷ many said that they had not thought it necessary to complete reports for contacts by telephone or ‘chance’ meetings.⁷⁸⁸ Some said that they noted the contacts in their duty books only.⁷⁸⁹ Others said that they were unaware of any need to report contacts with informants registered to other officers;⁷⁹⁰
 - it was seen to be relatively easy for an officer to create a false CAR and thus manufacture the details of an informant relationship, if a corrupt relationship with a criminal was called into question;⁷⁹¹
 - supervision was identified as a particular problem. In many cases any sensible or reasonable attention to the task of supervision would have identified officers who were failing to comply with the Plan.⁷⁹² The system was so disorganised that in at least two cases an officer acted as his own supervisor in carrying out reviews of his own dealings as a case officer with informants.⁷⁹³ In another case, a letter of assistance was given to an informant without any check of the details by the supervisor.⁷⁹⁴ The evidence was strongly suggestive of failure by supervisors to draw attention to the Plan and to supply training in relation to it;⁷⁹⁵ and
 - discipline for failure to comply with the Plan was non-existent, at best leading to counselling.⁷⁹⁶

7.42 Without identifying specific cases because of the need to protect informants, the following deficiencies in case officer compliance emerged repeatedly:

- informant registration forms lacked important information such as relevant criminal records,

⁷⁸¹ KX11, RCT, 13/6/95, pp. 8622 & 8650; WS14, RCT, 12/3/96, p. 21520; T. W. Sharp, RCT, 27/2/96, pp. 20673-74.

⁷⁸² T. D. Haken, RCT, 23/8/95, p. 12055; T. D. Haken, RCT, 24/8/95, p. 12134.

⁷⁸³ WS9, RCT, 21/2/96, p. 20345.

⁷⁸⁴ WS14, RCT, 8/3/96, p. 21273; JTF16, RCT, 4/10/95, p. 13913; T. D. Haken, RCT, 10/10/95, p. 14371; N. J. Scullion, RCT, 10/7/95, pp. 9960-61.

⁷⁸⁵ T. W. Moss, RCT, 15/1/96, p. 18239; WS8, RCT, 28/2/96, pp. 20776-81; WS14, RCT, 12/3/96, pp. 21520-21; WS14, RCT, 11/3/96, pp. 21425-27.

⁷⁸⁶ EC, RCT, 15/3/96, pp. 21866-67.

⁷⁸⁷ eg. R. J. McDougall, RCT, 22/6/95, pp. 9123-24; R. J. Reid, RCT, 28/2/96, p. 20852.

⁷⁸⁸ eg. W. J. Eade, RCT, 7/9/95, pp. 12551-52; R. J. McDougall, RCT, 19/10/95, p. 15036; P. Young, RCT, 25/1/96, pp. 1893-942.

⁷⁸⁹ P. Young, RCT, 25/1/96, p. 18939.

⁷⁹⁰ eg. P. Young, RCT, 25/1/96, p. 18943.

⁷⁹¹ T. Eastwood, RCT, 3/11/95, p. 15962; M. A. Hagan, RCT, 13/2/96, p. 19936; M. L. Bigg, RCT, 9/5/95, pp. 6683-84.

⁷⁹² M. A. Hagan, RCT, 12/2/96, pp. 19926-27.

⁷⁹³ T. A. Griffiths, RCT, 3/11/95, pp. 16009-11; D. F. White, RCT, 10/4/96, p. 1282.

⁷⁹⁴ WS9, RCT, 21/2/96, p. 20360.

⁷⁹⁵ T. Eastwood, RCT, 3/11/95, pp. 15955-57.

⁷⁹⁶ D. N. Brown, RCT, 29/2/96, pp. 20892-97; M. A. Hagan, RCT, 13/2/96, pp. 19951-52.

photographs of the informant, warrant checks, reliability and motivation assessments, and any clear account of the information received;

- there was duplicate registration of informants; and
- meetings occurred without advance notification to the supervisor.

7.43 In relation to supervisors, the following specific deficiencies occurred:

- there was a general unwillingness to use co-handlers, or to apply conditions of contact to meetings between informants and case officers;
- the informant-case officer relationship was rarely explained in any depth;
- supervisors of the same rank as the case officer simply accepted their assurance that the relationship was normal and proper; and
- there was a general unwillingness to de-register informants, even though there had been a loss of contact, or information was available suggesting that the informant was involved in criminal activity.

7.44 The Commission has examined comparable plans from all Australian police services and from some overseas law enforcement agencies. By comparison, the 1994 Informant Management Plan was detailed and gave officers far less discretion in their dealings with informants than many other plans.

7.45 On paper, it can fairly be said that it represented a best practice plan but failed in its implementation and in its lack of acceptance by working detectives. As such it provided a further example of a Service which lacked effective supervision, genuine accountability, a culture of professionalism and an ability to implement reform.

SERVICE REVIEW

7.46 In April 1996, Acting Assistant Commissioner Malcolm Brammer conducted a special audit of the Special Agencies Informant Registers.⁷⁹⁷

7.47 Following the identification of numerous deficiencies:

- a working party was established to develop new procedures;
- a program of training for commanders and supervisors within the Special Agencies was developed immediately;⁷⁹⁸ and
- interim procedures for informant management records within the Special Agencies were introduced.

7.48 An Informants Management Advisability Study (the Study) followed with the objective of determining the requirements of a 'complete' Informant Management System (IMS), and the most appropriate means of implementing it.⁷⁹⁹

7.49 The Study found particular problems with the way in which informant information was managed by the Service. In place of the procedures which were almost entirely manual and paper-based, a computer system was proposed as part of COPS that would facilitate:

⁷⁹⁷ The Special Agencies command comprised the Drug Enforcement Agency, Fraud Enforcement Agency, Licensing Enforcement Agency and Child Protection Enforcement Agency.

⁷⁹⁸ M. Brammer, 'Special Review of Informant Registers - Special Agencies', 17/4/96, Doc. 2096964.

⁷⁹⁹ NSW Police Service, *Informants Management Advisability Study*, 8/7/96, RCPS Exhibit 5999/24.

- standardisation of procedures and systems;
- central identification and registration of informants;
- improved evaluation of information provided by informants;
- improved accountability and audit procedures; and
- the elimination of delays in information updates resulting from manual transfer.⁸⁰⁰

THE INFORMANT MANAGEMENT MANUAL 1996

7.50 In response to the problems identified in the hearings and by the further internal studies, the Service has now revised its procedures in consultation with the Royal Commission.

7.51 On 14 April 1997, the new Informant Management Manual (the Manual) came into effect.⁸⁰¹

7.52 Its key factors include:

- compliance: the 'linchpin' for which is to be the supervisor. Accordingly, the duties and responsibilities of supervisors have been expanded to include a requirement that they personally meet with an informant to assess suitability for registration; complete and sign a form detailing the manner in which each informant is to be managed; assess each CAR and discuss it with the senior supervisor; ensure information is disseminated appropriately; and review the informant-officer relationship quarterly and with each submission of a relevant CAR.⁸⁰²
- ownership of informants: the principle that they are not the property of an individual officer has been reinforced. In relation to transferred officers, it was previously almost automatic that they 'took' informants with them. The Manual places review conditions on such circumstance;⁸⁰³
- pre-registration assessments: it is now mandatory that supervisors personally meet with informants prior to registration, consider the conditions to be imposed on contact prior to registration, and select and appoint a suitable co-handler, who is to be present at all arranged contacts;⁸⁰⁴
- assessment and review procedures: it is now necessary for case officers to submit a report to their supervisor on a quarterly basis assessing the quality and reliability of the information given and providing details against specific performance indicators such as arrests, property recovered and the like. The supervisor and senior supervisors are required to constantly reassess the value of the informant to the Service, and decide whether or not the informant-officer relationship should continue;⁸⁰⁵
- dissemination of information: a responsibility is now placed on the supervisor to not only assess the value of information provided by informants, but also to ensure that it is appropriately disseminated;⁸⁰⁶ and
- misuse of working expenses: it is now the responsibility of supervisors to approve working expenses after submission of a Working Expenditure Voucher prepared by the case officer.⁸⁰⁷

⁸⁰⁰ *ibid.*

⁸⁰¹ Commissioner's Circular, *Police Service Weekly*, vol. 9, no. 13, 31/3/97, p. 17.

⁸⁰² NSW Police Service, *The NSW Police Informants Management Plan*, March 1994, RCPS Exhibit 1113'C', pp. 23-37.

⁸⁰³ *ibid.*, paras. 3.74 - 3.77, p. 22.

⁸⁰⁴ *ibid.*, paras. 4.13 - 4.14, p. 26.

⁸⁰⁵ *ibid.*, para. 3.49, p. 18; para. 4.65, p. 32; & para. 5.32, p. 42.

⁸⁰⁶ The proposed integration with COPS is intended to greatly assist this process. *ibid.*, para. 4.66, p. 32.

7.53 The Service has recognised that computerisation of the informant management system will assist in overcoming many of the problems identified. Its purpose is to enhance control, accountability and evaluation by linking such components as the criminal histories system, intelligence system, and rewards payments with registration, contact reports and audit procedures.⁸⁰⁸ The new computerised system is to be operational by November 1997.⁸⁰⁹

7.54 The Royal Commission welcomes the initiative of the Service in developing the new Informant Management Manual, and its acceptance of a number of amendments suggested by the Commission. Computerisation of the system is fully supported by the Commission, as it has the potential to significantly improve the integrity and effectiveness of informant management.

7.55 It has now been clearly demonstrated that:

- the relationship between police and criminal informants is fraught with danger, and should occur only in accordance with a strictly controlled regime;
- understanding of the Manual and training of all officers who are potentially involved in the management of informants is essential;
- failure to comply with informant management procedures constitutes a serious breach of professional duty which should lead to prompt management action,⁸¹⁰ and even dismissal in cases where the Commissioner is not satisfied that an association between a police officer and a known criminal is maintained for proper policing reasons; and
- careful monitoring and regular review of the system will be essential to ensure that yet again it is not respected in the breach.

7.56 Several further matters arise:

- it needs to be brought home to supervisors and senior supervisors through training and specific statement in the Manual that its successful implementation is dependent upon their reviews, and that they are personally responsible and accountable for any failure to carry out this task effectively;
- although ultimate responsibility for compliance with the Manual should always remain with the senior supervisor, provision should be made for regular but random audits to determine compliance, by officers who have an adequate security clearance and are sufficiently experienced to conduct a qualitative as well as systems-based review. This could be carried out by the Office of Internal Affairs or by the PIC; and
- it should be brought home to all police that non-compliance, or lack of understanding of the Manual, will be regarded as a most unfavourable circumstance, both for case officers and supervisors, upon any assessment of their integrity in relation to matters of promotion and transfer.

7.57 It is essential that the Service emphasise and re-emphasise through training and on the job that:

- informants and their information are resources of the Service, and not of the individual case officer;

⁸⁰⁷ *ibid.*, para. 4.57, p. 31.

⁸⁰⁸ J. Ure, Acting Chief Superintendent, State Intelligence Group, Letter to the RCPS re NSW Police Informant Management Manual, 10/2/97, RCPS Exhibit 6006, p. 3.

⁸⁰⁹ *ibid.*, p. 2.

⁸¹⁰ See Volume II, Chapter 4 of this Report.

- particular care has to be exercised with the pre-registration assessment, both in deciding whether to register the informant and in selecting a suitable case officer and co-handler;
- every meeting with the informant must be promptly recorded in detail, and where practicable by use of a hand-held tape recorder;
- case officers must maintain control in their relationships, and be alert to any sign that the informant is trying to manipulate them;
- case officers must be wary of over-familiarity with informants, must not become involved in lengthy drinking sessions, or in prolonged or dubious social meetings with them, must not involve the families of the informant or officer in the relationship, and must never engage in any form of criminal activity with them or supply drugs to them by way of reward;
- only active and reliable informants should remain registered;
- informants are not to be led into the belief that their status protects them from prosecution or affords them special privileges;
- the use of informants of the opposite sex to the case officer must be treated with extreme care and, save in exceptional circumstances, any meeting should take place only in the company of a second officer;
- there must be strict accountability for, and recording of, all rewards and benefits received by the informant, which are not to be shared with the informant;
- very heavy responsibility rests with operational commanders to ensure that their staff understand and comply with the procedures; and
- advances in technology, electronic surveillance, and analysis of physical evidence, together with the more traditional lines of investigation represent the primary weapons of police, for which informant assistance should be regarded as an aid rather than a substitute.

RECOMMENDATIONS

The Commission recommends:

- ◆ All officers who are potentially involved in the management of informants must be trained in the procedures required under the Informant Management Manual, and in the dangers associated with informants (para. 7.55).
- ◆ Failure to comply with informant management procedures lead to prompt management action or dismissal where the Commissioner cannot be satisfied that an association with a known criminal is maintained for proper policing reasons (para. 7.55).
- ◆ The informant management system be carefully monitored and reviewed regularly (para. 7.55).
- ◆ It be emphasised to supervisors and senior supervisors through training and specific statement in the Manual that its success depends on their reviews and that they are personally responsible and accountable for any failure to carry out this task effectively (para. 7.56).
- ◆ Provision should be made for regular random audits to determine compliance by officers who have an adequate security clearance and are sufficiently experienced to conduct a

qualitative as well as a systems-based review. This could be carried out by the Office of Internal Affairs or the PIC (para. 7.56).

- ◆ It be emphasised to police that non-compliance or lack of understanding of the Manual will be regarded most unfavourably when assessing their integrity prior to promotion or transfer (para. 7.56).
- ◆ The Service emphasise and re-emphasise through training and also on the job that (para. 7.57):
 - informants are resources of the Service not the individual case officer;
 - particular care must be exercised with pre-registration assessment;
 - every meeting with an informant must be properly recorded in detail;
 - case officers must maintain control in their relationships;
 - case officers must be wary of over-familiarity with informants;
 - only active and reliable informants should remain registered;
 - informants are not to be led in the belief that their status protects them from prosecution or affords them special privileges;
 - care must be taken when using informants of the opposite sex to the case officer, including ensuring that meetings should take place only in the company of a second officer;
 - there must be strict accountability for and recording of all rewards and benefits received by the informant and no sharing of such rewards; and
 - operational commanders must ensure their staff understand and comply with the informant management procedures.
- ◆ Assistance from informants should be regarded as an aid to, rather than a substitute for, traditional lines of investigation (para. 7.57).

D. UNDERCOVER OPERATIONS

RIDGEWAY

7.58 Covert undercover operations in themselves are not illegal,⁸¹¹ but there are times when it has become necessary for an undercover police operative to participate in criminal activity to see the operation through to the time when an arrest might be made.

7.59 The circumstances in which this might occur are diverse but commonly arise, for example, in narcotics investigations where:

- having become aware that a consignment of drugs is on its way into the country, police arrange for customs officers to facilitate its entry, so that it can be given a controlled run to identify and arrest those who intended to receive, warehouse and distribute it;

⁸¹¹ See eg. *Ridgeway v The Queen* (1995) 184 CLR 19 at 70 (per Gaudron J) and 91 (per McHugh J).

- monies are provided to finance a controlled buy of drugs so as to arrest the supplier;
- meetings are arranged, premises or vehicles are acquired, potential 'purchasers' are introduced, and other activities undertaken to establish a realistic scenario;
- false documentation, in the form of birth certificates, drivers' licences, passports, and even counterfeit money, is provided to facilitate an operation; and
- misrepresentations are made, or steps are taken which might constitute a public mischief, or any one of a number of minor offences.

7.60 A not dissimilar situation can arise in the setting up of a contrived scenario to test the integrity of a police officer, but this has now been accommodated by amendment to the *Police Service Act 1990*⁸¹² in response to the Second Interim Report.

7.61 Issues arise concerning:

- the criminality of the conduct which the undercover operative has undertaken; and
- the impact it may have on the admissibility of the evidence collected.

7.62 An answer to these questions was given in *Ridgeway v The Queen*.⁸¹³ Ridgeway was convicted of being unlawfully in possession of heroin which had been passed to him by an accomplice who, unbeknown to Ridgeway, was a police informer assisting both the Royal Malaysian Police and the Australian Federal Police. The heroin was imported into Australia by the informer, and a Malaysian police officer with the knowledge and assistance of the AFP, who described it as a 'controlled importation'. The conduct of the police concerned was in breach of the *Customs Act 1901* (Cth) s. 233B(1)(d) which provides that any person who 'aids or abets ... the importation ... of any prohibited imports is guilty of an offence'. The conviction was quashed on the public policy ground that the AFP had committed a criminal act which was an essential ingredient of the offence charged.⁸¹⁴

7.63 In answer to the first issue, it was held that criminality does attach to the actions of the operative irrespective of the motives behind them:

where no law exists authorising law enforcement officers to encourage or participate in the commission of criminal offences ... it is likely that the conduct which procures the commission of a criminal offence by another will itself be criminal.⁸¹⁵

The criminal law has developed on the basis that criminal activity attaches if a person 'intends to commit a crime and actually commits it'. And that is so no matter that the person concerned is acting for or on behalf of a law enforcement agency or some other arm of executive government. Thus, and as a matter of legal principle, law enforcement agents who engage in criminal activity are criminally liable for their actions and liable to punishment.⁸¹⁶

7.64 The answer to the second question lies in the exercise of a judicial discretion to reject evidence by reference to:

- the public interest in the conviction and punishment of those guilty of crimes; and
- the public interest in opposing the 'enforcement of the law by lawless means'.⁸¹⁷

⁸¹² *Police Service Act 1990*, s. 207A.

⁸¹³ *Ridgeway v The Queen* (1995) 184 CLR 19.

⁸¹⁴ The Commonwealth power is based on s. 90 of the Constitution, the customs power.

⁸¹⁵ *Ridgeway v The Queen* (1995) 184 CLR 19, at 36, per Mason CJ, Deane and Dawson JJ.

⁸¹⁶ *Ridgeway v The Queen* (1995) 184 CLR 19, at 73, per Gaudron J.

⁸¹⁷ *Sherman v US* (1958) 356 US 369 per Frankfurter J quoted with approval by Mason CJ Deane and Dawson JJ in *Ridgeway v The Queen* (1995) 184 CLR 19 at 34.

The weight to be given to the public interest in the conviction and punishment of those guilty of crime will vary according to the degree of criminality involved. The weight to be given to the principal considerations of public policy favouring the exclusion of evidence - the public interest in maintaining the integrity of the courts and in ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement - will vary according to the ... seriousness and the effect of the illegal conduct engaged in by the law enforcement officers.⁸¹⁸

7.65 The High Court in *Ridgeway* recognised the consequences of its decision, and the need for legislation if those responsible for the investigation of crime are to be freed from any of the restraints of some provisions of the criminal law.⁸¹⁹

7.66 Such a regime has already been put in place in South Australia with the *Criminal Law (Undercover Operations) Act 1995* (SA) which requires that a senior police officer⁸²⁰ give an approval in writing for an undercover operation for the purpose of gathering evidence of 'serious criminal behaviour',⁸²¹ which specifies:

- the officers who will be involved in the operation; and
- the nature of the operation itself.

Once that approval has been given:

an authorised participant ... incurs no criminal liability by taking part in undercover operations in accordance with the terms of the approval.⁸²²

7.67 Similar legislation has been enacted by the Commonwealth of Australia, the *Crimes Amendments (Controlled Operations) Act 1996*, although it is confined to investigations directed at a Commonwealth offence involving the importation, export or possession of narcotic goods. In Victoria, similar protection arises under the *Drugs, Poisons and Controlled Substances Act 1981* but is confined to drug investigations.

7.68 The Australian Police Ministers Council resolved in April 1996 to seek cross jurisdictional recognition of legislation designed to address Ridgeway problems.

7.69 In NSW, the ICAC convened a working group for the purpose of promoting legislation which would preserve the integrity of undercover operations and provide legal immunity for authorised officers taking part in approved, controlled operations, who might otherwise be at risk of prosecution or criticism for activities undertaken in their specialist investigative work.

7.70 A draft Bill was drawn up for discussion purposes to address a number of related issues:

- the provision of false identities;
- the formation of 'Controlled Operations Committees' in relevant agencies to make recommendations in respect of controlled operations;
- the approval of controlled operations;
- the authorisation of illegal activity in the course of such operations;

⁸¹⁸ (1995) 184 CLR 19, at 38, per Mason CJ, Deane and Dawson JJ.

⁸¹⁹ (1995) 184 CLR 19, at 44, per Mason CJ, Deane and Dawson JJ, and at 54 per Brennan J.

⁸²⁰ Defined as one of or above the rank of Superintendent, *Criminal Law (Undercover Operations) Act 1995* (SA), s. 2.

⁸²¹ This is defined in the Act (s. 2) and includes among others:

- an indictable offence;
- an offence against the *Controlled Substances Act 1984* and various sections of the *Fisheries Act*, *Lottery and Gaming Act*, *National Parks and Wildlife Act*, *Racing Act*, and *Summary Offences Act*.

⁸²² *Criminal Law (Undercover Operations) Act 1995* (SA), s. 4.

- the circumstances where officers act illegally in emergent situations which are not capable of anticipation and for which prior approval has not been granted;
- the exemption from liability in tort for any action undertaken in good faith by an officer;
- the recording of undercover operations; and the
- protection of the identity of covert operatives if called as witnesses.

7.71 In the Second Interim Report, this Commission recommended the introduction of legislation to overcome the implications of *Ridgeway* for covert operations. Notwithstanding reservations expressed to the Royal Commission by the Attorney-General,⁸²³ as to the need for, and appropriateness of, any legislative intervention, the Commission remains persuaded that it is necessary. It is aware that the Ministry for Police is working towards the development of appropriate legislation, in consultation with interested parties. However, as it is unlikely to be settled by the time this Report is presented, this point will be developed here in a little more detail.

7.72 The *Ridgeway* exclusionary rule is now entrenched⁸²⁴ in the *Evidence Act 1995* which makes illegally or improperly obtained evidence inadmissible 'unless the desirability of admitting evidence outweighs the undesirability' of doing so, and sets out the criteria which the court may take into account.⁸²⁵ These include:

- the probative value and importance of the evidence;
- the nature of the offence, and subject matter of the proceedings;
- the gravity of the impropriety or illegality in obtaining the evidence;
- whether that impropriety was deliberate, reckless or contravened the International Covenant on Civil and Political Rights; and
- whether the evidence might have been obtained in some other way.

7.73 This provision changes the onus for admissibility rendering *Ridgeway*-type evidence presumptively inadmissible but raises essentially similar considerations.⁸²⁶ It is likely to give rise to delay and the expense of a *voir dire* examination, and it is accompanied by the not inconsiderable uncertainty and appeal potential attaching to any category of evidence that invites exclusion on what amount to public policy grounds.

7.74 The Royal Commission also remains concerned as to the first issue identified earlier. While it is the fact that intermediate Courts of Criminal Appeal have so far not been quick to reject evidence obtained in circumstances where a police undercover operative, or an informant acting under police instructions, has participated in unlawful activity,⁸²⁷ this does not alter the position of the operative or supervisor involved in that operation. Each faces the prospect of being charged criminally or departmentally, notwithstanding the circumstance that the conduct was approved at the highest level of the Service, was fully disclosed and carried out for the sole purpose of securing the conviction of a person engaged in or suspected of serious criminality. It is in substance a form of process corruption, and it does not lose that characteristic because it was approved by higher authority.

7.75 This Commission takes the view that:

⁸²³ Letter from Attorney-General to RCPS, 11/3/97 - Doc. 2682297.

⁸²⁴ Save so far as it alters the onus of proof in making the evidence presumptively inadmissible.

⁸²⁵ *Evidence Act 1995*, s. 138(3).

⁸²⁶ See the discussion in *Bunning v Cross* (1978) 141 CLR 54, at 72-73, per Stephen and Aicken JJ.

⁸²⁷ *Peters v R*, unreported, NSW Supreme Court, CCA, 20/8/96; *R v Kolalich*, unreported, NSW Supreme Court, CCA, 17/6/96, (in respect of which special leave to the High Court was refused on 14/2/97); *R v Dumas*, unreported, NSW Supreme Court, CCA, 20/11/95; *Karam v R* (1995) 93 ACrimR 416; *Reidy v R*, unreported, NSW CCA, 31/5/95; *Kapeliotis*, unreported, NSW Supreme Court, CCA, 31/8/95. Each is a decision on its own facts, and neither individually nor collectively do they necessarily weaken *Ridgeway* or s. 1B8 of the *Evidence Act*.

- it is contrary to principle to place any police officer in a position where operationally, he or she is expected to commit a criminal offence, and to apply to the Attorney General after the event for an indemnity from prosecution if the relevant conduct is called in question, or to rely on the discretion of the Director of Public Prosecutions not to prosecute, or of the Commissioner of Police not to institute disciplinary proceedings;
- it is undesirable for the courts to be placed in a position where an expectation arises that they will similarly turn a blind eye to this form of conduct or *de facto* be given a delegated responsibility to 'excuse' criminal conduct; and
- it is equally undesirable that uncertainty should exist in the planning of an operation, or in the presentation of a Crown case, which might ultimately depend on an exercise of discretion.

7.76 The Commission recommends, accordingly, the enactment of legislation which would extend to the Police Service, the PIC, the Crime Commission, the ICAC and other prescribed agencies, and be along the lines of that proposed by the majority of the members of a working group convened by the ICAC. The purpose would be to introduce a greater degree of regularity and certainty into undercover operations, and to remove any residual concerns as to the criminal and tortious liability of officers to perform their duty in the course of approved controlled operations.

7.77 Such objections as have been raised which turn largely upon the potential breadth of a 'prospective statutory indemnity'⁸²⁸ can, in the view of the Commission, be satisfied by the introduction of suitable safeguards which would ensure that:

- an operational plan is prepared which is in writing, and approved by a Commander with the assistance of a Controlled Operations Committee within the relevant agency, and which details all activities involved that might be unlawful, and the expected duration of the operation;
- approval is not given to activities in which the Service, the undercover operative, or any controlled agent:
 - acts as an *agent provocateur*, that is, entices a target to commit an offence which he or she would not have otherwise committed;⁸²⁹
 - accepts a major role in planning and committing the crime in question; and
 - is expected to engage personally in conduct that might risk the safety of other citizens or property;
- covert activity is confined to cases where:
 - the activity in question is necessary to enable police to detect, prevent or prosecute the crime in question;
 - there is credible reason to suppose that the target of the operation is engaged or about to engage in that crime;
 - steps can be taken through corroboration, surveillance and the like to secure an unassailable record of what occurred;⁸³⁰ and

⁸²⁸ Considerable doubt exists whether an indemnity can be given prospectively by an Attorney-General: *R v D'Arrigo* (1991) 58 ACrimR 71 per de Jersey J, at 76-77 and per Dowsett J, at 78-79.

⁸²⁹ 'As a matter of legal principle, law enforcement agents who engage in criminal acts are criminally liable': per Gaudron J in *Ridgeway v R* (1995) 184 CLR 19, at 73.

⁸³⁰ These safeguards broadly follow the draft Covert Operations Management Plan prepared by the Attorney General.

- an annual report is provided by the agency specifying the number of controlled operations approved and the nature of the offences against which they were directed.

7.78 The Commission is of the view that the immunity conferred should extend to:

- civil liability, and also to
- civilians acting under the direction of police in the course of approved controlled operations.

7.79 The Royal Commission further specifically recommends that legislation be enacted, on both a State and Federal basis, to regularise the creation of false identities, and to provide for a permanent and secure register within the agency sponsoring any change in identity of an undercover agent or protected witness, or where appropriate, members of their families or partners. Such arrangements as are presently made in this regard are *ad hoc*, uncertain in their legality, sometimes call for unauthorised amendments to official records, and are lacking in accountability.

USE OF UNDERCOVER OPERATIVES

7.80 The desirability of the use of serving police in any long-term undercover capacity has in recent times come to be seriously questioned.⁸³¹ The problems identified relate to the corrupting nature of this form of work, the long-term psychological consequences attributable to the stress involved arising out of the need to assume a very different identity, and to engage in conduct which is often the antithesis of the values appropriately held by a police officer.⁸³²

7.81 So far as the Commission is aware, the NSW Police Service seems not to have used its members in long-term undercover operations. For that reason, the Commission merely expresses the need, in the event of any task force or agency deciding to engage in this form of activity, for the Service to develop and carefully implement guidelines which provide for:

- intense vigilance to ensure that the undercover operative is not corrupted by the circumstances of the operation, and in particular, is not expected to personally inject or use drugs;
- psychological profiling of undercover officers;⁸³³
- careful selection of operatives based on their experience and suitability for the work;
- careful training for undercover officers including where possible 'on the job training';⁸³⁴
- meticulous planning of operations including assessment of the risk and/or necessity for the use of an undercover operative;⁸³⁵
- regular review by qualified staff to confirm the suitability of the officer to continue in undercover work; and
- rotation of duties, and counselling where stress is observed, or the operative is moved to another job.

⁸³¹ See comments by Deputy Commissioner Whiddett of the AFP in letter to RCPS dated 22/10/95, Doc. 1418154 and by then Commissioner McAuley of the AFP dated September 1991, Doc. 0478973.

⁸³² M. Girodo, 'Drug corruption in undercover agents: Measuring the risk', *Behavioural Sciences and the Law*, vol. 9, 1991, p. 362.

⁸³³ See generally the work of M. Girodo and in particular M. Girodo 'Drug corruption in undercover agents: Measuring the risk' *Behavioural Sciences and the Law*, vol. 9, 1991, p. 361.

⁸³⁴ T. M. Burton, 'Undercover Officer Safety', *Beretta USA Leadership Bulletin*, vol. 1, issue 11.

⁸³⁵ See comments by Deputy Commissioner Whiddett of the AFP in letter to RCPS dated 22/10/95, Doc. 1418154; and by then Commissioner McAuley of the AFP dated September 1991, Doc. 0478973.

RECOMMENDATIONS

The Commission recommends:

- ◆ The introduction of legislation, along the lines of that proposed by the ICAC convened Working Party, to regulate undercover operations and to provide an immunity from civil and criminal liability to officers involved in approved controlled operations, subject to suitable safeguards of the kind identified in this Report (paras. 7.76 - 7.79).
- ◆ The development of guidelines for the use of long-term undercover operatives (para. 7.81).
- ◆ The introduction of legislation to regularise the issue of false documents such as birth certificates, drivers' licenses, passports and the like to support false identities, both of protected witnesses and undercover operatives (para. 7.79).

E. ELECTRONIC SURVEILLANCE**THE VALUE OF ELECTRONIC SURVEILLANCE**

7.82 The Royal Commission found that its use of electronic surveillance was the single most important factor in achieving a breakthrough in its investigations. In this regard, it mirrors the experience of conventional law enforcement agencies faced with a proliferation of the drug trade, and an increase in the sophistication of the methods employed by those engaged in organised crime. Although the advantages of this form of surveillance are so obvious that they barely need statement, they include:

- the obtaining of evidence that provides a compelling, incontrovertible and contemporaneous record of criminal activity;
- the removal of the incentive to engage in process corruption;
- the opportunity to effect an arrest while a crime is in the planning stage, thereby lessening the risk to lives and property;
- the provision of greater security for money in the possession of undercover operatives;
- the reduction of the possibility of harm to police, and undercover operatives and informants, arising out of the opportunity this form of surveillance provides to obtain a forewarning of any planned reprisals, and to know in advance the planned movements and activities of the targets;
- the reduction in the need for close personal contact with criminals;
- overall efficiencies in the investigation of corruption offences and other forms of criminality that are covert, sophisticated, and difficult to detect by conventional methods, particularly where those involved are aware of policing methods, are conscious of visual surveillance and employ counter-surveillance techniques;
- a higher plea rate in cases which, by reason of unequivocal surveillance product, are indefensible, and do not depend on disputed evidence or civilian eyewitnesses who are untrained as observers and historians of fact; and
- the provision of a record to establish or rebut complaints against police.

7.83 The effective use by the ICAC of this form of surveillance during the past 18 months and its regular and exceedingly productive use by the AFP in major drug importation cases provides further testimony to its value. In the judgment of this Commission, it is essential that the Police Service (and similar law enforcement agencies), the Crime Commission, the PIC and the ICAC be equipped with adequate resources and electronic surveillance capacity, to fulfil their charters to best advantage and to keep ahead of the increasing sophistication of criminals. Those resources and powers need to extend to listening devices, intercepts of telephone and other forms of telecommunications, tracking devices, and video surveillance.

7.84 In each area at the moment there are deficiencies in the relevant legislation, or practical problems that limit their effectiveness, and as a result:

- reduce the capacity of law enforcement to deal with serious crime;
- encourage process corruption; and
- hinder the detection and investigation of corruption on the part of police, and other public officials.

7.85 The Royal Commission recognises that these types of investigative techniques are invasive, and that privacy interests need to be taken into account. However the need to protect individual privacy was not the sole purpose behind legislation such as the *Listening Devices Act 1984* (NSW) (LD Act) and the *Telecommunications (Interception) Act 1979* (Cth) (TI Act). For example, it is well recognised that one of the objectives of the TI Act was to permit information to be 'available for use in furtherance of the proper objectives of law enforcement agencies, the dictates of national security and the prosecution of serious offences'.⁸³⁶ Indeed, the Commission notes a recent public opinion poll⁸³⁷ that reported significant community support for the use of video surveillance in public and work places as a means of preventing crime.

7.86 Ultimately the question is one of weighing the broader public interests in effective law enforcement, corruption prevention and preservation of the safety of the community against the individual interest in privacy. In such a balancing exercise, sight should not be lost of the fact that:

- law-abiding citizens have little to fear from surveillance;
- those involved in serious crime have no legitimate claim to plan or engage in their criminal activities in privacy;
- safeguards can be provided through:
 - a suitable legislative prescription of the circumstances in which video surveillance is allowed;
 - the need for a court approved warrant before targeted individual surveillance extending to conversations is allowed, in which conditions can be imposed;
 - a statutory regime as to the use, storage and destruction of all electronically gathered product, to ensure that it is used only for legitimate purposes of law enforcement;
 - oversight by the Ombudsman (State and Federal) in accordance with existing arrangements, of compliance with the relevant legislation.

⁸³⁶ *The Hon JRT Wood v Beves*, unreported, NSW Supreme Court, CCA, 14/3/97, at 11 per Cole JA; see also *Kizon v Palmer & Ors*, unreported, Full Federal Court, 5/2/97.

⁸³⁷ Morgan-Bulletin Poll, 'Majority of Australians Support Surveillance Cameras in Public and Work Place', March 1997, RCPS Exhibit 5999/7. The survey reported that 89% of persons surveyed approved of the use of surveillance cameras in public places and 57% of persons surveyed approved the use of surveillance cameras in the workplace.

7.87 Although the Royal Commission was not given a telephone interception capacity, it has become aware of a number of deficiencies in relation to the legislation governing that form of surveillance. Similarly, it has become aware of a number of matters affecting other forms of electronic surveillance, that merit consideration for reform.

INTERCEPTION OF TELECOMMUNICATIONS

7.88 The TI Act,⁸³⁸ which governs the interception of communications by telephone and other forms of telecommunication, is extraordinarily complex and the occasion of real difficulty in its application.

7.89 The Commission accepts that the policy underlying the TI Act is that interception should be used only in relation to criminal prosecutions for serious offences in order to achieve a balance between this form of law enforcement and the right to privacy. However, even accepting that policy, it is the Commission's view that the types of offences stipulated as attracting the interception power do not achieve the correct balance. Of particular concern is the fact that a significant number of offences which are defined as serious offences at State level, do not qualify as serious offences for the purposes of the TI Act either because the minimum penalty set by the State Legislature is less than seven years' imprisonment or the offence is not specifically referred to in the definitions of 'class 1 offence' and 'class 2 offence' in the TI Act.⁸³⁹

7.90 Amendments to the TI Act in 1995 extended the category of offences amenable to the use of intercept investigation by including the offences of bribery and corruption within the definition of 'class 2 offence'.⁸⁴⁰ Although it is difficult to see why these classes of offence were ever excluded, this amendment did at least enable the Royal Commission to receive vital telephone intercept product from other agencies. The Commission remains concerned, however, that other serious offences are not included within the legislative scheme. *Ad hoc* amendment such as this is one way of facilitating reform. When consideration is given not only to the number of offences which are currently excluded but also the suitability of the types of offences which are included, a more systematic and comprehensive review seems appropriate. This review could be performed at Commonwealth level with input from all agencies interested in the use of intercept powers.

7.91 The Commission is also concerned that the narrowness of the TI Act stifles effective law enforcement by preventing the use of intercept product in proceedings which, though they may not constitute criminal proceedings, are nevertheless integrally related. The Commission has in mind bail applications,⁸⁴¹ proceedings for contempt,⁸⁴² proceedings in Coroners Courts, proceedings for injunctive or declaratory relief arising out of an investigation by a relevant agency, and proceedings for the recovery of proceeds of crime under the *Drug Misuse (Civil Proceedings) Act 1990*. Each of these should, in the view of the Commission, be included within the definition of 'exempt proceedings' and it recommends reform accordingly. The present judicial interpretation of the TI Act has led to the absurd situation that product legitimately tendered as a public exhibit in one proceeding, and amenable to unrestricted publication in the media, cannot be used in another court proceeding unless the proceeding is specifically designated.⁸⁴³

⁸³⁸ *Telecommunications (Interception) Act 1979* (Cth).

⁸³⁹ eg. A person who without lawful excuse wilfully prevents, obstructs or dissuades a person being called as a witness in any judicial proceeding from attending as a witness or from producing anything in evidence pursuant to a summons or subpoena is liable to imprisonment for five years: *Crimes Act 1900* (NSW), s. 325(1). By virtue of the definition of 'serious offence' contained in s. 311, this offence is a serious offence. However, in spite of its designation as such by the NSW Parliament, investigation of this offence would not be amenable to the use of telephone intercepts because the *Telecommunications (Interception) Act 1979* (Cth) restricts use of telephone intercepts to the investigation of offences punishable by imprisonment for at least seven years. Even those offences which are designated penalties of seven years' imprisonment or more by the NSW Legislature (and are by definition serious offences) (eg. perverting the course of justice) cannot be investigated with the benefit of telephone intercepts because they are not specifically referred to in the *Telecommunications (Interception) Act 1979* (Cth).

⁸⁴⁰ See *Telecommunications (Interception) Act 1979* (Cth), s. 5D(2)(vii), inserted by the *Telecommunications (Interception) Amendment Act 1995* (Cth).

⁸⁴¹ cf. *Director of Public Prosecutions v Serratore* (1995) 132 ALR 461.

⁸⁴² cf. *The Hon JRT Wood v Beves*, unreported, NSW Supreme Court, CCA, 14/3/97.

⁸⁴³ See Serratore and Beves supra.

7.92 Compounding these legislative impediments to law enforcement objectives are a variety of other difficulties. The current telecommunication interception monitoring system (named TIRAC) requires the AFP to be informed about the issue of all warrants to other agencies.⁸⁴⁴ In an effort to ensure individuals' right to privacy, the system is also such that the AFP may switch the intercept off at any time. As a matter of practical reality, this safeguard is illusory due to resource constraints and the technical ability of agencies to by-pass the system if so minded. As a matter of policy, this additional safeguard is unnecessary when regard is had to the following:

- a warrant authorising an interception cannot be issued without the approval of an eligible judge of the Federal Court;⁸⁴⁵
- the requirement for the chief officer of an agency to whom a warrant has been issued to notify the Commissioner of the AFP of this fact forthwith;⁸⁴⁶ and
- oversight by the Ombudsman of telephone intercept product record keeping procedures.⁸⁴⁷

7.93 Difficulties have also been experienced, and may continue to be experienced, due to the inability of the current TI Act to keep pace with changes in technology. The advent of digital technology and encryption has had the effect of preventing law enforcement agencies from intercepting many communications. For example:

- the current legislation provides for the issue of warrants to particular telephone services only. The issue of multiple SIM⁸⁴⁸ cards capable of use via a single digital mobile handset significantly hampers efforts to intercept communications from the handset as separate warrants are required for each card;
- this problem is compounded by the 'wholesaling' of digital subscription numbers to service providers. Carriers do not have access to subscription information held by service providers. For law enforcement agencies, this may mean that inquiries will need to be made of all service providers and carriers to ascertain relevant subscription information. The subscriber may be using more than one carrier for a particular handset and warrants will need to be obtained for each number; and
- little is done by carriers and service providers to confirm the identity of the subscriber to whom cards or services are provided, thereby complicating the task of law enforcement agencies in finding relevant telephone, fax or intercept numbers.

7.94 Encryption presents a particular problem since current technology effectively prevents deciphering of encrypted communication unless the most sophisticated equipment is available, and even then, only after considerable delay.

7.95 What is essential, in the view of the Commission, is an effective regime for the continuous monitoring of advances in technology that:

- can prevent their introduction until suitable capacity for intervention is established; and
- ensures prompt amendment of the TI Act to meet any such advance.

At the moment, despite the existence of the Law Enforcement Advisory Committee, amendment of the TI Act has proved tortuously slow and unresponsive to needs. The Commission will not speculate

⁸⁴⁴ *Telecommunications (Interception) Act 1979* (Cth), s. 53.

⁸⁴⁵ *Telecommunications (Interception) Act 1979* (Cth), s. 6D. This is the subject of imminent review following a policy decision of the judges of the Federal Court that it was not appropriate for them to continue to act in this capacity.

⁸⁴⁶ *Telecommunications (Interception) Act 1979* (Cth), s. 53.

⁸⁴⁷ *Telecommunications (Interception) (NSW) Act 1987*.

⁸⁴⁸ Subscriber Identity Module (SIM).

as to the reasons for this, although it understands that they have at least in part been due to some general philosophical resistance to the interception of private communications.

7.96 Significant among other practical difficulties associated with telecommunications interception is cost. Under current arrangements, telecommunications carriers are permitted to recover from agencies the capital costs associated with providing interception capacity,⁸⁴⁹ as well as heavy charges for the retrieval of call charge records. Until the legislation can be modified to enable State agencies proper access to these facilities for the reasons identified above, serious consideration should be given to re-visiting this funding model.

7.97 In particular, consideration should be given to requiring carriers, as a part of their licence conditions, to provide at their own cost, interception capability on telecommunication services which they wish to introduce. They should also be required to have technology and systems in place which facilitate the retrieval of call charge records for, say, 10 years. Law enforcement agencies should not have to bear the actual capital cost of this technology. Rather, minimum fees should be set which encourage carriers to take commercially viable decisions to install and utilise their technology in a productive and efficient way. It is not in the public interest that law enforcement agencies should have to bear the cost of expensive capital acquisitions when more effective and inexpensive options may be available.

7.98 In any further review of the TI Act, specific consideration should in the Commission's view, also be given to devolution of Commonwealth responsibility to the States, at least in relation to the selection of agencies which might use a TI power, and the offences for which it should be available. This is in recognition of the inappropriateness of the Commonwealth being involved in the enforcement of laws at a State level. The result would enhance State accountability and responsibility, and promote law enforcement. It would also avoid the distinctly unsatisfactory situation which emerged, for example, when the State of New South Wales was rebuffed by the Commonwealth in its request, supported by the State Opposition and several other law enforcement agencies, for this Royal Commission to be given agency status.⁸⁵⁰ It is difficult to fathom why, in an inquiry involving issues of such profound importance to the people of NSW as the later inquiries revealed, the State should have been denied its wish to confer the full powers it desired on the agency it selected to carry out the investigation. Certainly the refusal constituted a major restriction upon the Commission's ability to conduct its investigations.

LISTENING DEVICES

7.99 The use of a listening device is regulated under LD Act. Some aspects of the LD Act in the view of the Commission, require attention:

- the definition of 'listening device' in s. 3 of the LD Act should be amended to make provision for the use of enhancement equipment during the recording process. The words used in the *Customs Act 1901* (Cth) provide a suitable model for reform (see italicised text):

an instrument, apparatus, equipment or device capable of being used *whether alone or in conjunction with any other instrument, device or equipment* to record or listen to a private conversation simultaneously with its taking place.⁸⁵¹

- in order to overcome the problems confronted by operational delays which exist or arise beyond the control of the law enforcement agency seeking to use such a warrant, s. 16(4)(c)

⁸⁴⁹ These arrangements are the result of recommendations by the Review of the Long Term Cost Effectiveness of Telecommunications Interception undertaken in 1994 by P. J. Barrett (the Barrett Review), RCPS Exhibit 6007.

⁸⁵⁰ Under the TI Act the Royal Commission was given the status of an 'eligible authority'. This meant that it could not apply for its own warrants but was entitled to receive from another agency product that agency obtained from its authorised interceptions if relevant to the Commission's inquiry. Thus, the Commission was relegated to access to material which was likely to emerge co-incidentally to the main purpose of the agency's warrant. See also the discussion on this topic in Volume I, Chapter 1 of this Report.

⁸⁵¹ *Customs Act 1901* (Cth), s. 219A.

of the LD Act should be amended to extend the maximum duration of a listening device warrant to 90 days. This position is consistent with the maximum duration of telephone interception warrants⁸⁵² and the maximum duration of listening device warrants obtained in South Australia,⁸⁵³

- administrative difficulties experienced by law enforcement agencies caused by having to name all persons who may use a listening device pursuant to a warrant should be overcome by amending s. 16(4)(d) of the LD Act to:
 - provide that a warrant need specify only the principal investigator of the law enforcement agency⁸⁵⁴ and to permit that person to obtain such assistance from other officers of the agency as may be necessary in the use of the device;
 - enable the warrant holder to obtain such other technical assistance as may be necessary (for example, an interpreter or a person expert in locking and security systems who can ensure that access to premises is achieved undetected);⁸⁵⁵
 - to permit the demobilisation of security systems for the duration of the entry; and
 - to protect the identity of informants and undercover officers who might use the device.

In recognition of the fact that there is no restriction on who may apply for a listening device warrant and that it is in the public interest for those who obtain warrants to remain accountable, these amendments should be restricted to applications for warrants by a ‘qualified agency’;⁸⁵⁶

- the LD Act should be amended to make it clear that more than one listening device may be used under the authority of a single warrant, provided that the warrant specifies all the devices intended to be used;
- s. 16 of the LD Act should be expanded in a way consistent with s. 219B(5) of the *Customs Act 1901* (Cth) to permit a warrant holder to enter any premises where the person is, or is likely to be, for the purpose of installing, using, maintaining, moving or recovering a listening device. This amendment contemplates that the existing requirement to specify premises where practicable be abolished. It would have the effect of permitting installation of listening devices into various premises in which the suspected person is likely to be during the period of the warrant. It would also enable devices to be installed into premises as the warrant holder becomes aware of the suspect’s change of location. Finally, it would also have the effect of permitting premises to be entered during the period when the device is *in situ* to enable repairs, tests and maintenance to be effected;⁸⁵⁷
- the LD Act should be amended to permit a listening device to be recovered after the expiry of the warrant period as it is not always possible to recover the device during the warrant period;
- the LD Act should also be amended to permit the warrant holder to enter upon any other premises, as may be necessary, for the purpose of gaining access to the premises where the listening device is to be installed;

⁸⁵² *Telecommunications (Interception) Act 1979* (Cth), s. 49(3).

⁸⁵³ *Listening Devices Act 1972* (SA), s. 6(7)(c).

⁸⁵⁴ This is analogous to the situation under the *Search Warrants Act 1985*, s. 18 and the *Telecommunication (Interception) Act*, ss. 45, 46, & 55.

⁸⁵⁵ See eg. *Listening Devices Act 1990* (NT), s. 4(6)(b); *Drugs Misuse Act 1986* (Qld), s. 53.

⁸⁵⁶ A qualified agency should be suitably defined to include: the NSW Police Service or a police service of another State or Territory; the NSW Crime Commission; the Australian Federal Police; the National Crime Authority; the Police Integrity Commission, ASIO and a Royal Commission.

⁸⁵⁷ See *Listening Devices Act 1990* (NT), s. 4(6)(a).

- the definition of 'premises' in the LD Act should be amended to include containers such as crates, suitcases, and drums, and the right of entry extended to their location;
- the LD Act should be amended to remove any doubt that overt recording of a conversation by a law enforcement officer whilst on official business is permissible without the need for a warrant or the consent of the other party or parties to the conversation. This would have the effect of removing any doubt as to the validity of the use of hand-held tape recorders by police. Such an amendment is consistent with s. 219B of the *Customs Act 1901* (Cth) and s. 12F of the *Australian Federal Police Act 1979* (Cth);
- the LD Act should be amended to incorporate a provision consistent with the requirements imposed by s. 51 of the *Telecommunications (Interception) Act 1979* (Cth). This section requires that affidavits in support of a warrant obtained by telephone be sworn and delivered to the judge within one day of the warrant application being granted. The purpose of this amendment is to remove any doubt as to the terms of a warrant obtained over the telephone and evidence upon which it is based;
- the need for service of a s. 17 notice on the Attorney-General should be reconsidered. Delay can arise attending the acceptance of notices by the Attorney-General's Department which can be critical in those cases where only a very brief window of time exists to obtain the evidence. The policy behind s. 17 is to provide a check upon the validity of the warrant application. The need for scrutiny is perfectly appropriate in light of the invasion of privacy arising from use of listening devices, but it is questionable whether there is a need for scrutiny by the Attorney-General in advance of the warrant, in the case of an application made by a law enforcement agency, which is scrutinised by a judge. The Commission notes that no process equivalent to that required by s. 17 exists at Federal level in relation to an application for a telephone interception warrant. Preservation of the existing provision would be appropriate for applications made by other than qualified agencies;
- the LD Act should be amended by inserting a provision similar to s. 43 of the *Invasion of Privacy Act 1971* (Qld), the effect of which is that records of applications for warrants and warrants issued are not amenable to inspection or production except by direction of a Supreme Court judge. This is in recognition of the fact that affidavits in support of warrant applications often contain extremely sensitive material. They are currently subject to the general law relating to the issue of subpoena and summonses for production of documents which are commonly issued as pure fishing expeditions. The release of these documents has the potential not only to compromise operations being conducted by law enforcement agencies, but it also puts at risk the safety of persons involved in the operation. At present, a law enforcement agency must seek to rely on the standard grounds in order to resist production of such documents (for example, public interest immunity or no legitimate forensic purpose). Although such claims are usually successful they do occasion cost and delay;
- the LD Act should be amended to accommodate the use of mains power, where that is authorised by warrant, in order to overcome the possibility of listening device evidence being excluded on the basis that it was obtained by illegally used mains power to drive the listening device. If necessary, a condition could be imposed in the warrant requiring reimbursement of the cost of any electricity consumed;
- the LD Act should be amended to provide for evidentiary certificates to be given by technical experts involved in the installation, use and retrieval of listening devices. Such technical experts are currently required to swear affidavits in their own names and to be available to give oral evidence. This obviously gives rise to the possibility that their identities may become known, thereby placing at risk their own safety and usefulness and future operations in which they may become involved. By contrast, technical experts employed in other aspects of law enforcement (for example, scientific examinations and things done of a technical nature by telecommunications carriers in connection with

intercepting a telecommunication under the authority of an interception warrant) need provide only an evidentiary certificate;⁸⁵⁸

- the LD Act should be amended to permit the use, without warrant, of a listening device to covertly listen to or record an official conversation, in which a member of a qualified agency or a person acting by arrangement with that member, participates as a speaker or listener. The use of a listening device in such circumstances is no more intrusive than a record made of the conversation from memory, or evidence of it given orally by the officer. It has the advantage of being a more accurate, reliable and contemporaneous record;⁸⁵⁹ and
- the LD Act should be amended to overcome any doubt as to whether lawfully obtained listening device product can be disseminated or communicated to other persons. It is in the public interest that a law enforcement agency be in a position to be able to disseminate lawfully obtained listening device product where it is considered that the information contained in the product is relevant to investigations being conducted by another law enforcement agency.

VIDEO SURVEILLANCE DEVICES

7.100 There is currently no specific legislative recognition of the use of video surveillance on public or private property for law enforcement or indeed for any other purpose. The general law therefore applies:

- the *Search Warrants Act 1985* permits private premises to be entered for the purpose of executing a properly authorised search; and
- the LD Act impliedly authorises the entry upon private premises for the purpose of installing a listening device.

7.101 Neither Act, nor any other legislation in its terms deals with the installation of a video camera (save so far as it doubles as a listening device). It might be argued that, provided entry to the premises is otherwise gained lawfully, there is no illegality if that opportunity is used to install a video surveillance device. Law enforcement agencies run the risk, however, that because this action is not specifically authorised, the evidence may nevertheless be excluded in the exercise of a court's discretion.⁸⁶⁰

7.102 The use of video equipment to record or to transmit signals to a remote location is an extremely valuable tool of law enforcement, which:

- provides cogent and compelling evidence not otherwise available of clandestine criminal activity;
- supplements listening devices or product by identifying visually the parties to a conversation;
- records activities involved, for example, in the manufacture, packaging and supply of drugs which might otherwise be incapable of observation; and
- rebuts false allegations of improper conduct by police, and of entrapment.

⁸⁵⁸ See procedure in *Telecommunications (Interception) Act 1979*, s. 61; *Crimes Act 1900*, s. 414A and *Drug Misuse & Trafficking Act 1985*, s. 43.

⁸⁵⁹ Such use is authorised by the *Customs Act 1901*, s. 219B, the *Australian Federal Police Act 1979*, s. 12F, and the *Invasion of Privacy Act 1971* (Qld) s. 43(2)(a).

⁸⁶⁰ *Bunning v Cross* (1978) 141 CLR 54 and *McNamara v R* (1994) 73 ACrimR 539.

7.103 Accordingly, it is recommended that a system of judicial warrants be created providing lawful authority for the use of video devices and entry into premises to permit their use along similar lines to the scheme created by the LD Act.

7.104 The Royal Commission supports the general use of simple video surveillance without the need for a warrant in public places, or places open to lawful access by the public, or able to be lawfully viewed from a public place. Recent trials of this form of surveillance have shown it to be:

- productive of safety;
- a useful tool in the enforcement of laws concerning street violence, drugs, property theft and similar offences that are likely to occur in shopping malls and public places; and
- unobtrusive, and of little concern to law abiding citizens.

No specific legislation is needed to continue this practice.⁸⁶¹

7.105 Further, the Royal Commission sees no objection to the continued use of simple video surveillance without the need for a warrant in shops, commercial premises, and the work place, by the owners or occupiers of those premises, for security reasons. So far as such surveillance might detect the perpetration of criminal offences, for example, in banks, it can only be an added advantage. No legislation appears to be needed.

TRACKING DEVICES

7.106 Current technology permits the use of devices that have a dual capacity to act as a tracking device and listening device. There are significant advantages in the use of these devices, and also of devices which provide a tracking capacity alone, for the purpose of electronic location and pursuit.

7.107 In these various ways they can be of value:

- preventing the theft or loss of drugs, drug buy money⁸⁶² and chemicals;
- providing personal security in the case of extortion investigations;
- supporting police in terrorist and siege situations; and in
- assisting surveillance.

7.108 Warrants have been sought and granted under the LD Act authorising the use of listening devices which have a tracking component, that is, when the principal purpose has been to monitor private conversations. The use of tracking devices alone is not covered by legislation. Their installation will usually require some form of unauthorised and therefore unlawful access. It is recommended that a warrant scheme be created authorising their use and installation, similar to the scheme which operates for listening devices and as recommended for video surveillance devices.

COMPUTER ASSISTED CRIME

7.109 Although the Royal Commission has not had occasion, save in a limited way in relation to the paedophile reference, to examine computer assisted crime, it is aware of concerns entertained by various agencies concerning:

⁸⁶¹ In *Bathurst City Council v Saban* (1985) 2 NSWLR 704 it was held that there is no legal prohibition against the use of a video camera, in a public place, to film a suspect in a criminal investigation.

⁸⁶² See Glossary.

- the legislative authority of law enforcement officers to conduct covert technically-based investigations of computer crime; and the
- provisions of the *Crimes Act 1900* which limit covert access to stored information of this kind without authority or lawful excuse.⁸⁶³

7.110 It is arguable but not clearly established that:

- the issue of a search warrant would allow access to a program or data stored on a computer; and that
- the issue of a TI warrant would permit covert on-line access to a computer database.

This is an area where technology has the potential to fast outstrip conventional law enforcement and it should be included in any overall review of electronic surveillance.

CONCLUSION

7.111 The law has lagged well behind technical developments and patterns of crime. A number of representations and submissions have been made to Government, there have been official inquiries,⁸⁶⁴ Senate Committee inquiries, references to the NSW Law Reform Commission and the Privacy Committee, and Review by the Criminal Law Review Division of the Attorney-General's Department. Yet substantial problems and uncertainties persist.

7.112 If law and order are serious issues on the political agenda, then the matters outlined in this section of the Report require careful consideration and implementation, rather than endless debate and procrastination. They have an immediate relevance to the terms of reference of this Royal Commission, so far as:

- the efficiency and capacity of the Police Service to engage in crime detection impacts on its overall performance and culture;
- the capacity of the Service and the PIC to detect and investigate corrupt conduct impacts on its re-emergence as a way of life; and
- they might discourage resort to process corruption.

RECOMMENDATIONS

The Commission recommends:

- ◆ A systematic and comprehensive review of legislation and procedures regulating the use of telephone intercepts. The review should be conducted at Commonwealth level with input from all agencies interested in the use of intercept powers (para. 7.90) and should give consideration to:
 - the inclusion of bail applications,⁸⁶⁵ proceedings for contempt,⁸⁶⁶ proceedings in Coroners Courts, proceedings for injunctive or declaratory relief arising out of an investigation by a

⁸⁶³ Subsection 309(1) makes it an offence to obtain access to a program or data stored on computer, without authority or lawful excuse. Under subsection 309(3), it is also an offence to intentionally obtain access to a program or data stored on a computer where the access is obtained without lawful authority or excuse and with the knowledge, or in circumstances where the person ought reasonably know, that the program or data is confidential.

⁸⁶⁴ eg. Review of the Long Term Cost Effectiveness of Telecommunications Interception undertaken in 1994 by P. J. Barrett (the Barrett Review), RCPS Exhibit 6007.

⁸⁶⁵ cf. *Director of Public Prosecutions v Serratore* (1995) 132 ALR 461.

⁸⁶⁶ cf. *The Hon JRT Wood v Beves*, unreported, NSW Supreme Court, Court of Appeal, 14/3/97.

relevant agency, and proceedings for the recovery of proceeds of crime under the *Drug Misuse (Civil Proceedings) Act 1990* within the definition of 'exempt proceedings' under the *Telecommunications (Interception) Act 1979* (Cth) (para. 7.91);

- the devolution by the Commonwealth of appropriate legislative and administrative responsibility for telephone intercepts from the Commonwealth to the States (para. 7.98);

- an effective and workable regime for the continuous monitoring of advances in technology that can prevent their introduction until suitable capacity for intervention is established and that ensures timely and proper amendment of the TI Act to meet any such advance and current needs (para. 7.95); and
- re-examination of the current funding model with a view to requiring carriers, as part of their licence conditions to provide at their own cost, interception capability on telecommunications services which they wish to introduce (para. 7.97).
- ◆ Amendment of the *Listening Devices Act 1984* in the ways outlined in para. 7.99 in order to overcome administrative and technical difficulties and to assist in the pursuit of law enforcement.
- ◆ A judicial warrant scheme similar to that established by the *Listening Devices Act 1984*, authorising the use and installation of video devices in private places and entry onto premises to facilitate the same (para. 7.103).
- ◆ A judicial warrant scheme similar to that established by the *Listening Devices Act 1984* authorising the use and installation of tracking devices and entry onto private premises to facilitate same (para. 7.108).

F. REGULATION OF POLICE POWERS

7.113 Amongst the most influential legislation affecting policing in England and Wales has been the *Police and Criminal Evidence Act 1984* (UK)(PACE), introduced as a result of the Philips Royal Commission.⁸⁶⁷ The purpose of the Act was to provide a comprehensive legislative framework within which:

- police were given adequate powers to perform their duties; and
- the rights of suspects were defined and protected.

7.114 Included in the Act are five Codes of Practice which regulate the following aspects of policing:

- stop and search (Part 1 Code A);
- search of premises (Part 2 Code B);
- detention and questioning (Part 4 Code C);
- identification procedures (Part 4 Code D); and
- tape recording of interrogations (Part 4 Code E).

7.115 The Home Office decided that the Codes would be most workable if contained in a 'custody officer's booklet' which would give a comprehensive and practical guide to the various aspects of policing duties. They were published by the Home Office in draft form and, when finalised following consultation, were brought 'into operation by order made by statutory instrument'.⁸⁶⁸

⁸⁶⁷ *Royal Commission on Criminal Procedure*, (Chairman Sir C Philips), HMSO, U.K., Cmnd 8092-1, January 1981.

⁸⁶⁸ *Police and Criminal Evidence Act 1984* (UK), s. 67 (4).

7.116 The police powers of detention after arrest, but before charge, are considerable under PACE. A suspect may be kept in detention for a period of up to 36 hours on the approval of a superintendent, and up to 96 hours with the approval of a magistrate.⁸⁶⁹

7.117 A further significant innovation of PACE was the creation of a custody officer. The custodial and the investigative functions are split and the custody officer, who must be of the rank of sergeant or above, is allocated specific personal responsibility for the treatment of detainees when they are brought into the police station. These are summarised as:

- attending to the welfare of suspects;
- seeing that they are aware of their rights;
- answering inquires about their whereabouts; and
- making decisions on the necessity of their detention.⁸⁷⁰

7.118 Views of PACE differ. Some commentators say that nothing much has changed and that the police are operating in the same way as before, although now with the imprimatur of legislation.⁸⁷¹ Others say that: 'PACE fundamentally changed criminal investigation, shifting it towards a supposedly American model of due process'.⁸⁷²

7.119 A recent review by the UK Home Office of the research conducted on PACE, concluded:

PACE has introduced a greater element of fairness into pre-charge procedures, in that suspects are now more aware of their rights and given the chance to exercise them, although there remain areas in which improvement is required. There are also benefits for the police in terms of clearer and more certain powers, particularly at the station.⁸⁷³

7.120 A NSW Police Service Working Party has been conducting a review of PACE. It has reached some provisional findings and has issued a 'very raw draft' code for consultation purposes.

⁸⁶⁹ *ibid.*, ss. 41-44.

⁸⁷⁰ K. Bottomley, C. Coleman, D. Dixon, M. Gill, & D. Wall, *The Impact of PACE: Policing in a Northern Force*, University of Hull, 1991, p. 84.

⁸⁷¹ *ibid.*, p. 195.

⁸⁷² D. Dixon, 'Reform of Policing by Legal Regulation: International Experience in Criminal Investigation', *Current Issues in Criminal Justice*, vol. 7, no. 3, p. 289.

⁸⁷³ UK Home Office, *PACE ten years on: A review of the research*, Home Office, 1997, p. ixx.

7.121 The draft addresses:

- the powers of arrest, including reasonable suspicion, the exercise of discretion, time out, and special treatment of children;
- the protection of the rights of detained persons, including charging at designated places, the appointment of a custody manager, enshrinement of the right to legal advice, the keeping of custody records, special arrangements for juveniles and mentally disadvantaged persons;
- the questioning of suspects including guidelines for cautioning, the removal of inducements (unless authorised), the use of ERISP and interpreters, and the interview of juveniles;
- the search of premises and seizure of property, including powers of entry and applications for the execution of search warrants; and
- guidelines for the exercise of stop and search, and detention powers.

7.122 As the draft is in a preliminary form, it is inappropriate for the Commission to comment upon its terms. However, it strongly supports the initiative as one which is consistent with the objective of ensuring fairness, clarity and professionalism in the execution of police powers and duties. Two aspects do however call for special mention.

INTERVIEW AFTER ARREST

7.123 At present, it is the common law as expressed in the case of *Williams v The Queen*,⁸⁷⁴ which regulates the position after arrest. As the Commission has already observed, the law in this respect has been attended with uncertainty and requires redefinition.⁸⁷⁵

7.124 The common law does not give police the power to arrest a suspect for the purpose of interrogation alone. After arrest, a suspect must be placed without unreasonable delay before a magistrate. If this does not occur, a confession or any other statement made by the suspect during any period of unlawful detention may become inadmissible (previously as a matter of discretionary exclusion, now by reason of the *Evidence Act 1995*, s. 138(3)).

7.125 The High Court in *Williams* declined to follow English authority⁸⁷⁶ which permitted police to interview a suspect for so long as it took to confirm or dispel the reasonable suspicion upon which the arrest was made. By majority, it reaffirmed the

⁸⁷⁴ *Williams v The Queen* (1986) 161 CLR 278.

⁸⁷⁵ RCPS, *Second Interim Report*, November 1996, p. 17.

⁸⁷⁶ *Dallison v Caffery* (1965) 1 QB 348.

common law position of arrest and detention, holding that the time for bringing a suspect before a justice 'as soon as practicable' did not commence when the interrogation had finished:

If the suspect has been arrested and the inquiries are not complete at the time when it is practicable to bring him before a Justice, then it is the completion of the inquiries and not the bringing of the arrested person before a Justice which must be delayed.⁸⁷⁷

7.126 The Court recognised that its decision did not make life easy for investigating police. However, it was for Parliament to change the law if the balance between the rights of the individual and police powers was not being met by the common law. The decision caused concern in the Police Service and in political circles,⁸⁷⁸ yet NSW has been slow to respond.

7.127 In the other States various solutions have already been adopted:

- in Victoria: there was initially a time limit of six hours, but this was amended in 1988 to require a suspect to be taken before a Justice 'within a reasonable time',⁸⁷⁹
- in Tasmania: the Law Reform Commission recommended in 1990 that the Code be amended to allow the police a reasonable period before bringing the suspect before a Justice and this recommendation was taken up in the *Criminal Law (Detention and Interrogation) Act 1995 (Tas)*,⁸⁸⁰
- in Queensland: the CJC produced a report in 1994 which recommended the introduction of a fixed detention period.⁸⁸¹ To date, although an amending statute has been passed,⁸⁸² it has not been proclaimed;
- in South Australia: the detention of suspects is governed by legislation⁸⁸³ which prescribes a period of four hours, with a maximum extension, to be 'authorised by a magistrate', of eight hours;
- in matters involving Commonwealth offences: the *Crimes Act 1914 (Cth)* applies⁸⁸⁴ which prescribes an investigative period of four hours, or in certain cases, two hours.⁸⁸⁵

7.128 If the rights of suspects and police are not properly spelled out there will inevitably be confusion and dispute. This leaves room for the abuse of common law rights either out of ignorance⁸⁸⁶ or deliberately. Alternatively, it can result in undue hindrance to police investigations which are, as the High Court pointed out,⁸⁸⁷ carried out for the benefit of the community at large. It is productive of delay and uncertainty in the trial process, and it features as an incident of process corruption so far as it encourages police to perjure themselves in relation to whether suspects being interviewed are under arrest or merely 'assisting inquiries'.

7.129 Legislative reform⁸⁸⁸ has been invited in NSW and, in 1990 the NSW Law Reform Commission produced a report⁸⁸⁹ in which it noted that, despite *Williams*, the common law 'fails in practice to secure meaningful rights and safeguards for persons in custody'. It made

⁸⁷⁷ *Williams v The Queen* (1986) 161 CLR 278, at 300.

⁸⁷⁸ eg. see L. Taylor 'What is the Government Doing', *Police News*, vol. 76, no. 4, April 1996, p. 5; Mr A. Tink in introducing his *Crimes Amendment (Police Detention Powers after Arrest) Bill* said: 'leaders of rank and file police are screaming out; they are on bended knees to get these powers sorted out once and for all.' NSW Parliament, *Hansard*, Legislative Assembly, 17/10/96, p. 5023.

⁸⁷⁹ *Crimes Act 1958 (Vic)*, s. 460.

⁸⁸⁰ *Criminal Law (Detention and Interrogation) Act 1995 (Tas)* s. 4(4); the legislation also requires the appointment of custody officers, s. 14.

⁸⁸¹ CJC, *Report on a Review of Police Powers In Queensland, Volume IV, Suspects' Rights, Police Questioning and Pre Charge Detention*, CJC, May 1994.

⁸⁸² *Criminal Code (Qld)*, Act No. 37 of 1995.

⁸⁸³ *Summary Offences Act 1953 (SA)*, s. 78.

⁸⁸⁴ This includes Part 1C which was enacted as a result of the Gibbs Committee.

⁸⁸⁵ This applies to those under 18 and to Aborigines and Torres Strait Islanders; s. 23(4)(c).

⁸⁸⁶ eg. see *Foster v R* (1993) 113 ALR 1.

⁸⁸⁷ per Wilson and Dawson JJ, 161 CLR 278, at 312.

⁸⁸⁸ 'The balance between personal liberty and the exigencies of criminal investigation has been thought by some to be wrongly struck. But the striking of a different balance is a matter for the legislature, not the courts.' per Mason and Brennan JJ, 168 CLR 279, at 297.

⁸⁸⁹ NSW Law Reform Commission, *Police Powers of Detention and Investigation after Arrest, Report*, NSWLRC, 1990.

recommendations which would redress this, and at the same time give police sufficient powers to do their jobs effectively.⁸⁹⁰ The Commission proposed that:

- police should have the right to detain people for up to four hours after arrest for the purpose of questioning;
- the four-hour period should be subject to 'time out' provisions, for example, while awaiting the arrival of a lawyer or an interpreter;
- an extension of the four-hour period could be granted only by a court or justice;
- police should be responsible for persons in custody, keep records and consider the appointment of a 'custody officer'; and
- the rights of the suspect (including the right to silence and the right to legal assistance) should be enshrined in legislation.

7.130 These recommendations have been adopted in a Bill which it is understood will be introduced later this year.⁸⁹¹ The Commission supports statutory modification of the common law, as declared in *Williams v The Queen*⁸⁹² so as to allow police a reasonable opportunity to make inquiries following the arrest of a suspect before taking that person before a justice, and it strongly recommends the passage of this legislation.

CUSTODY OFFICERS/MANAGERS

7.131 The Commission also strongly supports the appointment of custody officers/managers. In particular, it considers that they are likely to act as a restraining influence so far as they might become personally accountable for anything untoward that may happen during the interview detention process, or for any failure to protect the rights of detained persons.⁸⁹³ Entrusted with specific responsibilities in relation to these matters they might better conduct the adoption procedures following interview, which has largely proved to be a solemn farce.

RECOMMENDATIONS

The Commission commends the Service initiative in examining the introduction of PACE style codes of conduct, to ensure that the rights of citizens and the powers of police are balanced and plainly articulated. It recommends:

- ◆ Enactment of the *Crimes Amendment (Detention after Arrest) Bill 1996* as speedily as possible (para. 7.130).
- ◆ Careful consideration of the Service review of the remaining PACE style codes of conduct, with a view to their implementation (paras. 7.120 - 7.122).

G. ALTERNATIVES TO ARREST

⁸⁹⁰ *ibid.*, p. xii.

⁸⁹¹ *Crimes Amendment (Detention after Arrest) Bill 1996*.

⁸⁹² *Williams v The Queen* (1986) 161 CLR 278.

⁸⁹³ 'A custody officer to whom I was expressing guarded scepticism about his "independent" role made the point bluntly: "A cough [confession] at the end of the day is less important to me than my job"; related by D. Dixon, 'Reform of Policing by Legal Regulation: International Experience in Criminal Investigation', *Current Issues in Criminal Justice*, vol. 7, no. 3, p. 292.

7.132 Another matter requiring careful attention by the Service, particularly by the PACE working party, and the subject of a number of submissions,⁸⁹⁴ is the extent to which it might permit or encourage resort to alternatives other than arrest.⁸⁹⁵ While relevant across the community, these alternatives have particular application in relation to summary offences by Aboriginal people and young persons. Their importance lies in the proposition that less dramatic approaches than the response of immediate arrest and charging might:

- improve the problem-solving skills of police;
- have a dramatic effect on the negative aspects of police culture through lessening the 'punishment mentality';
- reduce the temptation to engage in process corruption; and
- lead to resource savings and greater efficiencies.

7.133 The use of arrest as a last resort is not a new concept, having been recommended by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC).⁸⁹⁶ The RCIADIC advocated the use of alternatives to arrest primarily as a means of reducing the incidence of injuries and deaths in police custody.⁸⁹⁷

7.134 In NSW the current alternatives include:

- informal caution 'on the run';
- formal caution;
- summons;
- Field Court Attendance Notice (FCAN); and
- Court Attendance Notice (CAN).

7.135 The use of informal cautions 'on the run' is obviously the least intrusive alternative to arrest, involving little more than a 'talking to' by police on the scene. Formal police cautions are presently available only in relation to juveniles, and do not extend to serious indictable offences.⁸⁹⁸ They usually involve the alleged offender being required to attend a police station. In this Commission's view, no apparent reason in principle exists for not extending this alternative to adults.⁸⁹⁹

7.136 Under current instructions, police are not to arrest an offender for a minor offence where a summons would be effective in having the person appear before the court.⁹⁰⁰ Summonses are far less invasive than the alternative of arrest and charging, as the alleged offender is unlikely to be arrested, conveyed to a police station or fingerprinted. Procedurally, however, the issue of a summons is resource intensive.

⁸⁹⁴ These include submissions from: the Aboriginal and Torres Strait Island Social Justice Commissioner (RCPS Exhibit 2809/3); the Western Aboriginal Legal Service (RCPS Exhibit 2811'C/2); the Alcohol and other Drugs Council of Australia (RCPS Exhibit 2809/95); The Australian Drug Law Reform Foundation (RCPS Exhibit 2809/14); the Redfern Legal Centre (RCPS Exhibit 2809/76b); the NSW Council for Civil Liberties (RCPS Exhibit 2809/67a & b); the NSW Society of Labor Lawyers (RCPS Exhibit 2809/68 a & b); and the AIDS Council of New South Wales (RCPS Exhibit 2809/102).

⁸⁹⁵ NSW police officers are afforded extensive powers of arrest without warrant under s. 352 of the *Crimes Act 1900*.

⁸⁹⁶ Royal Commission into Aboriginal Deaths in Custody, *National Report: Overview and Recommendations*, (E. Johnston, Commissioner), AGPS, Canberra, 1991, pp. 50-51 (Recommendation 87).

⁸⁹⁷ In response to this recommendation, the Police Service identified the issue of 'safety in custody', including alternatives to charging, as a key result area in its Corporate Plan. NSW Police Service, *Corporate Plan 1993-96*, p. 13.

⁸⁹⁸ NSW Police Service, Commissioner's Instruction 75.04.

⁸⁹⁹ cf. Recommendation 87(d) Royal Commission into Aboriginal Deaths in Custody, *National Report: Overview and Recommendations*, (E. Johnston, Commissioner), AGPS, Canberra, 1991, pp. 50-51.

⁹⁰⁰ NSW Police Service, Commissioner's Instruction 96.01.

7.137 Although the Commissioner's Instructions permit the use of CANs for all indictable and summary offences,⁹⁰¹ this is confined to cases where the defendant would normally be granted unconditional bail, and is capable of understanding the procedure.⁹⁰² In most cases, when a CAN is issued the offender is arrested, conveyed to a police station, issued with the notice and fingerprinted. The proportion of alleged offenders in NSW dealt with by way of a CAN has increased dramatically since mid-1996.⁹⁰³

7.138 Following a feasibility study in 1993-94, FCANs are currently being trialled by the Service.⁹⁰⁴ The FCAN is a pocket-sized version of the CAN, which has the advantage of enabling the officer to issue a notice on-the-spot, without having to convey the offender to a police station. FCANs are suitable for a limited class of offences, where it is not necessary to remove the offender to prevent a continuation of the offence or a breach of the peace, and where police are of the opinion that the alleged offender will attend court.⁹⁰⁵ An issue which may affect police support for FCANs is current legislation which prevents police officers from fingerprinting in the field. The concern is that the inability to obtain fingerprints of people issued with an FCAN will mean that criminal records, which are based upon fingerprint identification, will be incomplete.⁹⁰⁶ Under the trial system, FCAN use is possible only where the alleged offender's identity is established, and fingerprints may be obtained following conviction.⁹⁰⁷

7.139 This Commission considers the use of CANs and FCANs to be viable alternatives to arrest and preferable to the issue of summonses in most simple cases. Their use, for example, in areas of street level drug dealing, has the potential to overcome the current log jam police are experiencing in the immediate processing of offenders taken off the streets, and in the multiple court appearances that follow.

7.140 In addition to the above options, police officers should also examine a range of informal problem-solving and conflict resolution techniques. A study by the National Police Research Unit (NPRU) suggested that 'bargaining' and 'compromising' were effective ways for officers of resolving disputes⁹⁰⁸ which may avoid the commission of an offence and need for an arrest. A further NPRU study indicated that officers who employed conflict resolution strategies in interactions with citizens were less likely to be involved in a physical altercation with the citizen.⁹⁰⁹ A recent report by the Criminal Justice Commission (CJC) on complaints of assault against police tends to confirm these findings and suggests that such complaints could be reduced by improving police training in communication and the exercise of discretion.⁹¹⁰ If this is the case, then the incidence of the 'trifecta' (offensive language, assault police and resist arrest) is likely to be reduced.

7.141 There is strong reason to suppose that the principle of arrest being the intervention of last resort is more often respected in the breach, and that police training and practices in this respect are wanting. The Royal Commission recommends that this be addressed in training and that serious consideration also be given to the issue of practical guidelines and training with a view to increasing the incidence of discretionary use of problem solving and conflict resolution strategies. This might

⁹⁰¹ NSW Police Service, Commissioner's Instruction 96.01.

⁹⁰² It is not available in cases of domestic violence.

⁹⁰³ NSW Police Service figures on CAN usage State-wide indicate that the percentage of alleged offenders issued with a CAN increased from 33% in May 1996 to 55% in January 1997, RCPS Exhibit 5999/70.

⁹⁰⁴ NSW Police Service, *Reform of the NSW Police Service: Implementation status report*, February 1997, Doc. 2669584-737, p. 14. RCPS Exhibit 2952.

⁹⁰⁵ NSW Police Service, Management Services, Report on Field Court Attendance Notices, 7/4/97, RCPS Exhibit 5999/45.

⁹⁰⁶ *ibid.*, p. 3.

⁹⁰⁷ *ibid.*, pp. 2-3.

⁹⁰⁸ C. Wilson, *Police-citizen interactions: Conflict resolution tactics and their influence upon the resistance patrol officers encounter*, Risk Management Study 1, NPRU, 1993, p. iv.

⁹⁰⁹ C. Wilson & H. Braithwaite, *Police officer behaviour during interactions with citizens: What distinguishes the 'skilled' from the 'average' officer?*, Risk Management Study 3, NPRU, 1996.

⁹¹⁰ CJC, *Reducing Police-Civilian Conflict: An Analysis of Assault Complaints Against Queensland Police*, Research and Co-ordination Division, CJC, 1997, p. 57.

particularly arise in matters involving street offences and disputes between citizens.⁹¹¹ It is recognised that the enlargement of discretion does open a window to corruption, but so long as the discretion is exercised by a person suitably trained, within clear guidelines, and is transparent and recorded, the risks can be contained and outweighed by the advantages outlined.

7.142 Finally, there needs to be a very plain message to police officers that they are not expected or entitled to take a punitive role in the criminal justice system, and that the sole purpose of arrest is to protect the public until such time as the person suspected of criminality can be brought before a court.

RECOMMENDATIONS

The Commission recommends:

- ◆ The development of strategies to ensure that arrest is used as the intervention of last resort (para. 7.141).
- ◆ The employment of alternative strategies including cautions, Court Attendance Notices and Field Court Attendance Notices wherever possible (para. 7.139).
- ◆ The development of practical guidelines and training in informal problem solving and conflict resolution techniques to moderate behaviour and to defuse situations which have the potential to result in arrest (para. 7.140).

H. INFORMATION MANAGEMENT

7.143 The management of information impacts directly on the whole of the Police Service, with far-reaching administrative and operational ramifications. The deficiencies of the existing *ad hoc* record keeping and intelligence management systems have long been apparent, and it is of concern that such condition persists, despite many attempts at reform.

7.144 The issues regarding information management within the Service are complex and problematic. As far as the Commission can ascertain, the main problems are:

- the existence of a multitude of different types of information, the specific requirements for the management of which have not been properly defined. Albeit extremely over-simplistic, two major groupings exist which are 'intelligence' - information gained during investigations that has been analysed and refined, and 'records' which are created to document business activity,⁹¹² and can relate either to investigations, or to purely administrative matters such as disciplinary proceedings against officers;
- the existence of information in various formats, most obviously hard copy and electronic, without specific attention being paid to procedures to support the secure storage and retrieval requirements of each;

⁹¹¹ cf. International Commission of Jurists, *Report of Aboriginals and the Law Mission*, ICJ, Australian Section, Sydney, 1990, p. 36; Royal Commission into Aboriginal Deaths in Custody, *National Report: Overview and Recommendations*, (E. Johnston, Commissioner), AGPS, Canberra, 1991, pp. 50-51 (Recommendations 79 & 86).

⁹¹² As defined in s. 2 of the *Archives Act 1960*, 'Public records' are papers, documents, records, registers, books, maps, plans, drawings, photographs, cinematograph films and sound recordings, of any kind, made or received in the course of his official duties by any person employed in a public office (such as the Police Service) and includes copies of public records as hereinbefore defined.

- the lack of consistent information management procedures throughout the state, the organisational structure of the Service having lent itself to an array of disparate 'information' producing units, each using its own terminology and procedures for information storage and use;⁹¹³
- a variety of computer systems which exist in isolation and are not integrated with one another resulting in the inability to take full advantage of criminal intelligence and other investigative and administrative records; and
- a lack of awareness of, commitment to and training in the importance of keeping clear and accurate records.

HISTORY

7.145 The following 'potted history' outlines developments in intelligence and records management and notes the various inquiries which have endeavoured to deal with the problem. From a historical perspective, it is evident that the strategies employed have lacked a clear and singular focus, and that what has amounted to a continual review over recent years has not been productive.

7.146 In 1985, the Service acquired a computerised Records Management System (RMS) for the tracking of hard copy records but it proved not to be user-friendly. Foremost amongst its deficiencies was inadequate security.

7.147 In 1987, the State Intelligence Group (SIG) was created to improve the flow of information/intelligence throughout the Service, and to provide intelligence analysis.⁹¹⁴ The Service has recognised however that the SIG has failed to 'reach its full potential and make a significant contribution to the corporate direction of the Service'.⁹¹⁵

7.148 In 1989, the Report of the Criminal Investigation Working Party (the Parsons Report) recommended the establishment of case management systems, to record the day-to-day management of investigations, in all patrols, and in the regional crime squads.⁹¹⁶ Case screening was also recommended as a mechanism for making 'a decision on whether or not to continue an investigation based on the existence of sufficient solvability factors'.⁹¹⁷

7.149 In October 1993, the ICAC published its Discussion Paper on the Management of Criminal Investigations which concluded that the development of case management systems within the Service was *ad hoc*, inadequate, and fell short of the Parsons Report recommendations.⁹¹⁸ Its survey showed that:

- there was an inconsistency in systems, ranging from completely manual systems to partially computerised systems;⁹¹⁹
- case screening was based on limited information criteria;⁹²⁰
- there was a need to replace discretion with a set of objective solvability factors;⁹²¹
- accountability was affected by lack of good record keeping;⁹²²

⁹¹³ In his evidence to the Commission, Kenneth Quince acknowledged that when he was appointed as Executive Director of the Police Service in July 1993, there was no universal commitment to one records management practice in NSW. K. F. Quince, RCT, 12/12/94, p. 441.

⁹¹⁴ ICAC, *Report on Investigation into Matters Relating to Police and Confidential Information*, June 1994, p. 5.

⁹¹⁵ NSW Police Service, *Police Intelligence Management Review*, April 1995, p. 1.

⁹¹⁶ ICAC, *The Management of Criminal Investigations*, ICAC Discussion paper, October 1993, p. 28.

⁹¹⁷ *ibid*, p. 38.

⁹¹⁸ *ibid*, p. 33.

⁹¹⁹ K. F. Quince, RCT, 12/12/94, p. 443.

⁹²⁰ ICAC, *The Management of Criminal Investigations*, ICAC Discussion Paper, October 1993, p. 41.

⁹²¹ *ibid*, p. 41.

- the Service's disposal policy was arbitrary, instanced by the disposal of police files and computer hardware at rubbish tips; and⁹²³
- lack of documentation of command responsibility meant that when files were moved from one person to another, it was difficult to determine who was responsible for them.⁹²⁴

7.150 Following this Discussion Paper:

- a working party was formed to look at Records Management generally; and
- revised instructions were issued to deal with publications and records, and for the filing of briefs in the Archives, Crime Data Centre, in respect of various unsolved crimes.⁹²⁵

7.151 The ICAC again reviewed the record keeping system in its Second Report into the Relationships between Police and Criminals, released in April 1994. It found, *inter alia*, that:

- the Service had been unable to produce many records generated in relation to the major investigations in which it was interested, and on occasions had to recover them from individual officers;⁹²⁶
- the Service had not maintained adequate records of matters associated with the receipt, use and storage of telephone interception product;⁹²⁷
- there was an absence of complete records of major criminal investigations which raised serious questions about the ability of the Service to investigate crime, because information was simply lost, and procedures were not in place to extract information about techniques and events from which a store of corporate knowledge could be built;⁹²⁸
- no distinction seems to have been drawn between Police Service records and the records of individual police, (a matter confirmed by the experience of this Commission in finding police records at the homes of various serving and former officers);⁹²⁹
- there was no policy relating to the keeping and destruction of records; the 'disposal policy' often being decided by individual officers who no longer could carry files from station to station or did not have sufficient space at home to continue storing files;⁹³⁰
- the absence of clear command responsibility for joint investigations resulted in a lack of accountability through improper record keeping practices; and⁹³¹
- there was a variation in practices relating to the documentation of proactive operations.⁹³²

7.152 The two important reasons for the Service to remedy its system which were identified by the ICAC related to:

- the accountability which good record keeping provides to clarify individual responsibility for all stages of operations; and

⁹²² *ibid.*, p. 45.

⁹²³ *ibid.*, p. 45.

⁹²⁴ *ibid.*, p. 47.

⁹²⁵ NSW Police Service, Commissioner's Circular of 9 August 1993, No. CC93/46 and 30 August 1993, No. CC93/49.

⁹²⁶ ICAC, *The Investigation into the Relationship between Police and Criminals - Second Report*, April 1994, p. 40.

⁹²⁷ *ibid.*

⁹²⁸ *ibid.*, p. 45.

⁹²⁹ *ibid.*, p. 43.

⁹³⁰ *ibid.*, p. 45-46.

⁹³¹ *ibid.*, p. 47.

⁹³² *ibid.*

- the need for quick access to information if complex investigations are to be pursued, and stalled or discontinued investigations are to be revived when fresh evidence or the whereabouts of a suspect becomes known.⁹³³

7.153 Arising from the findings of the ICAC inquiry, the Commissioner's Task Force 3 (Communications) was established to review and reform records management practices.⁹³⁴ Within Task Force 3, a steering committee was established, comprising members of the Service, the Ombudsman, and the ICAC, with a brief to review existing practices and develop a model of best practice. In April 1994 a census conducted by the Task Force revealed that:

- 68% of all recording activities by the Service were performed manually;
- 55% of all recording activities involved correspondence and files that were not recorded on the existing records management system;
- at least 29 varieties of computer software were being used for recording purposes;
- there was a lack of computer hardware to facilitate computerised recording within patrols and sectors.⁹³⁵

7.154 The review by ICAC was supplemented by its report into investigations into the discovery of the Major Active Criminals list (MAC) and other confidential police documents, in the hands of criminals. This investigation found:

- inadequate computer and physical security within the State Intelligence Group;
- a lack of adequate record keeping and handling; and
- a lack of detailed training and awareness in security practices and procedures.⁹³⁶

7.155 The report noted that the Service was taking action to rectify the situation, by way of a *Statement of Best Practice on the Security of Information Systems*, and a continuing review of its information and records management systems, and stressed that appropriate emphasis should continue to be given to this most important issue.⁹³⁷

7.156 In April 1994, the Service began to use the first stage of the Computerised Operational Policing System (COPS), which consisted of five operational modules. COPS had been adopted as a major initiative of the Service in 1989; with the objective of providing a comprehensive and uniform system to assist police in all facets of their work, and to maintain all operational information within an integrated system.⁹³⁸

7.157 The first stage of COPS focused on subsystems such as an events, intelligence and a central index. The subsequent stages proposed related to charge management, court notices, case management and major investigations.⁹³⁹ Following criticisms contained in the ICAC report into the Relationships between Police and Criminals, the Service selected case management as a corporate priority, and commenced building this COPS module in September 1994. A progressive implementation of the module across NSW between January and June 1996 was planned.⁹⁴⁰

⁹³³ *ibid.*, p. 45.

⁹³⁴ NSW Police Service, Information and Records Management Business Case, February 1995, p. 2.

⁹³⁵ NSW Police Service, Commissioners Task Force 3 - (Communications) Census of Existing Records Systems and Procedures, 1994, p. 1.

⁹³⁶ ICAC, *Report on Investigation into Matters Relating to Police and Confidential Information*, June 1994, p. 20.

⁹³⁷ *ibid.*, p. 21.

⁹³⁸ NSW Police Service, Submission to RCPS on Criminal Histories, p. 14, RCPS Exhibit 2912'C'.

⁹³⁹ *ibid.*

⁹⁴⁰ A. R. Lauer, Letter to RCPS re COPS Case Management System, 29/11/95, RCPS Exhibit 5999/79.

7.158 The Task Force 3 steering committee engaged a firm of consultants (BHP-IT) to develop a strategic plan, the recommendations were accepted in principle at the end of 1994.⁹⁴¹

7.159 In January 1995, the strategic plan was released which highlighted the importance of accountability, and the need for an attitudinal shift, to recognise that information was a corporate, not a personal resource. The significance of this observation was underlined by the experience of this Royal Commission in relation to the unduly close and unhealthy relationships which developed between detectives and informants, and the vigour with which they protected and clung to those informants.

7.160 An economic appraisal, completed in April 1995,⁹⁴² confirmed the need for a new records management system. Following these reports in July 1995 a tender was put out for its supply, development and implementation.⁹⁴³

7.161 In 1996, the Service purchased TRIM, a records management software product. Implementation of TRIM standalone systems at all key metropolitan and country sites commenced 1 October 1996 and is due to be finalised 1 December 1997. Also commenced in October 1996 was the implementation of TRIM Corporate systems with statewide implementation to follow when the network has been modernised.⁹⁴⁴

7.162 Other Service reviews in recent times, relevant to information and intelligence management issues, have been conducted by the Task Force for the Comprehensive Review of Criminal Investigations (CROCI), and by a project team headed by the Director, Quality & Review. Task Force CROCI was established in March 1995 to review different aspects of criminal investigations.⁹⁴⁵ One of its issues papers focused on Information Management as it Relates to Investigations, Operations and Intelligence.⁹⁴⁶

7.163 The Service has continued to develop modules within the COPS database. COPS has significantly altered the 'intelligence network' within the Service but its potential is yet to be fully realised. The Royal Commission's own experience in using it has highlighted the various design restrictions that inhibit the easy or prompt extraction of anything other than rudimentary information. Complex information searches are time and resource intensive and many are not available to general users.

7.164 Commissioner Ryan has raised similar concerns in regard to the COPS system, suggesting that the slow and cumbersome nature of data entry and retrieval does not meet the needs of the Police Service.⁹⁴⁷ He has indicated that a 'whole new review of what COPS is providing, will commence shortly'.⁹⁴⁸ While the Commission agrees that a review of COPS should be undertaken, it stresses that the job should not end there. The rectification of the existing problems requires a singular and focused approach, and an expenditure of whatever monies are needed to develop and introduce a comprehensive system responsive to the present and future needs of the Service. Fragmented development and second-best solutions will end up perpetuating the problems and prolong the cycle of review.

CONSEQUENCES OF AN IMPERFECT SYSTEM

⁹⁴¹ NSW Police Service, Economic Appraisal of Records Management Reform Project, April 1995, p. 6.

⁹⁴² Police Service economic appraisal of the records management reform project, Doc. 1281711.

⁹⁴³ NSW Police Service, Information Records Management, Request for tender for Corporate Records Management System, Doc. 1281714.

⁹⁴⁴ NSW Police Service, Reform Implementation Status Report, February 1997, p. 26 and reform strategy attachments.

⁹⁴⁵ NSW Police Service, *Comprehensive Review of Criminal Investigation*, p. 1.

⁹⁴⁶ *ibid.*, p. 2.

⁹⁴⁷ G. Bearup, 'Ryan to push for high-tech policing', *Sydney Morning Herald*, 5-6 April 1997, p. 10.

⁹⁴⁸ L. Kennedy, 'Ryan's chicken grill', *The Daily Telegraph*, 5 April 1997, p. 9.

7.165 Although the deficiencies and consequences of an imperfect intelligence and records management system are so obvious that they barely need stating, some examples deserve mention.

Unauthorised Access

7.166 A very common form of corruption, which has attracted the concern of the ICAC and the Ombudsman, and which has a regular appearance in the internal Police Complaints System, is the unauthorised access to, and release of, confidential information.

7.167 An increase in the improper accessing of COPS by police was the subject of an Ombudsman Special Report to Parliament in 1995. The Ombudsman found that while much of the information accessed was not being disseminated for financial or other benefit, officers did not fully comprehend that the authority to access any specific information rests with the Police Service, and not with the individual.⁹⁴⁹ Following this report, the Commissioner's Instructions were amended to formalise the requirements that officers document the reasons for computer access.⁹⁵⁰

7.168 Despite the increased accountability, announcements that a full audit trail to COPS access is possible and that random audits are undertaken,⁹⁵¹ and warnings of the seriousness with which the Service views unauthorised COPS access,⁹⁵² leading to several police being criminally charged,⁹⁵³ the message still seems not to be getting through.⁹⁵⁴

7.169 Instances of such misconduct, found by the ICAC, Ombudsman, or the Service in recent times have included:

- the systematic release of information to private inquiry agents, (usually former members of the Service), in return for payment;⁹⁵⁵
- the search for identifying particulars of a female motorist whose photograph appears in the media;
- searches made on behalf of friends and relatives in relation to family and marital disputes, motor vehicles and the like,⁹⁵⁶ and
- searches made to assist criminals in relation to the status of current investigations, or criminal records.⁹⁵⁷

7.170 Similar instances of inappropriate access to and use of information were found by the Royal Commission,⁹⁵⁸ and it goes without saying that the Commission takes a very dim view of such activity.

Insufficient Security

7.171 Insufficient attention has been given, at times, to security procedures, in relation to sensitive intelligence and operations, although many techniques are available with current technology to quarantine information or to restrict access via user passwords. A prime example was the release of

⁹⁴⁹ NSW Ombudsman, *Confidential Information and Police*, A Special Report to Parliament under s31 of the Ombudsman Act, November 1995, p. 9.

⁹⁵⁰ NSW Police Service, Commissioner's Circular, 'Recording Computer Access', CC 96/58, 29 July 1996, File No. 81704293.

⁹⁵¹ NSW Police Service, Commissioner's Notice, 'Random audits of the COPS system and authority to charge etc.', CN 94/110, 5 December 1994, File No. 7350016U.

⁹⁵² NSW Police Service, Commissioner's Instruction 27.03 outlines that dismissal is the presumptive option for a proved unauthorised access.

⁹⁵³ Under s. 309 of the *Crimes Act 1900* one officer was proved on a random audit to have accessed COPS on 1,591 occasions in a six-month period and was charged with 71 offences. M. Mulhall, 'Unlawful access to computer systems', *Policing Issues and Practice Journal*, vol. 5, no. 1, 1997, p. 10.

⁹⁵⁴ M. Mulhall, 'Unlawful access to computer systems', *Policing Issues and Practice Journal*, vol. 5, no. 1, 1997, p. 10.

⁹⁵⁵ ICAC, *Report on the Unauthorised Release of Government Information*, Vol 1, August 1992, p. 117.

⁹⁵⁶ NSW Ombudsman, *Confidential Information and Police*, A Special Report to Parliament under s31 of the Ombudsman Act, November 1995, p. 6.

⁹⁵⁷ ICAC, *The investigation into the Relationship between Police and Criminals - Second Report*, April 1994, p. 50.

⁹⁵⁸ S. M. Pentland, RCT, 1/8/95, p. 10505; T. D. Haken, RCT, 10/10/95, p. 14379.

the MAC list earlier maintained. This list was generated in a word processing file within the SIG. It was accessible via approximately 30 terminals in various units and centres, and in the result more than 100 police had access to it. While a user password was needed to log in, there was no audit trail, and access was not confined to SIG members working on the MAC project. Its release became a matter of serious embarrassment and concern to other Services and agencies, particularly when the source of its release could not be found,⁹⁵⁹ although the ICAC established that at least one leak came from within the Police Service, and particularly from within the SIG.⁹⁶⁰

7.172 Another instance of 'leaked' SIG information, occurred when the minutes of a Wingclipping Committee meeting, were discovered in the possession of a man known to be highly connected with motorcycle groups. While the meeting was attended by representatives of the intelligence cells of the four NSW Police Regions, the DEA Task Force 4, the Australian Bureau of Criminal Intelligence and other appropriate agencies, the minutes were produced by, and held in an unlocked filing cabinet of the SIG. The ICAC, ascertained that the leak was most likely to have come from the Police Service, and in particular the SIG, as the information handling procedures would have permitted it.⁹⁶¹

Destruction Policy

7.173 An appraisal of the Police Service records and archiving procedures by BHP-IT in 1994, found that 'until very recently there had been no systematic attempt to control archival records',⁹⁶² and identified the limitations of the Service's disposal practices, noting that:

- records were often disposed of indiscriminately;
- staff were not sure about the current procedures in relation to the disposal of files;
- procedures for the transfer of records to off-site storage and their listing for later retrieval were not well-known and were inadequate; and
- there was no documentation ensuring accountability for records destroyed.⁹⁶³

7.174 The experience of the Royal Commission is that the Service policy for destruction of records has been uncertain and uneven in its application, since:

- it depends on individual assessment of what is or is not of continuing relevance;⁹⁶⁴
- it is not easily applicable to records in varying formats, particularly electronic records;
- it has largely depended on local systems, which are not consistent statewide;⁹⁶⁵
- it is often arbitrary in its application, as evidenced in the burning of Special Branch files early in the life of this Commission, which, compounded by insufficient documentation as to what has been destroyed, has left the Service unable to account for what records it does and does not have.⁹⁶⁶

7.175 As a consequence, the work of Task Force 3, a Service record-keeping requirement and disposal policy has been articulated by way of a Resource Manual, which provides for:

- the classification and naming of files using the Police Service Keyword Thesaurus;

⁹⁵⁹ ICAC, *Report on Investigation into Matters Relating to Police and Confidential Information*, June 1994, p. 6.

⁹⁶⁰ *ibid.*

⁹⁶¹ *ibid.*, p. 8.

⁹⁶² NSW Police Service, *Information and Records Management Strategic Plan*, December 1994, p. 8-3.

⁹⁶³ *ibid.*

⁹⁶⁴ J. W. Garvey, RCT, 9/12/96, p. 325266.

⁹⁶⁵ K. Quince, RCT, 12/12/94, p. 442.

⁹⁶⁶ B. M. Mohr, RCT, 9/12/96, p. 35221.

- the adoption of standard Police Service file covers, which are intended to identify the records as those of the Service, and not of individuals;
- the use by record sites of approved record management software;
- the use of disposal schedules to identify records for disposal and their approval by the relevant manager or commander;
- the shredding or pulping of records approved for destruction prior to their disposal.⁹⁶⁷

7.176 The Commissioner's Instructions have also been updated to outline retention periods, destruction requirements, and the identification of records with a continuing value which are to be transferred to the Archives Authority of NSW.⁹⁶⁸

Ineffective Use of Intelligence

7.177 This is the area of most immediate and greatest concern, and was well illustrated by two examples arising in the course of the Royal Commission:

- the inquiry into the backpacker murders progressively established the most effective and practical information/intelligence system yet achieved by the Service to support its complex and protracted investigations involving a possible serial offender. Had it been available from the outset, valuable intelligence which later threw up the key Crown witness, might not have been missed in the early stages of the investigation;
- the recent inquiry into a series of possibly related sexual assaults in the western suburbs of Sydney was hampered by the lack of co-ordination between the bordering patrols within which the offences were committed, and by the absence of any effective communication of intelligence between them. Further, while computer facilities were available to allow the communication of intelligence, there was no commitment by officers to the proper inputting of crime information into the COPS database, and inadequate training of officers to do it.

7.178 This has also been a serious problem within the Internal Affairs command, where there has not been a sharing of information between Regional and Central offices, and where little effort was made to link intelligence concerning individual inquiries to support a more broad-based inquiry.⁹⁶⁹ It also emerged as a serious problem in the policing of the drug trade at Kings Cross, where there was:

- no effective interchange of information between the several groups working in that field;⁹⁷⁰ and
- no sharing of intelligence between the Kings Cross Drug Unit and uniformed police within that patrol.⁹⁷¹

7.179 The problem has been compounded by ineffective procedures for the movement of briefs between commands, leading to matters being neglected,⁹⁷² on some occasions possibly deliberately.

7.180 The problem was neatly encapsulated by a former acting commander of SIG who said that the Service was 'riddled with enclaves of data, with no central facility able to recognise and

⁹⁶⁷ NSW Police Service, Task Force 3 (Communications), *Information Records Management Resource Manual*, 1995, p. iii.

⁹⁶⁸ NSW Police Service, Commissioner's Instruction 28.12. The requirements for the transfer of government records to the Archives Authority are set out in s. 14 of the *Archives Act 1960*.

⁹⁶⁹ eg. the Internal Affairs Cornish inquiry, into allegations of corruption and misconduct within the Northern Rivers and Peel Districts. A particularly important deficiency in this inquiry, was the lack of co-ordination between two significant investigations which had commenced in 1987. Had there been any effective communication, it might have been expected that a more far-reaching and satisfactory investigation would have occurred.

⁹⁷⁰ See Volume I, Chapter 5 of this Report.

⁹⁷¹ N. Scullion, RCT, 10/7/95, pp. 9929-30.

⁹⁷² eg. the investigation into the theft at the Earlwood Newsagency and the whereabouts of the Beves. A. R. Conwell, RCT, 16/10/96, p. 23724; T. J. Marks, RCT, 16/10/96, p. 32713.

synthesise the holdings' so that eliciting information for investigation purposes was 'usually the result of serendipity'.⁹⁷³

7.181 The sensible solution is the integration of databases in order to develop links between like information, thereby using information/intelligence to its full potential. Such is the brief of the Police Complaints Case Management Steering Committee,⁹⁷⁴ which, following a recommendation in the First Interim Report,⁹⁷⁵ aims to create a system to electronically record information and intelligence concerning complaints against police, and to provide an in-built case management system to manage investigations into police corruption.

Criminal Records

7.182 The system for maintaining criminal records similarly has a troubled history, having regard to its user-unfriendly status, and inaccuracies. It is an area where the interests of law enforcement have come to collide with privacy interests, particularly in the retention or destruction of information concerning spent and quashed convictions, and pardons.

7.183 Consideration has been given to improvement of this aspect of the system on at least two fronts:

- a Criminal Histories Working Party was established in 1995 to develop a system that was more accurate and useable by the courts;
- a review has been undertaken by the Department of the Attorney General in relation to the *Criminal Records Act 1991*, an Act which was the subject of significant criticism by the Police Service in its submissions to the Royal Commission.⁹⁷⁶

Neither has yet led to the implementation of change, the latter review apparently having been put on hold pending a wider review of data protection and privacy legislation.

7.184 In the meantime practical problems remain in relation to:

- the easy and accurate determination of criminal antecedents, which are required not only for investigation purposes but also for bails and sentencing; and
- the corruption possibility left open where a police officer deliberately mis-states, or withholds, relevant evidence concerning criminal antecedents, and has available the excuse that the records were unclear or incorrect.

⁹⁷³ Section 6 Response of Chief Inspector Angus Graham, RCPS Exhibit 1545/2.

⁹⁷⁴ The Committee is chaired by the Premier's Department and comprised of members of that department, the Police Integrity Commission, the Office of the Ombudsman, the NSW Police Service and the Department of Public Works and Service.

⁹⁷⁵ RCPS, *First Interim Report*, February 1996.

⁹⁷⁶ NSW Police Service, Submission to RCPS re Criminal Histories, 10/1/97, RCPS Exhibit 2912 'C', p.48.

Informants Rewards and Expenses

7.185 Although touched on earlier, it is relevant to note that the recording of information in relation to rewards and expenses paid to informants has been deficient. In the case of the Special Branch this saw money ostensibly withdrawn for payment to informants being retained by the officer concerned, there having been no sufficient disclosure of the reason for the withdrawal, or checking of it by a supervisor. In other cases, there was evidence suggestive of the 'manufacture' of circumstances leading to a reward, so that it might be shared between the case officer and informant.

7.186 The Detectives Special Spending (SPX) allowance (justified as an allowance to cover expenses in dealing with informants and the like), which came under review by CROCI in 1995⁹⁷⁷ was also examined during the course of evidence before the Royal Commission.⁹⁷⁸ It was similarly uncontrolled, and payable whether or not it was used for policing purposes. The Service decided, in response to this evidence, to replace the allowance with a work-skills based allowance or similar salary component.⁹⁷⁹ The Commission supports this decision, particularly if it means that better records are kept of all payments and other benefits given to informants, both as an anti-corruption measure, and as a means of ensuring that the defence and the courts are fully informed of any matters that might affect the reliability or credibility of an informant.

7.187 This Commission also supports the recommendations of the Informant Management Advisability Study to implement a statewide system to manage informant information, as part of the COPS system, rather than by a standalone system.⁹⁸⁰ Again the purpose is to create an effective anti-corruption strategy, and to provide a tool with which intelligence can be better used, and kept secure, for investigative purposes.

CONCLUSION

7.188 The history outlined above provides another graphic illustration of the Service attempting reform in an area, at the very heart of its operations, by working parties, plans, and band-aid measures. It remains of concern that such an important matter is still not fully resolved, and that in the meantime:

- individual investigations, particularly into major and complex crimes, have risked compromise;
- corruption has occurred in the release of confidential information;

⁹⁷⁷ NSW Police Service, Taskforce CROCI, Appendix to Issue Paper 3, *Human Resource Planning and Education and Training* at 13.14, p. 165.

⁹⁷⁸ P. M. Ryan, RCT, 11/3/97, p. 36977; P. Young, RCT, 25/1/96, p. 18956.

⁹⁷⁹ NSW Police Service, *Reform Implementation Status Report*, 26 February 1997, RCPS Exhibit 2952.

⁹⁸⁰ NSW Police Service, Informant Management Advisability Study, 8/7/96, RCPS Exhibit 5999/24, p. 3.

- corruption has been concealed because of the inability to recover important information; and
- the resources of the Service have not been put to best use.

7.189 The recent report by the Council on the Cost of Government noted that the past focus of the Police Service on operational level issues has been at the expense of administrative and management information systems. While the Police Service has allocated \$112 million for 23 Information Technology projects during the four-year period 1997-2000, the majority of these proposals focuses on the operational requirements of the Service instead of seeking to integrate arrangements for 'whole of Service' objectives.⁹⁸¹

7.190 While operational policing is of obvious importance, the detrimental effects of poor administrative and management systems have far-reaching ramifications for the accountability of individuals and the productivity of criminal investigations. The Service does need to address the issue of service-wide information management as a high priority.

7.191 It is unrealistic to assume that information management can work effectively in an organisation as large and structurally diverse as the Police Service⁹⁸² without the creation of and adherence to, comprehensive procedures for dealing with records and intelligence. While the decrease of administrative units within the 'flatter structure'⁹⁸³ suggested by the Service should go some way to unify practices for dealing with information, a 'cultural change' concerning the importance of good information practices is imperative.

7.192 A high priority must now be placed on bringing into existence a fully computerised, records management and intelligence system which is user-friendly and available across the Service. What is needed is:

- the provision of a system accessible to all, which will call for an effective training regime and ongoing technical support;
- a recognition that the development of information management expertise is a career development option;
- an audit process which focuses on the effective compliance and use of the prescribed information management practices;
- an end to the notion that information can be retained by an individual officer as personal property, and replacement of this notion by recording and distribution as appropriate, subject to security imperatives;
- collection of data that is relevant and processed in a way that it is capable of being used for analysis;
- a review of the value and the usefulness of all current methods of information storage.
- the development of best practice case management allowing team leaders and others to effectively track all developments, and to guide new lines of inquiry;
- the capacity to quickly access information for intelligence and financial analysis;
- the collection and processing of local information and intelligence to better support beat and community policing; and

⁹⁸¹ Council on the Cost of Government, *NSW Police Service, Review of Scoping Study Report*, November 1996, RCPS Exhibit 2819, p. 46.

⁹⁸² In the year 1995-96, the total number of employees within the Service, including police officers, administrative, ministerial and other employees, was 16,568. NSW Police Service, *Annual Report 1995-96*, p. 108.

⁹⁸³ NSW Police Service, *What's the go?*, no. 8, February 1997, p. 4.

- a thorough commitment by all officers, sworn and unsworn, to the importance of good information management, and an understanding that records created in the course of duty belong to the Service, are a corporate asset, and should be handled according to established guidelines.

RECOMMENDATIONS

The Commission recommends:

- ◆ Attention by the Service, as a high priority, to the introduction of a co-ordinated and user-friendly Service-wide information management system, paying particular attention to administrative and management systems, as well as those systems which support operational policing and criminal investigations; and to all aspects of storage, use and disposal (paras. 7.190 - 7.192).
- ◆ An education program to make all staff aware of the importance of good information management (para. 7.192).
- ◆ The development of information management expertise as a career opportunity (para. 7.192).
- ◆ The development of a more reliable and useable criminal histories system (paras. 7.182 - 7.184).

I. POLICE ASSISTANCE IN SENTENCING PROCEEDINGS

7.193 For a long time courts have reduced sentences they might otherwise have imposed in recognition of the assistance which an accused person has provided, or undertaken to provide, to law enforcement agencies.⁹⁸⁴ This practice has proved to be a useful incentive in securing the assistance of those who are well-placed to help investigations, and it is one that this Commission has used to advantage.

7.194 It is a practice however that was shown on the evidence before the Royal Commission to have been often abused by criminals and corrupt police who have conspired to put false or misleading material before the courts by way of letters of assistance (sometimes called letters of comfort) in order to secure an improper advantage.⁹⁸⁵ The officer concerned, sometimes in return for a monetary payment, has achieved this by:

- inflating the value of the assistance provided;
- attributing to the accused information supplied by someone else;
- concealing aspects of the accused's record, or the fact of other pending proceedings; or
- preparing the letter without the knowledge or approval of any supervisor and at a time when the ODP or Crown Prosecutor has no chance to check its accuracy.

⁹⁸⁴ Provision for this is now encapsulated in s. 442B of the *Crimes Act 1900*; and see *Cartwright* (1989) 17 NSWLR 243.

⁹⁸⁵ KX11, RCT, 13/6/95, p. 8622; WS14, RCT, 12/3/96, p. 21520; T. Sharp, RCT, 27/2/96, pp. 20673-74; WS9, RCT, 21/2/96, p. 20335.

7.195 Although it was expected in accordance with the 1994 Informant Management Plan that these letters would be checked before they were countersigned by the senior supervisor, the evidence suggested that very often they were signed without being checked.⁹⁸⁶

7.196 The 1996 Informant Management Manual has introduced a comprehensive new procedure in this area.⁹⁸⁷ Where information is to be provided to the court in support of a person standing for sentence, the Manual requires:

- a report setting out comprehensive and accurate details of the assistance provided to police or other authorities by the informant, countersigned by the supervisor and accompanied by supporting documentation, to be personally presented to the patrol commander or equivalent specialist agency commander;
- this is to be arranged by the supervisor who is to attend on the commander with the Informant Management File;
- the patrol commander or equivalent, if satisfied that the information is accurate and that it is proper to provide the affidavit to the court, having regard to the seriousness of the offence(s) and the level of assistance rendered by the informant to police, is to prepare the affidavit;
- the affidavit is to be delivered in a sealed envelope to the DPP or the police prosecutor seven days before the sentencing of the informant;
- the DPP or the police prosecutor is to be contacted three days before sentencing to find out if any further inquiries are needed; and
- the case officer is to be present when the affidavit is formally tendered in a sealed envelope to the court.⁹⁸⁸

7.197 The Royal Commission welcomes this initiative as an appropriate and a sensible response to the problems identified in its hearings.

7.198 Compliance with these provisions is a matter that warrants particular attention in the course of any audit of the informant management process, in particular:

- to ensure that any affidavit presented to a court was fair and proper, having regard to the information documented on the Informant Management file, and
- that it has been approved by the region commander or equivalent.

7.199 The Commissioner's Instructions also now provide guidelines for the conduct of police when they are subpoenaed to give evidence on behalf of an accused person. They require:⁹⁸⁹

- the officer subpoenaed to immediately submit a report to the district or branch commander setting out the officer's knowledge of the case and the accused's antecedents;
- the patrol commander to obtain details of the nature of the evidence to be given by the officer; and
- the DPP or the police prosecutor to be notified of the fact that a police officer is to be a defence witness.

⁹⁸⁶ WS9, RCT, 21/2/96, p. 20359; JTF6, RCT, 28/9/95, p. 13704.

⁹⁸⁷ NSW Police Service, State Intelligence Group, *Informant Management Manual*, March 1997.

⁹⁸⁸ This is modelled on the procedure used by the Queensland Police Service whereby information is provided by the case officer to a senior officer in the form of an affidavit which is sworn by that senior officer and known as an Affidavit of Assistance. See 3.66 and 4.80 of the Manual.

⁹⁸⁹ NSW Police Service, Commissioner's Instruction 91.13.

7.200 It is sometimes the case that officers give evidence for accused persons in circumstances where they have not been subpoenaed. It should be made clear by amendment that the requirements of this instruction apply to police whether or not they have been subpoenaed.

7.201 Additionally, it seems appropriate to deal with the situation where a police officer is called in the prosecution case, and is cross-examined to give evidence which, had it been called in the accused's case, would have attracted the provisions in the Informant Management Manual, or the Commissioner's Instructions. In a worst case scenario, this practice may be deliberately and corruptly employed to circumvent the safeguards. Conversely, there is a possibility that such practice develops in response to what may be perceived as an undue or time-consuming formality.

7.202 There is value in consideration being given to the development of a protocol between the Office of the Director of Public Prosecutions (ODPP) and the Police Service to ensure that the Office of Internal Affairs is notified of all circumstances in which a police officer is a party to the placing of material before a court which, had that evidence been called in the accused's case, it would have been subject to the safeguards described above.

RECOMMENDATIONS

The Commission recommends:

- ◆ The introduction of a system to monitor, through the audit of the Informant Management Manual, compliance with the provisions governing the issue of letters of assistance (para. 7.198).
- ◆ Amendment of the Commissioner's Instructions to cover those cases where a police officer gives evidence without a subpoena (para. 7.200).
- ◆ The establishment of a protocol for notification to the Office of Internal Affairs when a police officer gives evidence in cross-examination which if given in chief would fall within the Manual or Commissioner's Instructions (paras. 7.201 & 7.202).

J. REVIEW OF CONVICTIONS

MISCARRIAGES OF JUSTICE

7.203 In recent times, certain celebrated cases involving serious miscarriages of justice have drawn attention to the failings of the established appeal processes in providing a remedy for people wrongfully convicted of crimes.⁹⁹⁰ There are many possible causes for a miscarriage of justice in an individual case, including:

- an incompetent investigation which has focused upon someone other than the offender, and closed its mind to alternative avenues for inquiry;⁹⁹¹
- process corruption in its various forms;
- the use of unreliable prison informant evidence;

⁹⁹⁰ eg. in Australia, the Ananda Marga/Hilton bombing cases, the Douglas Rendell case, the Ziggy Pohl case, the Chamberlains and in the UK, the Birmingham Six and the Guildford Four cases.

⁹⁹¹ eg. the circumstances leading up to the NSW Royal Commission of Inquiry into the Arrest, Charging and Withdrawal of Charges against Harold Blackburn and matters associated therewith (J. A. Lee, Commissioner), June 1990.

- over-zealous prosecution which encourages the propping up of a weak case, or concealing from the defence evidence which might assist it;

- the use of evidence based on dubious forensic evidence, or poor management of physical exhibits;⁹⁹² and
- incompetent or under-resourced conduct of the defence case.

7.204 The limited capacity of the criminal appellate process to identify and rectify miscarriages of justice is a product of:

- the circumstance that a criminal trial is an adversarial process bound by strict rules of evidence and procedure and not an inquiry directed to ascertaining the truth;
- the further circumstance that appellate review is largely confined to errors of law at the trial, and is not an occasion for reconsideration of the verdict on the facts, unless the court is satisfied by the appellant that, upon the whole of the evidence, it was not open to the jury to have been satisfied beyond reasonable doubt of the accused's guilt;⁹⁹³
- the restrictions on the reception of new or fresh evidence in an appeal which take into account, *inter alia*, whether the material was reasonably available at the trial, and whether it is sufficiently cogent, plausible and/or relevant to raise a significant possibility that the jury would have acquitted the appellant;⁹⁹⁴ and
- the further fact that the incompetence of defence counsel, or *bona fide* but imprudent tactical decisions which sometimes contribute to a conviction, are similarly reviewable only on limited grounds.⁹⁹⁵

7.205 The practical limitations of the criminal trial, and appellate process, were succinctly noted by Justice Michael Kirby, in a speech delivered in 1991:

the point made by critics of the present system is that the number of such miscarriages is far greater than those operating the system will acknowledge. And that the greatest injustice arises from the way in which operators of the present system at every level allow it to be manipulated, pre-trial, at trial and on appeal, with too much attention to rules and procedures and insufficient concern about the risk of injustice ... the strongest argument for a separate tribunal is the extreme difficulty which appellate judges face in finding the time to reconsider all, and I mean all, of the evidence of the trial in order to decide whether a conviction can safely stand or must be set aside and a new trial ordered.⁹⁹⁶

CURRENT RIGHT OF REVIEW

7.206 In NSW, a procedure for the review of convictions outside the appellate process was conferred under s. 475 of the *Crimes Act 1900*. That provision was replaced in 1993⁹⁹⁷ by a more comprehensive code for review contained in Part 13A of the Act, following a spate of miscarriage inquiries under the earlier provision which had noted its deficiencies.⁹⁹⁸ It was further amended in 1996.⁹⁹⁹

7.207 As currently enacted Part 13A allows for the review both of the proceedings giving rise to convictions and sentences, and the convictions and sentences themselves.

⁹⁹² P. Wilson, *Travesty, Miscarriages of Justice*, p. 4: Wilson's analysis of 20 cases where the conviction was quashed or a Commission cast doubt on the conviction, identified characteristics common to these cases. Wilson's list was a starting point, with further categories and explanations added.

⁹⁹³ See *R v M* (1994) 181 CLR 487 and *R v McKnulty* (1995) 77 A Crim R 353 at 338.

⁹⁹⁴ *Gallagher v R* (1986) 160 CLR 392; see also: *Mickelburg v R* (1989) 167 CLR 259; *Hemsley v R*, unreported, NSW Supreme Court, CCA, 8/12/95.

⁹⁹⁵ *R v Birks* (1990) 19 NSWLR 677 at 683-5; *R v Ignjatich* (1993) 68 A Crim R 332.

⁹⁹⁶ M. Kirby, 'Miscarriages of Justice - Our Lamentable Failure?', *Commonwealth Law Bulletin*, July 1991, pp. 1040 & 1049.

⁹⁹⁷ *Crimes Legislation (Review of Convictions) Amendment Act 1993* (NSW).

⁹⁹⁸ See D. Brown, D. Farrier, & D. Weisbrot, *Brown, Farrier, Neal and Weisbrot's Criminal Laws*, (2nd edition) Federation Press, Sydney, 1996, p. 308.

⁹⁹⁹ By the *Crimes Amendment (Review of Convictions and Sentences) Act 1996*.

7.208 In summary:

- a convicted person, or another person acting on his behalf, may petition the Governor of New South Wales for a review, whereupon:
 - the Governor may direct that a prescribed person (a judicial officer or justice) conduct an inquiry into the conviction or sentence; or
 - the Minister may refer the case to the Court of Criminal Appeal to be dealt with as an appeal under the *Criminal Appeal Act 1912*, or for an opinion on any point arising in the case;¹⁰⁰⁰
- alternatively an application may be made to the Supreme Court for an inquiry;¹⁰⁰¹
- the Supreme Court may also direct that an inquiry be held on its own motion;¹⁰⁰²
- the procedure for conducting an inquiry is that of an inquiry under the *Royal Commissions Act 1923*;¹⁰⁰³
- the report is sent to the Governor, and may be followed by a pardon, or exercise of the prerogative of mercy,¹⁰⁰⁴ and
- a conviction may be quashed by the Court of Criminal Appeal following the grant of a pardon.¹⁰⁰⁵

7.209 A special procedure has been established to facilitate the review of those convictions which were based wholly or partly on the testimony of police officers discredited in proceedings before the Royal Commission whereby:

- upon application received by the Attorney General, the matter is referred to the Crown Solicitor for advice;
- the Crown Solicitor notifies the Royal Commission which disseminates any information within its possession, relevant to the application, to the Crown Solicitor; and
- upon receipt of the Crown Solicitor's advice, the Attorney General deals with the matter in accordance with the Part 13A options.

A SEPARATE TRIBUNAL ?

7.210 The Royal Commission received several submissions suggesting the establishment of an independent body to review questioned convictions.¹⁰⁰⁶

7.211 The Fitzgerald Commission recommended the establishment of a Miscarriages of Justice Unit¹⁰⁰⁷ in Queensland, although that recommendation was not implemented. During the debate on the 1996 amendments to part 13A of the Crimes Act in NSW, the Opposition invited the Government to seriously consider the establishment of a separate body to review unlawful convictions,¹⁰⁰⁸ an invitation that was met by the response that there were insufficient cases to warrant that course being taken.¹⁰⁰⁹ Similar recommendations have been made elsewhere.¹⁰¹⁰ No other State in Australia has a

¹⁰⁰⁰ *Crimes Act 1900*, s. 474C.

¹⁰⁰¹ *Crimes Act 1900*, s. 474D.

¹⁰⁰² *ibid.*, s. 474G.

¹⁰⁰³ *ibid.*, s. 474G.

¹⁰⁰⁴ *ibid.*, s. 474H.

¹⁰⁰⁵ *ibid.*, ss. 474 J-K.

¹⁰⁰⁶ Australian Council for Civil Liberties, Submission to the RCPS, 2/8/96, RCPS Exhibit, 2809/98; Justice Action, Submission to the RCPS, 26/7/96, RCPS Exhibit 2809/54.

¹⁰⁰⁷ *Report of a Commission of Inquiry Pursuant to Orders in Council*, (G. E. Fitzgerald, Commissioner), Brisbane 1989, p. 332.

¹⁰⁰⁸ NSW Parliament, *Hansard*, 20/6/96, p. 3342.

¹⁰⁰⁹ NSW Parliament, *Hansard*, 20/6/96, p. 3344.

separate review committee or tribunal but such a body was established in the United Kingdom, in 1995, in the form of the Criminal Cases Review Committee.¹⁰¹¹

7.212 This Committee has power to refer questioned convictions to the Court of Appeal if certain criteria are met, and to investigate and report back to the court on matters referred to it by the court.

7.213 The Royal Commission has given consideration to the adequacy of the present arrangements, and to any advantages which might exist in the establishment of a separate tribunal or committee to review convictions. It has reached the conclusion that, subject to certain qualifications and procedural changes, there is no need for the creation of such a body:

- there is now a system available which presents a substantial opportunity for any applicant armed with fresh evidence or material which was insufficiently considered at trial or in an appeal, to have a conviction reviewed on its merits;
- the review is of an inquisitorial kind, and is not one bound by strict rules of procedure or formality; and
- depending on the outcome of the inquiry, a conviction can be quashed and the record of the applicant cleared.

7.214 Some residual matters do arise:

- while the procedure for conducting the inquiry is that contained in the *Royal Commissions Act 1923*, the powers of the judicial officer carrying out the task fall short of those possessed by this Commission or by the PIC;
- neither the Crown Solicitor, Attorney General, the Court of Criminal Appeal, or officer conducting the inquiry have investigators on hand able to carry out any necessary further investigations;
- Legal Aid is not available to pursue Part 13A reviews, at least so far as this Commission has been informed;
- no statutory system exists for the payment of compensation for miscarriages of justice, the current alternatives including:
 - civil proceedings (an uncertain and expensive option);
 - application for an *ex gratia* payment (an *ad hoc* solution);
 - passing of a Private Members Bill to deal with a specific case (an option only likely to succeed in a matter attracting the strongest sympathy).

7.215 Each of these matters invites consideration by the Government, in the light of the experience of this Commission, as to the widespread incidence of process corruption. If there is to be a meaningful process of review for those cases which have passed through the court system, but for which serious and reasonable suspicion of a miscarriage of justice persists, then:

- that process must be accessible; and
- the review must be one which is thorough and capable of either removing those suspicions or establishing that they were justifiably held.

¹⁰¹⁰ See also the Republic of Ireland, *Report of the Committee to Inquire into Certain Aspects of Criminal Procedure*, Dublin 1990, which recommended that the Republic of Ireland establish an independent body to investigate the circumstances of a conviction although without the power to make recommendations.

¹⁰¹¹ In response to the *Report of the Royal Commission on Criminal Justice*, London, HMSO, July 1993, which noted the perception that the Court of Appeal had been unduly reluctant to overturn jury verdicts in the past, p. 170.

7.216 This process would be assisted by:

- enlargement of the powers attached to the inquiry so that they equate with the powers of the PIC;
- the provision of funding for applications of this kind either by direct grant or by way of specific top-up funding to the Legal Aid Commission;
- conferring upon the Court of Criminal Appeal a power to award compensation (either to be assessed by it or by a single judge upon reference from it) in those cases where a conviction is quashed after inquiry, in place of the existing system dependent on *ex gratia* payment.

7.217 The more difficult question is the question of further investigation into matters raised by the applicant, or by the court of its own motion. In those cases where the doubt arises out of evidence before the PIC, or involves possibly serious process corruption or incompetence amounting to serious misconduct, there is no difficulty since the PIC can use

its own investigators to pursue any further inquiry which might be necessary. In other cases, the Royal Commission sees no practicable alternative other than to use police investigators, notwithstanding the possible appearance of a conflict of interest in police re-opening an inquiry which may lead to the quashing of a conviction reached as the result of earlier police action. It might also however lead to the arrest and conviction of the true offender, an objective which does not involve any conflict of interest.

RECOMMENDATIONS

The Commission does not consider that there is any need for the creation of a separate tribunal to review convictions (para. 7.213) however it recommends:

- ◆ Extension of the powers attached to a Part 13A inquiry to equate with the powers of the Police Integrity Commission (7.216).
- ◆ Establishment of funding for the legal costs connected with Part 13A applications either by direct grant or by way of specific top-up funding to the Legal Aid Commission (para. 7.216).
- ◆ Conferral upon the Court of Criminal Appeal of a power to award compensation in those cases where a conviction is quashed after inquiry (7.216).

K. REVIEW OF PROSECUTIONS

7.218 The Police Service has not, in the past, had any formal mechanism for reviewing the conduct of investigations in cases where a prosecution fails, in circumstances which strongly suggest a neglect of basic investigative technique or worse.

7.219 It is not suggested that a criticism necessarily attaches to investigating police, in all cases where a charge is dismissed. Very often this is nothing more than an indication that the tribunal of fact was not satisfied of the defendant's guilt beyond reasonable doubt. The Commission's concern is that failed prosecutions, marred by demonstrable incompetence or corrupt conduct, have commonly been treated as though the result were merely the luck of the draw. The collapse of a prosecution in such a case is an issue for management review.

7.220 In the view of the Commission an internal review mechanism should be developed, for such cases, so that:

- mistakes can be identified and steps taken to ensure they are not repeated; and
- corruption and misconduct can be noted, and suitable further inquiry initiated.

7.221 For this purpose, it would be appropriate within each region and within the Specialist Operations Command to establish a prosecution review committee, comprised of senior officers, to conduct a post mortem on:

- any major prosecution, which has failed in circumstances suggestive of serious police incompetence or malpractice; and
- all cases in which judicial criticism is made of the integrity and conduct of the police concerned, or where the ODPP delivers an adverse report on the quality of the police investigation, co-operation, or conduct.

7.222 That Committee should notify the Office of Internal Affairs of any such post mortem, and report to it on the outcome. In appropriate cases the office of Internal Affairs or the PIC might wish to take over any inquiry.

7.223 The Commission views commitment of the Service to such a procedure as a valuable means of enlisting the support of the profession, the ODPP and the Judiciary in improving the overall efficiency, professionalism and integrity of the Service. For too long, the attitude on the part of the Crown prosecutors and the judiciary has been that problems seen in prosecutions have not been their concern, and that if anything is to be done, it should be left to the Service. Such an attitude excludes a valuable and independent sentinel and weakens police accountability.

RECOMMENDATIONS

The Commission recommends:

- ◆ The establishment of Prosecution Review Committees within each region and within the Specialist Operations Command to review major prosecutions which have failed in circumstances suggestive of serious police incompetence or malpractice, including cases where judicial criticism is made of the integrity and conduct of the police concerned, or where the ODPP delivers an adverse report on the quality of the police investigation, co-operation or conduct (para. 7.221).

CHAPTER 8

INTEGRITY MEASURES (II) INCIDENTS OF SERVICE

8.1 In addition to the measures directed at operational matters, the Royal Commission identified in its two Interim Reports various incidents of service which, if addressed, might alter the culture of the Service and encourage integrity. They were the subject of round table discussions and work has already commenced within the Service, or is planned, in relation to some of them. None is by itself an instant solution, but in conjunction with the other measures proposed they have the potential to advance the fundamental reform required. They are addressed in this chapter.

A. ETHICS AND INTEGRITY FIRST

RECRUITING ETHICAL OFFICERS

8.2 Integrity begins with recruitment, both in the selection of a representative Service and in screening out applicants susceptible to dishonesty. Thorough background checks should be made including contact with previous employers to verify employment history and integrity. In addition, psychological testing should be undertaken.¹⁰¹²

8.3 While it is important to have in place procedures to recruit officers with integrity, recruitment procedures alone will not guarantee an ethical officer. Attitudes are also influenced by experiences during service.¹⁰¹³ Rigorous screening is accordingly important throughout an officer's probationary and training period, employing performance assessment to determine whether new officers display appropriate attitudes and behaviours.

TRAINING AND EDUCATING IN ETHICS

8.4 Education in ethics needs to be prominent in all police education courses, at the time of recruit training and during all phases of an officer's career development. Those taking on supervisory and leadership roles require specific training in developing and recognising ethical behaviour in subordinate staff.

RECOGNISING ETHICAL PERFORMANCE

8.5 Recent research by the National Police Research Unit (NPRU) indicates that a strong relationship exists between the attitudes of police towards ethical behaviour and a perceived lack of reward for ethical conduct. Officers generally noted that ethical conduct in policing was not noticed or rewarded by their supervisors or managers.¹⁰¹⁴

¹⁰¹² The psychological testing of recruits has in the past focused on assessing characteristics such as racism, aggression and ethnocentrism. Research is under way to establish whether there is an adequate psychological test for identifying corruption tendencies. NSW Police Service, Corruption Risk Assessment submission, 23/1/96, RCPS Exhibit 2464/8, p. 17.

¹⁰¹³ A. Butler, 'Police Recruit Selection', *Police Review*, vol. 2, 1982, pp. 1262-3. The Mollen Commission acknowledged the role of police culture in changing officers during their service, *Commission Report: The City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department*, (M. Mollen, Commissioner), New York, 1994, pp. 51-69.

¹⁰¹⁴ NPRU, 'Practical Ethics in the Police Service, Ethics and policing - Study 3', NPRU, RCPS Exhibit 2902/4. p. vii.

8.6 Rewarding employees is widely practised in private and public sector organisations and is based on the rationale that staff are motivated to demonstrate ethical behaviour when they are presented with the opportunity to do so, and expect that such behaviour will be recognised.¹⁰¹⁵

8.7 Earlier in this Volume¹⁰¹⁶ the Commission examined the link between ethical performance by police and recognition or reward for demonstrated integrity. Although it does not support formal awards in this respect, it recommends the introduction of procedures whereby assessments for promotions and transfers take into account demonstrated ethical performance, and supervisors take the trouble to specifically acknowledge instances of such conduct.

8.8 Commanders and supervisors should also take steps to ensure that ethical officers play a key role at patrol or equivalent level.

INTEGRITY IN THE PROMOTION SYSTEM

8.9 The promotion system has not given sufficient consideration in the past to the ethical conduct of officers when selecting those worthy of promotion.

8.10 In 1992 the Service introduced a system calling for comment by first and second line supervisors in relation to the suitability of applicants for promotion.¹⁰¹⁷ In 1994, a Steering Committee to examine the promotions system noted the unreliability of the comments of these officers.¹⁰¹⁸ This finding was reinforced by evidence received by the Royal Commission.¹⁰¹⁹

8.11 The Service has recently adopted the use of Selection Assessment Centres to improve the screening of officers for promotion to patrol commander positions,¹⁰²⁰ and intends to progressively introduce this procedure for other promotions.

8.12 In order to assess integrity within this process each officer was given a case scenario requiring a written response which was then given a mark. An evaluation of the exercise reported on the difficulties involved and the perceived subjectivity in this method of assessment.¹⁰²¹ Further work is clearly needed to develop a suitable objective test for determining the applicant's personal integrity, and understanding of ethical issues, to be used in conjunction with performance assessments. Such testing will need to be supplemented by frank and honest assessment by supervisors.

8.13 It is important that supervisors be made to understand that:

- the Service expects their comments in relation to a subordinate to represent an objective and truthful account; and that
- officers who lack the ability or will to report objectively and honestly on their subordinates do not have the capacity to hold supervisory positions within the Service.

8.14 The Commission recommends that more accountability be instilled into the process and the commanders be required to provide examples of an officer's behaviour which illustrate the characteristics they describe in references and assessments.

¹⁰¹⁵ NPRU, 'Practical Ethics in the Police Service, Ethics and policing - Study 3', NPRU, RCPS Exhibit 2902/4; H. W. More & W. R. Wegener, *Behavioural Police Management*, Macmillan, New York, 1992, p. 169.

¹⁰¹⁶ See Volume II, Chapter 4 of this Report.

¹⁰¹⁷ Briefing by Assistant Commissioner Nixon for RCPS, Police Promotion System, 1/3/96, RCPS Exhibit 2463/19, p. 1.

¹⁰¹⁸ *ibid*, p. 2.

¹⁰¹⁹ See Volume II, Chapter 3, Section E - Promotions & Transfers, in this Report.

¹⁰²⁰ NSW Police Service, Interim Report on the - Pilot Scheme for Selection Assessments, 1 May 1996, RCPS Exhibit 5569, p. 3.

¹⁰²¹ *ibid*, p. 17.

8.15 Integrity assessment must be integrated into the promotion system since the ultimate objective is to allow only officers of integrity, who are also the most able and committed, to rise to command positions. In September 1996, the Service formed the Integrity Review Committee. Made up of the Executive Director, Human Resources and Development, Commander Internal Affairs, Commander Selection and Appointments, this committee is reactive in nature and reviews any promotional matter subject to integrity problems.¹⁰²² The Commission supports this initiative. In conjunction with the input of the Police Integrity Commission, it has the potential to produce a more reliable indicator of suitability for promotion. The Commission recommends that performance and integrity assessments be integrated into every stage of the selection process.

PROFESSIONAL STANDARDS COUNCILS

8.16 Police regularly encounter decision-making situations which are not part of ordinary life and involve ethical dilemmas.¹⁰²³ In 1995, the Kings Cross Patrol formed a Professional Standards Council (PSC) to meet this need.¹⁰²⁴ The former Commissioner of Police subsequently directed that PSCs be established in all demonstration and training patrols.¹⁰²⁵ Following an evaluation it was then recommended that they be established in all commands.¹⁰²⁶

8.17 Their stated objective is to provide an avenue through which officers can discuss and devise strategies which help promote ethical behaviour. Most PSCs consist of core members elected by the patrol who meet regularly and have the authority to develop guidelines or a charter relevant for the patrol. They hold open meetings at which all members can contribute.¹⁰²⁷

8.18 The concept of empowering officers in this area is one which will take time to have effect and it is a little early to form judgment yet. For example, it was reported that it was only after nine months operation that the Kings Cross Council began to discuss meaningful issues touching on ethics and professional standards.¹⁰²⁸ Messages about their implementation elsewhere have been mixed.

8.19 The Commission recommends that the concept of Professional Standards Councils be retained and encouraged, but that it be the subject of ongoing evaluation by an external body such as the ICAC. Measures such as these require careful research and testing to establish their correct role, and to ensure that they receive adequate organisational and managerial support. It is also essential that the Service provide a clear exposition of their role and purpose and of the goals to which they should aspire.

ETHICS COUNSELLORS

8.20 The Service has for some time provided employee assistance in the form of psychological counselling.¹⁰²⁹ Specially trained peer support officers are also available to debrief officers following critical incidents and related stress.¹⁰³⁰ A submission to the Commission has suggested that voluntary and confidential ethics counselling also be made available¹⁰³¹ to deal with the problem of job socialisation which is a significant factor in policing, and has much to do with the negative aspects of the culture previously mentioned.

¹⁰²² NSW Police Service, Implementation of reforms - Establishment Control report re progress, 11 April 1997, RCPS Exhibit 5999/54.

¹⁰²³ J. Kleinig, 'Teaching and Learning Police Ethics: Competing and Complementary Approaches', *Journal of Criminal Justice*, vol. 18, 1990, pp. 1-18.

¹⁰²⁴ NSW Police Service, Draft Evaluation of the Implementation of Professional Standards Councils, May 1996, RCPS Exhibit 5999/26, p. 1.

¹⁰²⁵ *ibid.*

¹⁰²⁶ *ibid.*, p. 6.

¹⁰²⁷ *ibid.*, p. 16.

¹⁰²⁸ *ibid.*, pp. 2 & 6.

¹⁰²⁹ NSW Police Service, Employment and Education Submission to RCPS, 26/7/96, RCPS Exhibit 2321 /1.

¹⁰³⁰ *ibid.*

¹⁰³¹ L. Whyte, Submission to RCPS, 17/10/97, RCPS Exhibit 2809/120, p. 14.

8.21 The Commission endorses the idea of ethicists being involved in the training and education program, but it has some difficulty in understanding the manner in which ethics counsellors could become involved in day to day policing. It accordingly makes no recommendation in this report.

CODE OF CONDUCT AND ETHICS

8.22 In 1985, on the initiative of then Commissioner John Avery, the Police Service adopted a Statement of Values to provide an ethical basis for policing.¹⁰³² The Statement was embodied in the Police Service Act¹⁰³³ and contained a broad statement of expected ethical ideals:

Each member of the New South Wales Police Service is to act in a manner which:

- places integrity above all;
- upholds the law;
- preserves individual's rights and freedom;
- seeks to improve quality of life by community involvement in policing;
- strives for citizen and police personal satisfaction;
- capitalises on the wealth of human resources;
- makes efficient and economical use of public resources; and
- ensures that authority is exercised responsibly.

8.23 The Statement of Values was supplemented by a Code of Conduct in the form of a pledge by members of the Service which repeated the substance of the Statement and went on to deal with several specific matters of ethical conduct.

8.24 The evidence received by this Royal Commission suggests that neither document had much practical impact in reducing corruption. In hindsight, it seems that:

- they gave little by way of practical guidance to officers in the work place;
- they were not tested for their relevance and impact upon police;
- their generality meant that they were, in real terms, incapable of enforcement; and
- they had little meaning to the recalcitrant or corrupt officer, or to the subversive supervisor;

yet their existence was somewhat blithely seen by the Service as the solution to the problem.¹⁰³⁴

8.25 This Commission in its First Interim Report recognised the importance of establishing a Code of Conduct and Ethics that provided a clear statement of the standards expected by the Service and gave practical guidance for the particular circumstances that police were likely to face.¹⁰³⁵

8.26 In January 1997 the Service introduced a new Code of Conduct and Ethics¹⁰³⁶ following consultation with the Commission and the Ombudsman. It is a living document in the sense that there is to be a review in two years' time.

8.27 The Royal Commission welcomes the introduction of this Code and the good sense in providing for later review and supplementation. It is, however, important to recognise that in the past, statements of weighty principle have not served to prevent corruption or misconduct. Publication of the Code should not be seen as a sufficient measure in itself to deal with the problems that it addresses. Rather it should be part of an overall strategy.

8.28 In a foreword to the Code Commissioner Ryan wrote:

I consider this Code of Conduct and Ethics a cornerstone for positive change and growth in the Police Service. Yet, on its own, it will achieve very little unless each of us takes full responsibility for our behaviour as it affects our work and other people.

¹⁰³² NSW Police Service, *NSW Police Service, 1984-1988 ... An Overview*, RCPS Exhibit 11, pp. 5-6.

¹⁰³³ *Police Service Act 1990*, s. 7.

¹⁰³⁴ NSW Police Service, *Complaints Against NSW Police: A discussion of the scale, nature and trends of allegations against New South Wales Police 1987-1991*, RCPS Exhibit 5999/92, p. 9.

¹⁰³⁵ RCPS, *First Interim Report*, February 1996, p. 121.

¹⁰³⁶ NSW Police Service, *Code of Conduct and Ethics, 25/2/97*, RCPS Exhibit 2948.

If we are to create a Police Culture free of the mistakes and wrongs of the past, each of us must contribute from day to day, leading by example and speaking out against unethical practices wherever they occur. You are responsible for your actions and their consequences.

Honesty and integrity are very important and those who operate ethically and in accordance with the Service's objectives will be recognised.

For my part, I am committed to creating and maintaining a style of management which listens and responds to the work related concerns of all staff so each of you feels valued, respected and supported by the Service.

This respect and support is fundamental to your ability to trust that the Service will protect you against false allegations of corruption, and will not punish honest mistakes.

If those concerned in the management of the Police Service at patrol level, and above, pay heed to the sentiments expressed in these words and place integrity first, then there is a real prospect of reform.

RECOMMENDATIONS

The Commission recommends:

- ◆ The theme 'ethics and integrity first', be emphasised at all levels of the Service, and incorporated into the recruitment and promotion processes (paras. 8.2 & 8.15).
- ◆ Procedures be adopted to encourage integrity through recognition and suitable acknowledgment of ethical behaviour (para. 8.7).
- ◆ Commanders and supervisors take steps to ensure that ethical officers play a key role at patrol or equivalent level (para. 8.8) and to be trained in the means of recognising and encouraging integrity (para. 8.4).
- ◆ Commanders and supervisors be made more accountable for the references and assessments they provide and be required to support their assessments (para. 8.14).
- ◆ The Service continue to encourage the use of Professional Standards Councils, subject to ongoing evaluation as to their utility (para. 8.19).

B. A UNIFORMED SERVICE

8.29 In its First Interim Report, the Royal Commission flagged as an issue for further examination a move towards a largely uniformed Service. The proposition to be tested was whether the visibility and discipline of the uniform introduced a greater awareness of the need to act according to proper standards and lowered the risk of corruption. In raising this issue the Commission was mindful that the incidence of corruption found was far less in frequency and seriousness for uniformed police than it was for city detectives.

8.30 The Police Service responded positively and on 8 March 1996 the State Executive Group (SEG) decided that, as a general rule, all police officers should perform duty in uniform save where operational necessity required otherwise.¹⁰³⁷

8.31 On 1 July 1996 the Royal Commission hosted a round table conference on this issue which was attended by representatives from the Police Service, the Commissioned Police Officers'

¹⁰³⁷ NSW Police Service, Submission to RCPS on the Uniform Issue, June 1996, RCPS Exhibit 2467/2, p. 2.

Association and the Police Association.¹⁰³⁸ Both Associations expressed agreement in principle with this policy and with a staged process of implementation.

8.32 Under the policy now in force, all police are required to perform duty in uniform unless this is inappropriate for the operational effectiveness of their duty type or unless budgetary constraints inhibit an immediate return to uniform.¹⁰³⁹ Stated exemptions to the policy include operational officers within the DEA, CPEA and LEA, and police prosecutors.¹⁰⁴⁰ Detectives are permitted to wear plain clothes at the discretion of their patrol commander.¹⁰⁴¹ Commanders are accountable and obliged to ensure compliance with the policy. The Commission, however, records its apprehension as to whether the policy is being meaningfully enforced in the case of detectives. Several inquiries have produced less than clear responses¹⁰⁴² and no specific examples of a return to uniform have been identified. Again the question of implementation compared with rhetoric looms large.

8.33 There are a number of potential advantages to be gained from implementation of this policy, which was also recommended by the Fitzgerald Commission:¹⁰⁴³

- detectives should feel more visible and accountable if they wear a uniform and, as a consequence, be less inclined to perform corrupt acts or misbehave;¹⁰⁴⁴
- it is more difficult for uniformed police to drink on duty, to associate with criminals, to visit places they should not be, or to leave the job for private purposes;¹⁰⁴⁵
- it should facilitate integration of the investigative process into the general policing model, particularly as many crimes now handled by plain clothes police can be investigated by uniformed police;¹⁰⁴⁶
- it should assist in the supervision of criminal investigative staff;¹⁰⁴⁷
- it should signal to investigators that they are part of the organisation and subject to the same regulations and supervision irrespective of function;¹⁰⁴⁸
- it should assist in removing notions of elitism;¹⁰⁴⁹ and
- the need for supervisors to approve the use of plain clothes should provide them with an opportunity, and a reminder, to make an accurate risk assessment of the activities in which their staff are involved.¹⁰⁵⁰

8.34 A uniformed Service policy is not a cure all for corruption. Nor should its introduction lead to complacency.¹⁰⁵¹ When taken with other measures however, this policy, if fully implemented and supported by commanders, will be a symbol of a changed culture. As such the Service should not allow it to fade away as yet another plan without commitment.

¹⁰³⁸ It was said at this meeting that there were currently 3,162 plain clothes officers (24% of the Service) and that 2,428 or 76% of these could perform duty in uniform; RCPS, Police Service Reform Process Meeting Minutes - Uniforms, 1/7/96, RCPS Exhibit 2458, p. 2.

¹⁰³⁹ NSW Police Service, Human Resources, Letter to RCPS re Uniforms, 21/3/97, RCPS Exhibit 5999/32, p. 2.

¹⁰⁴⁰ *ibid.*

¹⁰⁴¹ *ibid.*

¹⁰⁴² See the material tendered as RCPS Exhibit 6001.

¹⁰⁴³ *Report of a Commission of Inquiry Pursuant to Orders in Council*, (G. E. Fitzgerald, Commissioner) Brisbane, 1989, p. 381.

¹⁰⁴⁴ Anonymous submission, 22/7/96, RCPS Exhibit 2466/9; J. Avery, Submission to RCPS, 7/11/95, RCPS Exhibit 1018/3; Whistleblowers Australia, Submission to RCPS, 14/11/95, RCPS Exhibit 1018/19.

¹⁰⁴⁵ RCPS, Police Service Reform Process Meeting Minutes - Uniforms, 1/7/96, RCPS Exhibit 2458, p. 4.

¹⁰⁴⁶ NSW Police Service, Submission to RCPS on Uniform Issue, June 1996, RCPS Exhibit 2467/2, p. 2.

¹⁰⁴⁷ *ibid.*, p. 2.

¹⁰⁴⁸ *ibid.*, pp. 2 & 148.

¹⁰⁴⁹ *ibid.*, p. 2.

¹⁰⁵⁰ *ibid.*, pp. 160-61.

¹⁰⁵¹ Both Haken and WS14 gave evidence to the effect that the wearing of a uniform would have been no bar to their corrupt activity. T. D. Haken, RCT, 23/8/95, p. 11991; T. D. Haken, RCT, 9/10/95, p. 14295; WS14, RCT, 12/3/96, p. 21496.

JM, a 'beats' sergeant, gave evidence to the effect that he was able to drink alcohol in establishments whilst on duty in Kings Cross. JM, RCT(U), 20/9/96, p. 7208.

RECOMMENDATIONS

- ◆ No further recommendation is required, save to underline the need for compliance with the uniformed Service policy now introduced.

C. ROTATION AND TENURE

8.35 In the First Interim Report, the Royal Commission drew attention to the need for an examination of the Service policy in relation to rotation and transfer.¹⁰⁵² Each has a particular relevance for those duties which attract a high level of stress, such as child sexual assault investigation, or a high risk of corruption, such as drug law enforcement and gaming. Each also has a relevance in bringing to an end the practice of using transfers:

- to deal with an officer whose integrity is suspect;
- to 'punish' an officer who has indicated a preparedness to stand up against corruption,¹⁰⁵³ or
- to facilitate the establishment of corrupt groups within squads where they can work together in safety.¹⁰⁵⁴

ROTATION AS A POLICY

8.36 This Royal Commission heard evidence from several witnesses supporting the establishment of an unequivocal and firm rotation policy.¹⁰⁵⁵ It has advantages in:

- breaking up the corrupt associations that develop when groups of officers work together over an extended period;
- enhancing job skills through exposure to other duties;
- increasing job satisfaction through avoiding boredom and staleness; and
- overcoming complacency.

8.37 The routine rotation of officers is therefore an important proactive anti-corruption measure and one which was recommended by the Fitzgerald Inquiry in sensitive or high-risk areas, on a three-to-five year basis.¹⁰⁵⁶

8.38 It has been argued¹⁰⁵⁷ that there is a price for rotation which includes:

- loss of specialist knowledge;
- loss of continuity of command which may leave windows of opportunity for police to act in corrupt ways;¹⁰⁵⁸

¹⁰⁵² RCPS, *First Interim Report*, February 1996, p. 120, para. 6.20.

¹⁰⁵³ A. R. Lauer, RCT, 6/12/94, p. 154; C. Nixon, RCT, 12/12/94, pp. 377-78.

¹⁰⁵⁴ D. H. Bracey, 'Proactive Measures Against Police Corruption, Yesterday's Solutions, Today's Problems', *Police Studies*, vol. 12, no. 4, Winter 1989, pp. 175-179 at p. 178.

¹⁰⁵⁵ M. Brammer, RCT, 17/7/96, pp. 28858-59; J. T. Jarratt, RCT, 13/12/94, p. 544; A. R. Lauer, RCT, 6/12/94, p. 153; K. F. Quince, RCT, 12/12/94, pp. 439-459 at p. 455.

¹⁰⁵⁶ *Report of a Commission of Inquiry Pursuant to Orders in Council*, (G. E. Fitzgerald, Commissioner), Brisbane 1989, p. 255.

¹⁰⁵⁷ D. H. Bracey, 1989, op cit.

¹⁰⁵⁸ B. Gibson, RCT, 15/7/96, p. 28700.

- loss of morale connected with the break-up of work friendships,¹⁰⁵⁹ and discouragement of team building;¹⁰⁶⁰
- conflict with community policing in that time is needed to acquire local knowledge and to build trust;¹⁰⁶¹
- loss of crime intelligence¹⁰⁶² through lack of continuity of contact with informants; and
- interruption of partner's careers and disruption to children's education associated with frequent, unrequested moves.

8.39 Each of these factors can be overcome by a carefully structured and consistent policy, and neither individually or collectively do they outweigh the advantages earlier identified.

TENURE AND TRANSFER POLICY OF THE NSW POLICE SERVICE

8.40 The Tenure and Transfer Policy of the Service has changed on several occasions. The 1996 policy specified minimum periods in various locations and positions before a transfer could be sought,¹⁰⁶³ and also required officers in non-operational specialist areas, and in locations which carried higher than usual levels of stress or danger, to return to operational and general duties respectively for specified short periods on an annual basis.¹⁰⁶⁴ The policy also provided for nominal maximum periods in various locations or positions.¹⁰⁶⁵ These provisions were all subject to the qualification that the Service could move police at any time for the effective management of human resources and for the development of individuals.

8.41 Notwithstanding these provisions and adoption of staff rotation in the Service's Corruption Plan,¹⁰⁶⁶ it seems to this Commission that there has been no clear corporate policy to relocate staff after any specific period.¹⁰⁶⁷ Commonly, tenure has been extended without any real consideration being given to the appropriateness of the decision and without advertisement. At best the policy has been applied inconsistently, and at worst used for improper purposes.

8.42 The impression gained is that the application of maximum tenure, and the rotation of officers working at high-risk locations, has been largely a matter of managerial discretion or convenience which has given way to:

- administrative cost and inconvenience; and
- pressure from staff to remain on a particular type of duty, or at a particular location.¹⁰⁶⁸

This has diminished the effectiveness of rotation as an anti-corruption measure. Moreover, as emerged in relation to the Kings Cross segment, while junior police were being rotated corrupt supervisors were able through various strategies to remain in place.¹⁰⁶⁹

¹⁰⁵⁹ D. H. Bracey, 1989, op cit.

¹⁰⁶⁰ M. Palmer, 'Controlling Corruption' in P. Moir & H. Eijkinan (eds), *Policing Australia, Old Issues New Perspectives* Macmillan: Melbourne, 1992, p. 122.

¹⁰⁶¹ D. H. Bracey, 1989, op cit.

¹⁰⁶² *ibid.*

¹⁰⁶³ NSW Police Service, Transfer and Tenure Procedures, 20/5/96, RCPS Exhibit 2463/21, for all office at cl. 4.2, specialist positions at cl. 6.1, and special remote locations at cl. 16.2.

¹⁰⁶⁴ NSW Police Service, Transfer and Tenure Procedures, 20/5/96, RCPS Exhibit 2463/21, specialist positions cl. 6.1, high risk (stress) or high risk (danger) locations cl. 17.4, superintendents cl. 11.1 and inspectors and chief inspectors at cl. 11.4

¹⁰⁶⁵ 3-year review and 5-year maximum for Patrol Detectives, Drug Enforcement Agency, Major Crime Squads, Cabramatta, Kings Cross, Licensing, Anti Theft, Internal Affairs, Fraud Enforcement Agency, Special Operations, Organised Crime, All Investigators. NSW Police Service, Transfer and Tenure Procedures, RCPS Exhibit 2463/21, cl. 18.1.

¹⁰⁶⁶ NSW Police Service, *Corruption Prevention Plan*, November 1993, RCPS Exhibit 13C, p. 15.

¹⁰⁶⁷ N. O. Taylor, memo to Executive Director, Human Resources, regarding 'Refinement of Transfer and Tenure Policy', 'Attachment C', RCPS Exhibit 2463/21.

¹⁰⁶⁸ Police Association of NSW, Minutes of Executive Meeting, July 1989, Policy Recommendations, RCPS Exhibit 5999/37, p. 881.

¹⁰⁶⁹ J. H. F. McCloskey, RCT, 26/4/95, pp. 5845-46.

8.43 In a submission to the Royal Commission in July 1996, the Service proposed new arrangements, including:

- a general minimum tenure of five years with exceptions for high-risk areas and officers selected for transfer and promotion;
- provision for extension of tenure subject to annual review; and
- monitoring of maximum tenure for duties attracting high-risk corruption, stress or danger.¹⁰⁷⁰

8.44 In its submission, the Police Association identified the areas of concern it entertained concerning the rotation and tenure policy.¹⁰⁷¹ In summary they related to:

- the impact on officers' families of a forced transfer requiring the relocation of residence;
- the absence of access to an independent arbitrator on transfers; and
- the need to take into account family responsibilities especially children's education and spouse employment when transferring officers.¹⁰⁷²

8.45 Arising out of the concentration of interest on this topic, the Service has been working on further changes to the policy, and on procedures for its implementation. Although the position remains in a state of flux, it appears that the following amendments to the Transfer and Tenure Procedures are proposed:

- all transfers are to be the responsibility of the State Transfers Co-ordinator and are to be processed by a central State Transfer Unit;
- transfers of Commissioned Officers are to be co-ordinated with the Assessment Centre process; and
- periods for review and mandatory tenure are to be established for high-risk locations subject to monitoring by the State Transfers Co-ordinator.¹⁰⁷³

8.46 This is a positive development, provided it is applied consistently, and provided there is continuing review and assessment of high risk areas, and of suitable periods of tenure. What is needed is a tenure and rotation policy that addresses the need for:

- rotation of officers in high-risk (stress and corruption) positions, into a location and duty that takes them away from the associations and influences of those positions;
- retention of expertise in those areas that call for particular knowledge and skills;
- preservation of command stability and adequate staffing;
- equity in relation to the consequences of rotation upon individual officers and their families; and
- maximisation of the overall skills and experiences of the Service and minimisation of burnout and complacency.

This means that a tenure and rotation policy should be more than a set of formulae which rigidly fix minimum and maximum periods of tenure or rotation. Such a policy has to fit in with other

¹⁰⁷⁰ NSW Police Service, Submission to RCPS on Employment and Promotion, RCPS Exhibit 2321/1, p. 37.

¹⁰⁷¹ Police Association of NSW, Submission to RCPS, 26/7/96, RCPS Exhibit 2321/2.

¹⁰⁷² *ibid.*

¹⁰⁷³ NSW Police Service, Transfer and Tenure Procedure Amendments, 18/4/97, RCPS Exhibit 5999/5.

arrangements and safeguards to ensure the effectiveness of police in crime detection and community policing, and to maximise career prospects.

8.47 Matters to be addressed should accordingly include:

- identification with care, and continuous review, of specific high and medium-risk locations and the development of appropriate minimum and maximum periods of tenure for each;
- consistent adherence to the policy in high-risk areas save in very specific circumstances, for example, where a significant current investigation might be threatened by the transfer of a key individual;
- rotation of officers from the high stress and high-risk areas into quite different locations and duties;
- rotation of detectives and plain clothes officers into general duties uniformed work at regular intervals, and vice versa, linked in with the promotion system, to break up the elitism traditionally attached to investigative work;
- rotation that maximises the opportunity of broadening experience, job skills, and career prospects as a trade-off for any personal hardship associated with transfer;
- rotation policies apply also to non-sworn staff in high-risk and medium-risk areas;
- annual assessment by the Office of Internal Affairs and the Human Resources & Development Region Command in order to establish which areas of the Service should be classified as 'high-risk (corruption)' areas, and whether the policy is being properly applied in these areas;

- attention by commanders to compliance with the rotation policy, and report to the Human Resources Command of any anomalies in its application; and
- the opportunity for staff, who are suited for and aspire to senior command, of rotation into the Office of Internal Affairs to increase their exposure to anti-corruption strategies and the promotion of integrity.¹⁰⁷⁴

RECOMMENDATIONS

The Commission recommends:

- ◆ The careful development of a tenure and transfer policy that meets the interests of the Service and of its staff (para. 8.46 - 8.47).
- ◆ The monitoring of the policy and its application to ensure that rotation is used as an effective anti-corruption tool (para. 8.47).
- ◆ That rotation to the Office of Internal Affairs be encouraged for officers of proven capacity, as a step towards promotion to senior command (para. 8.47).

D. DRUG AND ALCOHOL TESTING

THE PROBLEM

8.48 The issue of alcohol and drug abuse by police was raised in the First Interim Report following concern by the Royal Commission as to the evidence and intelligence available suggestive of drug abuse by younger members of the Service.¹⁰⁷⁵ Additionally, the Commission was aware of the long-standing problem of alcohol abuse among police which was not confined to the NSW Police Service.¹⁰⁷⁶

8.49 Considerable evidence had by then been gathered of 'liquid' lunches, heavy drinking by police on and off duty, and the expectation of some groups of officers that they could attend clubs and other premises, as they wished, to obtain free alcohol.¹⁰⁷⁷ The evidence gathered supported various studies which have suggested that the problem of alcohol abuse is linked to broader, police cultural issues,¹⁰⁷⁸ particularly so far as it has been seen as a test for acceptance among detectives.

8.50 A recent study of lifestyle behaviours among NSW Police has confirmed Commission evidence, revealing an alarming level of alcohol abuse among officers, with 48% of men and 41% of women consuming alcohol at levels considered 'hazardous or harmful (including binge drinking)'.¹⁰⁷⁹ The research report notes that, whilst previous studies have suggested that alcohol is used by officers

¹⁰⁷⁴ P. Macklin, Submission to the RCPS, 2/8/96, RCPS Exhibit 2809/60, p. 4.

¹⁰⁷⁵ See Volume I, Chapter 4 of this Report, Section A, part 3 -Substance Abuse.

¹⁰⁷⁶ NPRU, *Alcohol and the police workplace - Factors associated with excessive intake*, Report Series No. 119.1, NPRU, 1996; J. Daulby, 'Research and assessment of alcohol problems in the NT Police', NT Police, 1991; Victorian Occupational Health and Safety Commission, *Inquiry into Alcohol, Drugs and the Workplace: Work, Drugs and Alcohol Research Report*, Melbourne, 1992.

¹⁰⁷⁷ See Volume I, Chapter 4 of this Report, Section A, part 3 -substance abuse.

¹⁰⁷⁸ NPRU, *Alcohol and the police workplace - Factors associated with excessive intake*, Report Series No. 119.1, NPRU, 1996; V. Kappeler, R. Sluder & G. Alpert, *Forces of Deviance: Understanding the dark side of policing*, Waveland Press, Illinois, 1994, pp. 191-92; P. Bonifacio, *The Psychological Effects of Police Work: a psychodynamic approach*, Plenum Press, New York, 1991, p. 161; R. Richmond et al., 'How Healthy is the Police Service? A Survey of Lifestyle Behaviours', St. Vincent's Hospital, (unpublished manuscript), Sydney, 1997, p. 14, RCPS Exhibit 5999/64.

¹⁰⁷⁹ R. Richmond et al., 'How healthy is the Police Service? A survey of lifestyle behaviours', St Vincent's Hospital (unpublished manuscript), Sydney, 1997, RCPS Exhibit 5999/64, p. 2.

to relieve the pressures of police work, 'the present study failed to show any significant relationship between excessive drinking and reported symptoms of stress'.¹⁰⁸⁰

8.51 What was clear by the end of the Bondi segment of evidence¹⁰⁸¹ was that the Service had no policy to deal with substance abuse, let alone any understanding of the dynamics of the problem. As former Assistant Commissioner Geoff Schuberg observed:

- the Service had responded to individual cases of substance abuse on an *ad hoc* basis;
- 'the ground rules kept changing' for those officers involved because there was no underlying policy; and
- there was 'a need for a carefully thought out policy which people can understand and adhere to'.¹⁰⁸²

8.52 The problems of substance abuse for police are obvious. They include the circumstances that:

- the nature of police duties which call for calm and careful decisions, a clear head and a balanced exercise of discretion, and the need to use motor vehicles and weapons are utterly incompatible with the impaired judgment and co-ordination which can result from drug and alcohol use;
- public respect for the Service, and the maintenance of good order and discipline are impossible in an environment that tolerates the presence of police at clubs, hotels and the like where they are seen to be affected by alcohol or drugs;
- the bonding influence of long liquid lunches and the shared inappropriate use of drugs is likely to promote the negative aspects of the police culture previously mentioned;
- the necessary association of any police officer who uses drugs, even for recreational purposes, with a supplier creates opportunities for compromise, blackmail and corruption, particularly if the habit becomes expensive to feed;
- a user of prohibited drugs is unlikely to approach the enforcement of drug laws with any degree of conviction;
- participation in any form of criminal offence by a police officer is in fundamental conflict with the sworn duty of the officer to uphold the law;
- the productivity of officers with a drug and alcohol problem is likely to be substantially reduced and the example they provide to other police is not only unacceptable, but a threat to the Service; and
- the presence of any significant degree of substance abuse suggests that the welfare programs of the Service are not working and that it is otherwise failing in its responsibility for the occupational health and safety of its employees.

THE FIRST INTERIM REPORT

8.53 In the Commission's First Interim Report, it suggested that the time had come for an examination of the problems of substance abuse within the Service, and for the introduction of random and targeted drug and breath testing.¹⁰⁸³

¹⁰⁸⁰ *ibid*, p. 14.

¹⁰⁸¹ See Volume I, Chapter 4 of this Report.

¹⁰⁸² G. Schuberg, RCT, 30/1/96, pp. 19251-52.

8.54 In response to this Report, the Minister for Police established a Drug and Alcohol Testing Working Party comprising representatives from the Professional Responsibility and Human Resources Commands of the Service, the Police Association and Commissioned Officers' Association, the Labor Council, the Health Department and the Ministry for Police.¹⁰⁸⁴ Arising out of its work, and in consultation with the Commission, draft legislation and regulations were prepared.

8.55 The *Police Legislation Further Amendment Act 1996*, now in force, provides that an authorised person may require any police officer¹⁰⁸⁵ rostered on duty:

- to undergo a breath test, or submit to a breath analysis, for the purpose of testing for the presence of alcohol,¹⁰⁸⁶ or
- to provide a sample of the police officer's urine or hair for the purpose of testing for the presence of prohibited drugs.¹⁰⁸⁷

The Act provides that the selection of an officer for testing may be on a random or targeted basis.¹⁰⁸⁸

8.56 On 7 April 1997 the Police Service Amendment (Testing for Alcohol and Prohibited Drugs) Regulation¹⁰⁸⁹ was proclaimed. The legislation is supported by two new Service policies: the Drug and Alcohol Policy,¹⁰⁹⁰ and the Healthy Lifestyles Policy.¹⁰⁹¹

8.57 The regulations establish a code of behaviour to be observed by police officers in relation to the consumption of alcohol and the use of prohibited drugs,¹⁰⁹² and the procedures for the conduct of drug and alcohol tests.¹⁰⁹³ The code of behaviour stipulates that a police officer must not:

- use any prohibited drug;
- have a concentration of 0.02 grams or more of alcohol in their blood whilst rostered on duty;
- consume alcohol whilst wearing a uniform (whether or not rostered on duty);
- consume alcohol on police premises (whether or not rostered on duty), without the approval of the patrol commander or manager of those premises;
- refuse or fail to:
 - undergo a breath test;
 - submit to a breath analysis; or
 - provide a sample of urine or hair.

The approach adopted towards officers who breach the code of behaviour represents a 'one chance' rehabilitation policy.

¹⁰⁸³ RCPS, *First Interim Report*, February 1996, p. 129.

¹⁰⁸⁴ Letter from the Hon. Paul Whelan LLB MP, 5/2/96, RCPS Exhibit 5999/12.

¹⁰⁸⁵ The legislation currently applies only to sworn staff.

¹⁰⁸⁶ Alcohol tests will be for a blood alcohol limit of 0.02.

¹⁰⁸⁷ *Police Legislation Further Amendment Act 1996*, s. 211A(1).

¹⁰⁸⁸ *ibid*, s. 211A(2).

¹⁰⁸⁹ Police Service Amendment (Testing for Alcohol and Prohibited Drugs) Regulation 1997, under the *Police Service Act 1990*.

¹⁰⁹⁰ NSW Police Service, 'Drug and alcohol policy', March 1997, RCPS Exhibit 5999/61.

¹⁰⁹¹ NSW Police Service, 'Healthy lifestyle policy', March 1997, RCPS Exhibit 5999/51.

¹⁰⁹² Police Service Amendment (Testing for Alcohol and Prohibited Drugs) Regulation 1997, cl. 66D.

¹⁰⁹³ Under the policy, random testing may be conducted at any work site, selected by way of a computer generated list, on a 24 hour, seven day week basis. Targeted testing may be instigated by a patrol commander or branch manager if they have reasonable cause to believe that a police officer may be under the influence of alcohol or prohibited drugs. NSW Police Service, 'Drug and alcohol policy', March 1997, RCPS Exhibit 5999/61, p. 7.

8.58 In relation to a positive alcohol test, the regulations¹⁰⁹⁴ provide that if the officer has not breached the code in the same way in the preceding three years:

- the officer will be relieved from duty, and will not normally be entitled to pay for the time that he or she does not work;
- the Commissioner may ask the officer to choose whether to undergo counselling and rehabilitation or whether to face possible managerial action;
- if the officer chooses to undergo counselling and rehabilitation, the Commissioner must direct the police officer to:
 - attend any interview organised with the officer's patrol commander;
 - attend an interview with the Police Service drug and alcohol counsellor for assessment; and
 - participate in any rehabilitation program recommended by the counsellor.
- if the officer:
 - chooses not to undergo counselling; or
 - without reasonable excuse fails to attend counselling after choosing to do so; or
 - without reasonable excuse fails to participate in a rehabilitation program after choosing to do so;

the officer's commander may take managerial action.

8.59 Where an officer has breached the code in the preceding three years, the Commissioner may take managerial action or refer the officer to the Police Medical Officer for a determination of fitness to remain with the Service.¹⁰⁹⁵

8.60 The same regime and the 'one chance' rehabilitation approach also apply to positive drug tests. In relation to prohibited drugs however, the timeframe in which the officer must not have previously breached the code to avoid reference to the Police Medical Officer or possible dismissal is five years.¹⁰⁹⁶

8.61 The new regime is to be introduced in three phases:

- a six-month drug and alcohol education program. Testing will not be conducted during the education program and officers with drug and/or alcohol problems will be encouraged to voluntarily seek help during this phase;
- introduction of random and targeted alcohol testing and an independent trial of testing for prohibited drugs. During this phase, testing for prohibited drugs will be conducted only as part of an independent research project to examine the extent of illicit drug usage within the Service. The results of prohibited drug tests will be strictly anonymous and used for statistical purposes only. The outcome of this research will determine whether drug testing is introduced on a random or a targeted basis;
- formal evaluation of the effectiveness of the drug and alcohol testing protocols is to be conducted 12 months after full implementation.¹⁰⁹⁷

¹⁰⁹⁴ Police Service Amendment (Testing for Alcohol and Prohibited Drugs) Regulation 1997, r. 66F & 66G.

¹⁰⁹⁵ Police Service Amendment (Testing for Alcohol and Prohibited Drugs) Regulation 1997, cl. 66H.

¹⁰⁹⁶ *ibid.*, cl. 66I.

¹⁰⁹⁷ NSW Police Service, 'Drug and alcohol policy', March 1997, RCPS Exhibit 5999/61, p. 11.

The legislation requires the Service in its Annual Report to include details of the number of the different types of tests conducted, and the number of tests in which officers tested positive for alcohol or drugs.¹⁰⁹⁸

CONCLUSIONS

8.62 The Commission commends the introduction of this legislation and the adoption of the policies developed by the Service. The approach taken seems to strike an appropriate balance between discipline, health and welfare issues, recognising that a purely punitive approach may increase the likelihood of substance abuse problems being denied or covered up.¹⁰⁹⁹

8.63 The Service has the opportunity to lead the way for Australian law enforcement agencies in this area, since no other Service has yet introduced an integrated policy dealing with substance abuse, random testing, education and prevention, welfare and discipline.

RECOMMENDATIONS

The Commission commends the introduction of the drug and alcohol testing legislation and the associated Service policies, and recommends:

- ◆ Effective supervision and training of supervisors to detect officers with drug or alcohol problems.
- ◆ Attention be paid to factors that might contribute to the development of drug or alcohol dependency, for example stress or exposure to activities that might increase the risk, such as undercover drug work.
- ◆ Encouragement of police officers with problems to seek assistance, and the provision of confidential welfare support for such officers.
- ◆ A clear explanation of and emphasis on the program during recruitment and training.
- ◆ Careful monitoring of the discipline/welfare decisions made in relation to positive tests to ensure consistency.

¹⁰⁹⁸ *Police Legislation Further Amendment Act 1996*, s. 211A(6).

¹⁰⁹⁹ A recent study by St Vincent's Hospital of NSW police officer lifestyle behaviours found that particularly older officers were unlikely to seek advice in the workplace in relation to problems associated with excessive use of alcohol. The report suggested that one reason for this may be 'a concern for confidentiality as seeking advice for a problem opens up the possibility of sanctions if confidentiality is not guaranteed' (R. Richmond et al. 'How healthy is the Police Service? A survey of lifestyle behaviours', St Vincent's Hospital (unpublished manuscript), Sydney, 1997, RCPS Exhibit 5999/64 p. 17).

E. INTEGRITY TESTING AND FIELD ASSOCIATES

8.64 An integrity test involves the creation of a situation or condition (within a common work setting) which is designed to provoke a reaction by the subject of that test. The subject is allowed to perform, or fail to perform, in a manner consistent with legislative and Service requirements. Its purpose is to detect and deter corrupt conduct, and it is of particular relevance as a preliminary method of determining whether there is a legitimate basis for suspicion in respect of an officer, or group of officers, about whom a complaint is made.

8.65 In its First Interim Report, the Commission invited consideration of the use of integrity testing,¹¹⁰⁰ a technique extensively used by the New York City Police Department. In its Second Interim Report,¹¹⁰¹ the Commission supported the use of integrity testing specifically targeted at problem officers and areas and recommended legislative amendment to protect a police officer, or other person who is involved in an integrity test, from the risk of prosecution for relevant acts or omissions occurring in the course of and for the purpose of such a test.

8.66 By virtue of the *Police Legislation Further Amendment Act 1996*, statutory authority to conduct integrity testing programs was introduced and suitable safeguards against prosecution were provided.¹¹⁰²

8.67 The Service has now adopted targeted integrity testing as a standard procedure and an Integrity Testing Unit has been established within the Office of Internal Affairs.

8.68 The Commission welcomes these developments, but emphasises that targeted integrity testing is only one strategy to detect corruption. It should not:

- replace other forms of investigation, particularly broader based intelligence gathering and proactive inquiries;
- replace ethical training, it being far preferable for police to voluntarily elect for integrity than to do so out of fear;
- be so contrived or unsophisticated as to readily alert the subject of the test;
- be seen as anything more than a test, which might or might not prove that an officer is susceptible to corruption; or
- be used save in cases where strong suspicion exists, lest it lose its surprise value.

8.69 What is left for consideration is the possible expansion of integrity testing to include random testing, and the use of 'field associates'.

8.70 Random integrity testing was adopted by the NYPD following the Mollen Commission report as an addition to its targeted testing program. Its performance has been recently evaluated in a study by KPMG,¹¹⁰³ which suggests that it has not achieved the objectives desired of:

- providing a corruption barometer;
- creating an environment of omnipresence by Internal Affairs (thereby acting as a general deterrent); or

¹¹⁰⁰ RCPS, *First Interim Report*, February 1996, p. 106.

¹¹⁰¹ RCPS, *Second Interim Report*, November 1996, pp. 14-15.

¹¹⁰² *Police Service Act 1990*, s. 207A.

¹¹⁰³ Report to The New York City Commission to Combat Police Corruption, The New York City Police Department Random Integrity Testing Program, KPMG, December 1996, p. 2.

- testing the adequacy of training.

8.71 The conclusion reached was that random tests suffered from certain practical deficiencies in that they:

- could not be tailored to the same degree or be as sophisticated as targeted tests;
- were usually initiated by a false emergency call to police which attracted other police to the scene, thereby reducing the opportunity for any one officer to resort to corrupt conduct;
- often failed to sufficiently engage the officer in the test, with the result that the opportunity for corrupt conduct was sometimes not even appreciated; and
- the scenario used soon became recognisable.¹¹⁰⁴

8.72 The study noted that it was almost impossible to measure the deterrent effect of random testing,¹¹⁰⁵ and concluded that such form of testing was no more accurate at measuring corruption levels than crime reports are at measuring the crime level.¹¹⁰⁶

8.73 There are other valid concerns about random testing which militate against its use:

- there is a risk that an unduly optimistic picture will be provided by random testing, since a single clear test does not necessarily establish integrity, and police are likely to recognise standard tests if they are in regular use;
- while police should be aware of their responsibility to act ethically, it is generally undesirable that honest police should go about their work in a climate of suspicion, since this might lead them to be overcautious or conservative in their work;
- it tends to elide the question whether an officer is 'corruptible' into the question whether he or she is 'corrupt', a not unimportant consideration in an activity such as law enforcement which is so filled with operational and ethical dilemmas that temptation should not be placed in the way of an officer, unless reasonable cause exists to test that person's integrity;¹¹⁰⁷ and
- the over-use of tests, which would be required for a random program, weakens their effectiveness for targeted testing.

8.74 The Commission considers these concerns to be well based and it does not recommend the introduction of random integrity testing.

8.75 The use of 'field associates' was adopted by the NYPD in the 1970s. These officers were the 'anonymous eyes and ears'¹¹⁰⁸ of Internal Affairs and were required to report the corrupt activity of their colleagues while going about their normal duties.

8.76 The concern with the use of field associates derives from two considerations:

- their presence is likely to generate resentment and suspicion among ordinary working police and lower the morale of even the most honest police who feel that they are under constant surveillance for even minor mistakes of judgment; and

¹¹⁰⁴ *ibid*, pp. 8-9.

¹¹⁰⁵ *ibid*, pp. 11-12.

¹¹⁰⁶ *ibid*, p. 16.

¹¹⁰⁷ G. T. Marx, 'When the Guards Guard Themselves: Undercover Tactics Turned Inward', *Policing and Society*, vol. 2, no. 3, 1992. p. 154.

¹¹⁰⁸ V. E. Henry, 'Lifting the 'Blue Curtain': Some Controversial Strategies to Control Police Corruption', *National Police Research Unit Review*, vol. 6, 1990, p. 50.

- to have officers reporting routinely to the Office of Internal Affairs about matters of patrol discipline cuts across the model of openness and patrol command responsibility which this Commission considers critical to the structure of accountability within the Service.

8.77 This is not to discourage officers from reporting corruption concerns. It is the concept of Internal Affairs agents working as 'spies' within the patrols which the Commission considers undesirable. So long as the shift in culture which has been discerned in recent times continues and the internal witness support program remains effective, the need for this anti-corruption strategy is not demonstrated and it is not recommended.

RECOMMENDATIONS

- ◆ No further recommendations are necessary. The Commission supports the introduction of targeted integrity testing as recommended in its Second Interim Report.

F. FINANCIAL STATEMENTS AND INTEGRITY DECLARATIONS

8.78 In the Second Interim Report the Commission indicated its support for legislation which would require all members of the Service to provide financial statements and integrity declarations at three-yearly intervals and when applying for each promotion.¹¹⁰⁹ Both were considered to be important anti-corruption measures, and were advanced in circumstances where the Commission had been regaled with evidence of lucky gambling wins, for which no records existed, of savings kept in shoe boxes and similar containers, and of undocumented borrowings or gifts from relatives.¹¹¹⁰

8.79 This proposal met some resistance largely centred on the administrative difficulty of receiving and storing a large volume of declarations, the extra work required of police in preparing the necessary documentation, and privacy considerations.

8.80 The Commission regards such objections as spurious, because:

- statements of private interests have been expected from certain classes of officers since 1988,¹¹¹¹
- the amount of work involved in preparing a financial declaration should be no greater than that required for completion of a credit application;
- the administrative difficulties in receiving and storing the forms and the privacy considerations can be easily overcome by:
 - a progressive implementation of the process beginning with high-risk areas, and more senior officers;
 - storing the financial declarations in a separate computer file with access limited to the State Commander and the Commander of the Office of Internal Affairs, acting upon authority of the Police Commissioner, or the Commissioner of the PIC;
 - building the integrity declaration into the application for promotion or transfer.
- no honest officer has anything to fear from such a regime.

8.81 The advantages of any such system are obvious having regard to the fact that:

- it will tend to discourage, or make more difficult, the receipt of improper benefits, particularly when it is known that financial declarations can be compared against patterns of expenditure and asset betterment picked up through financial analysis of the kind used by this Commission;
- it reinforces the awareness of integrity and honesty each time a financial or integrity declaration is made; and
- it will assist in the removal of those corrupt officers in respect of whom reasonable suspicion exists, yet evidence of specific incidents of corruption is lacking, since if they are unable to provide a plausible account for their income and asset betterment they will risk losing the Commissioner's confidence.

¹¹⁰⁹ RCPS, *Second Interim Report*, November 1996, p.16.

¹¹¹⁰ eg. M. L. Bigg, RCT, 9/5/95, pp. 6715-31; A. R. Conwell, RCT, 16/10/96, pp. 32765-67; F. W. Johnson, RCT(U), 6/6/96, pp. 4020-21; R. J. Lysaught, RCT, 29/4/96, pp. 24302-08; K. R. Middleton, RCT, 18/9/96, pp. 32540-64; generally the evidence of L. G. Churchill. In several cases the officer concerned disclaimed all knowledge of his financial affairs, and disclosed an apparent ignorance of commercial matters that was disturbing for a detective, if true.

¹¹¹¹ Such as from members of the DEA, FEA and PSSSES; the previous Code of Conduct incorporated a Statement of Values and an 'outline' of pecuniary interests, see NSW Police Service, *Annual Report 1988-89*, p. 6.

8.82 The Police Service Act was amended in December 1996¹¹¹² to permit the Service to request financial statements and integrity statements from its members 'as the case requires' or pursuant to regulations.¹¹¹³ To date regulations have not been introduced to support the legislation,¹¹¹⁴ although Standing Operating Procedures have been developed in relation to the Declaration of Private Interests and Assets by officers of the Major Crime squads.

8.83 One matter not addressed in the Second Interim Report requires attention. It is inappropriate that, as part of the general fishing expedition so commonly mounted in the defence of criminal and civil proceedings, that the financial declarations should be made available in answer to subpoenae. Their use should be confined to the special requirements of the Service, and legislative protection is desirable to secure that objective.

RECOMMENDATIONS

The Commission recommends:

- ◆ The introduction of the regulations which would allow the recommendation in this Commission's Second Interim Report to be fully implemented (para. 8.82).
- ◆ Amendment of the *Police Service Act 1990* to limit access to the financial declarations save by direction of the Police Commissioner or Commissioner of the PIC, and to prevent their production in answer to subpoenae issued in civil or criminal trials (paras. 8.82 & 8.83).

¹¹¹² Date of commencement 1/1/97.

¹¹¹³ *Police Service Act 1990*, s. 97.

¹¹¹⁴ In February 1997 the Service advised the 'Regulations to enable the operation of recommendation 8 - Integrity Declarations - have yet to be finalised', NSW Police Service, 'Reform of the NSW Police Service; Implementation Status report', February 1997, p. 32.

G. GRATUITIES

8.84 There has been abundant evidence of the ready availability of various forms of gratuities.¹¹¹⁵ These have included:

- free liquor, meals and sexual services;¹¹¹⁶
- spotters' fees and commissions from tow truck operators, funeral directors and private inquiry agents and the like;
- payments for informal security services provided to licensed clubs;¹¹¹⁷
- the sharing of rewards obtained for informants;¹¹¹⁸ and
- donations of money or goods for police sporting teams, golf days, Christmas parties, and suspended and sick officers.¹¹¹⁹

8.85 The ICAC report on the Sutherland Licensing Police in 1991 which found that the provision of free meals and gifts of liquor was common and extended beyond the Sutherland region,¹¹²⁰ stated that:

...no police officer should receive any benefit which might give rise to the impression that favours might be done in return.¹¹²¹

The Report observed that it is difficult to say just where the line should be drawn but concluded that:

no police officer ... should ever accept a gift which could be construed by a member of the public ... as intended or likely to cause the officer concerned to do his or her job in a particular way, or deviate from the proper course of duty.¹¹²²

8.86 Although there are conflicting views¹¹²³ on the acceptance of gratuities by police, the conventional view is that the acceptance of gratuities not only creates a sense of obligation to do favours and thereby compromises impartiality but increases the likelihood of a decline into more serious forms of corruption.¹¹²⁴ This is the slippery slope theory of corruption.¹¹²⁵ It is this view that the Royal Commission accepts. In most cases those who proffer a gift expect something in return, and even if this is not the case in a specific instance, the appearance of bias or favouritism is unacceptable.¹¹²⁶

8.87 The *Police Service Act 1990* creates a specific offence relating to the reception or soliciting by a member of the Service of a 'bribe', and the giving, offering, or promising to give a bribe or other benefit to such a member:

for the purpose of inducing the member to neglect his or her duty, of influencing the member in the exercise of his or her functions or of improperly taking advantage of the member's position.¹¹²⁷

¹¹¹⁵ See Volume I, Chapter 4 of this Report.

¹¹¹⁶ JJ, RCT(U), 13/8/96, p. 6317; MV3, RCT(U), 26/7/96, pp. 6227-29; MV6, RCT(U), 24/7/96, p. 6020; MV7, RCT(U), 13/8/96, pp. 6298-300; WD3, RCT, 24/9/96, pp. 7341-3; NSW Police Service, Report of Task Force Medlar, September 1996, RCPS Exhibit 5730B.

¹¹¹⁷ R. J. Reid, RCT, 28/2/96, p. 20838; RS, RCT, 22/2/96, p. 20530; WS8, RCT, 27/2/96, p. 20742.

¹¹¹⁸ WS9, RCT, 21/2/96, pp. 20342-44.

¹¹¹⁹ P. Devlin, RCT(U), 16/8/96, p. 6636; FT2, RCT(U), 15/8/96, p. 6599; FT3, RCT(U), 15/8/96, p. 6541; S. M. Pentland, RCT, 31/7/95, pp. 10404-06; MV1, RCT(U), 18/7/96, p. 5587, 24/5/96, p. 3229.

¹¹²⁰ ICAC, *Report on Investigation into Sutherland Licensing Police*, February 1991, p. iv.

¹¹²¹ *ibid.*

¹¹²² *ibid.*, p. 62.

¹¹²³ R. Kania, 'Should we tell the police to say 'Yes' to gratuities?', *Criminal Justice Ethics*, 7, Summer/Fall 1988, pp. 37-49.

¹¹²⁴ J. Kleinig, *The Ethics of Policing*, Cambridge University Press, New York, 1996, chapter 9; A. Neiderhoffer, *Behind the Shield: The Police in Urban Society*, 1969, p. 239; T. Prenzler & P. Mackay, 'Police Gratuities: What the Public Think', *Criminal Justice Ethics*, vol. 14, no. 1, 1995, p. 17.

¹¹²⁵ T. Prenzler & P. Mackay, 'Police Gratuities: What the Public Think', *Criminal Justice Ethics*, vol. 14, no. 1, 1995, p. 18.

¹¹²⁶ *ibid.*

¹¹²⁷ *Police Service Act 1990*, Part 10, s. 200.

CURRENT POLICY

8.88 The Service Code of Conduct and Ethics introduced in February 1997 provides that:

You must never solicit a gift or benefit for yourself or anyone else and are not to accept any such gift or benefit in the course of your duties regardless of value, other than in circumstances specified below. This includes times off-duty when the gift or benefit is or appears to be associated with your employment with the Police Service. In this way, there will be no circumstances where you might be, or might appear to be, compromised.¹¹²⁸

8.89 It is permissible under this Code for an officer to receive:

- gifts of nominal value from another organisation, on behalf of the Service, provided it becomes the property of the Service or permission is given in writing by a manager to retain the gift;
- donations to the Service in connection with recognised charity events, provided that appropriate records are maintained for audit; and
- benefits such as free (or discounted) travel on trains for sworn officers in uniform, provided they follow a written standing agreement between the Police Service and the organisation providing the discount.¹¹²⁹

GRATUITIES GENERALLY

8.90 The Commission welcomes the introduction of this Code. It should be enforced and compliance carefully monitored. It should also be made clear that particular care needs to be taken in relation to donations for police functions, and fundraisers. If they are to be accepted, then that should occur only:

- with the permission of a commander;
- in circumstances of full accountability and record keeping;
- on condition that no payment should be received from persons engaged in criminal conduct or in activities calling for police regulation where a risk of favouritism might be seen by a reasonable member of the public; and
- on condition that contributions are not to be received for suspended or dismissed officers from persons outside the Service.

SPONSORSHIP

8.91 Sponsorship has the potential to conflict with the Service's mission and functions, and it has been identified as one of the 'high risk management areas' in the Service's Corruption Prevention Plan.

8.92 Prior to September 1996, Commissioner's Instruction 138 dealt with sponsorship and endorsement. This has been replaced by a revised Sponsorship and Endorsement Policy.¹¹³⁰ This provides guidance in relation to the selection of sponsors, the securing and management of sponsorships, the documentation of agreements and approvals and reporting requirements. It provides for ethical conduct when dealing with sponsors.¹¹³¹ The Marketing and Media Branch is to negotiate major sponsorships covering state-wide programs and strategies. Local patrol

¹¹²⁸ NSW Police Service, *Code of Conduct & Ethics*, 25/2/97, RCPS Exhibit 2948, p. 5.

¹¹²⁹ *ibid.*

¹¹³⁰ NSW Police Service, *Sponsorship and Endorsement Policy*, 11 July 1996, RCPS Exhibit 5999/2.

¹¹³¹ *ibid.*, p. 9.

commanders, or unit managers/commanders are required to initially canvass all approaches for local sponsorship.¹¹³² It is a requirement that all sponsorships be registered by each patrol/unit, locally if under \$2,000 and with the Marketing and Media Branch if over \$2,000.¹¹³³ Those over \$2,000 must also be included in the Annual Report.¹¹³⁴

8.93 The Code of Conduct and Ethics provides that:

Where goods, services or cash are given to the Service by any individual or organisation, in return for any benefit such as publicity or recognition of the sponsor, you must comply with the Service's Sponsorship & Endorsement Policy, 1996. Any other endorsement of commercial products or services is prohibited.¹¹³⁵

The Commission similarly sees these developments as positive, so long as they are properly respected and compliance is monitored.

¹¹³² *ibid*, p. 10.

¹¹³³ *ibid*, p. 17.

¹¹³⁴ *ibid*, p. 17.

¹¹³⁵ NSW Police Service, *Code of Conduct & Ethics*, 25/2/97, RCPS Exhibit 2948, p. 5.

RECOMMENDATIONS

- ◆ The Commission commends the introduction of the Code of Conduct and Ethics and the Sponsorship and Endorsement Policy. It recommends that each be strictly applied and monitored and that it be made clear in relation to police fund-raisers that they should only occur:
 - with the permission of a commander;
 - in circumstances of full accountability and record keeping;
 - on condition that no payment should be received from persons engaged in criminal conduct or in activities calling for police regulation, where a risk of favouritism might be seen by a reasonable member of the public; and
 - on condition that contributions are not to be received for suspended or dismissed officers from persons outside the Service (para. 8.90).

H. PERSONAL LIABILITY OF POLICE

8.94 Police who are enriched from corrupt behaviour or are party to serious misconduct should not expect to retain their unlawful gains, or to be spared civil liability for any personal injury or property loss they cause. Nor should the Service or the Government be expected to indemnify them for the consequences of wrongful acts involving serious and wilful misconduct or criminality.

PROTECTION FROM CIVIL LIABILITY

8.95 In NSW the common law¹¹³⁶ concerning the civil liability of police and the Service has been modified by:

- the *Police Service Act 1990*,¹¹³⁷ which provides that:
 - a member of the Police Service is not liable for any injury or damage caused by any act or omission of the member in the exercise by the member in good faith of a function conferred or imposed by or under this or any other Act or law with respect to the protection of persons from injury or death or property from damage.¹¹³⁸
- the *Law Reform (Vicarious Liability) Act 1983* which makes the Crown vicariously liable for a tort committed by:
 - a person in the service of the Crown in the performance or purported performance by the person of a function (including an independent function).¹¹³⁹

The Act provides that a police officer 'shall be deemed to be a person in the service of the Crown'.¹¹⁴⁰

¹¹³⁶ See *Little v Commonwealth* (1947) 75 CLR 95, where Dixon J refers to 'the doctrine that any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which he serves or which appointed him incurs no vicarious liability. (*Tobin v The Queen* (1864) 16 CBNS 310 (143 ER 1148); *Raleigh v Goschen* (1898) 1 Ch 73; *Enever v The King* (1906) 3 CLR 969; *Baume v The Commonwealth* (1906) 4 CLR 9; *Fowles v Easter and Australian Steamship Co. Ltd.* (1916) 2 AC 556; (1913) 17 CLR 149; *Zachariassen v The Commonwealth* (1917) 24 CLR 166; *Commonwealth v Zachariassen* (1920) 27 CLR 552; *Fisher v Oldham Corporation* (1930) 2 KB 364; *Field v Nott* (1939) 62 CLR 660.

¹¹³⁷ *Police Service Act 1990*, s. 213.

¹¹³⁸ A similar provision exists for Transit Police, *Police Department (Transit Police) Act 1989*, s. 9(3).

¹¹³⁹ *The Law Reform (Vicarious Liability) Act 1983*, s. 8.

¹¹⁴⁰ *ibid*, s. 6. The *Police Service Act* extends the application of this provision to police volunteers; *Police Service Act 1990*, s. 91E.

8.96 The statutory protection in the Police Service Act is qualified by the requirement that the act or omission occur in the 'exercise in good faith' of a 'function conferred or imposed' by law. Under this provision, conduct involving theft, or a wanton or malicious assault, or damage to property, even if occurring in the course of police inquiries or the execution of a search warrant, would not qualify for protection. No good reason is apparent to this Commission for any amendment of the law which would excuse the officer from personal liability in such circumstances, or require the Service to extend an indemnity to an officer against whom judgment for damages is entered,¹¹⁴¹ where that officer has been guilty of serious and wilful misconduct.

8.97 The vicarious liability imposed on the Crown under the *Law Reform (Vicarious Liability) Act 1983*, extends to torts committed in the 'performance or purported performance' of a function 'incidental to service'. It is not qualified, at least in its express terms, by any requirement that the conduct in question occur in the 'exercise in good faith' of a function, nor does it expressly exclude vicarious liability for conduct on the part of the police officer constituting 'serious and wilful misconduct',¹¹⁴² or involving an exercise of bad faith.

8.98 The Service follows NSW Government policy which provides that when a police officer is granted Crown representation, he or she is automatically indemnified in respect of the verdict and costs.¹¹⁴³ The policy, however, depends on 'a full and complete disclosure by the applicant' for Crown representation.¹¹⁴⁴

8.99 The Royal Commission has examined a large number of civil cases brought against the Service and police officers,¹¹⁴⁵ which disclose that uniformly the proceedings have been defended or settled by the Service and the officer in question indemnified by it, even though the conduct in question would appear not to have fallen within the statutory protection of the Police Service Act. This Commission does not quibble with the Service electing to accept financial responsibility for the serious misconduct of its officers, since otherwise:

- innocent citizens treated improperly by police might be left without effective recourse; and
- acceptance of responsibility by the Service for these acts of misconduct might reinforce its commitment to enforce proper standards of conduct.

8.100 This Commission however does not see any reason for the Service accepting sole financial responsibility for personal injury, or financial loss where it arises out of serious and wilful misconduct on the part of a police officer. In any such case it seems appropriate, if it has been found liable to a third party, that it have a right of recourse against the officer. Such a right of recovery is preserved under the *Employees Liability Act 1991*, s. 5.

8.101 Similarly, consistent with legislation in other states,¹¹⁴⁶ it seems appropriate that the liability of the Service be limited to ordinary damages and should not extend to the payment of punitive damages.

¹¹⁴¹ See *Employees Liability Act 1991*, s. 3(1)(c) & s. 5. See also comments by Commissioner Wood, RCT, 20/6/96, p. 27328: 'As the Chief Justice made clear yesterday, it amounts to serious criminality and it is punishable on indictment for perjury or conspiracy to pervert the course of justice. It is also justiciable by way of civil action for damages for assault, malicious prosecution or unlawful arrest, for which there should be no expectation on the part of individual police who are defendants in those cases for any form of indemnity from the State.'

¹¹⁴² *Employees Liability Act 1991*, s. 5 permits recovery by an employer of damages for which the employer was made vicariously liable where such liability arose through the 'serious and wilful misconduct' of the employee.

¹¹⁴³ As confirmed by the NSW Attorney General's Department, 30/4/97.

¹¹⁴⁴ Upon risk of having the representation withdrawn and attracting action for the recovery of money expended to that point, should it be later shown that the officer has not made full disclosure of matters relevant to his or her case. This part of the policy was introduced in 1996 following the Attorney General's decision to withdraw grants of Crown representation made to a particular police officer. Although there are instances where Crown representation has been withdrawn no action has yet been taken to recover monies expended.

¹¹⁴⁵ Cases covered a period from 1 January 1983 until August 1996.

¹¹⁴⁶ *Police Administration Act (NT)*, s. 163(3) & *Police Service Administration Act 1990 (QLD)*, s. 10.5.

RECOMMENDATIONS

The Commission recommends:

- ◆ The exercise by the Service of its right to recoupment from an officer, on a full indemnity basis, of any damages or costs incurred which it is adjudged liable to pay to a third party, arising out of serious and wilful misconduct on the part of that officer (para. 8.100).
- ◆ The vicarious liability of the Service be limited to ordinary damages, and not extend to punitive damages (para. 8.101).

CONFISCATION OF THE PROCEEDS OF CORRUPTION

8.102 In the course of its inquiries, the Commission has been able to seize a not inconsiderable sum of money which represented the proceeds of corruption, and to identify other cases where financial analysis is strongly suggestive of the unlawful acquisition of monies. In several cases, proceedings under the *Confiscation of Proceeds of Crime Act 1989* have been put in train, and external investigations initiated, for example, to recover income tax on undeclared income.

8.103 This Commission takes the view that the Service, the ODPP, the Crime Commission and the PIC should follow the same hard line taken by it in relation to:

- the dissemination of relevant information in these cases to the Australian Tax Office; and
- the initiation of proceedings under the *Confiscation of Proceeds of Crime Act* where the evidence discloses that police have received financial benefits from corrupt conduct.

Each is an important consequence, the availability of which needs to be understood by all staff.

8.104 The Service's stand on this, as on similar integrity issues, should be made crystal clear at the PREP stage of training and reinforced at regular intervals in the course of career development, so as to flag the limited benefits of corruption.

8.105 Consideration has been given to legislation permitting a claw-back from pensions or superannuation entitlements where it is established that an officer has benefited financially from corruption. Despite the superficial attraction of such a provision, this Commission does not recommend such a course for the reasons earlier specified.¹¹⁴⁷

RECOMMENDATIONS

- ◆ No specific recommendation is made save that the Commission wishes to underline that every available step should be taken to discourage corruption, including recovery of the proceeds of such conduct, and co-operation with the Australian Taxation Office to ensure that corrupt officers do not retain the benefits of any corrupt activity (para. 8.103).

¹¹⁴⁷ See Volume II, Chapter 4 of this Report.

CHAPTER 9

AN END TO THE CYCLE OF CORRUPTION

9.1 As noted earlier in this Report, corruption within policing tends to be a cyclical phenomenon.¹¹⁴⁸ Following a period of scandal and disclosure, there comes commitment and reform which lasts for a time, and then the cycle begins again. The occasion of this Royal Commission, and the strength of the present climate for change, provide an opportunity to challenge the inevitability of that cycle.

9.2 What is needed, in the view of this Commission, is a series of strategies that can bring about fundamental change, and then maintain the momentum so that:

- ethics, integrity, and professionalism become a way of life within the Service;
- a real capacity exists to detect and deal with any suspicion of corrupt activity that may arise; and
- those officers who are unprepared to behave to the high standards required, accept that there is no place for them in the Service.

9.3 Accordingly, this Report has in various ways dealt with those matters that have contributed to the existence of a poorly managed Service and to its unethical culture, that is, with those matters that can be addressed from within. In this final chapter, the Commission draws together the threads of the monitoring and review process that need to be applied from outside the Service.

9.4 Of these matters one of the most important will be the manner in which the reform process is driven, because:

- in the past the Service has shown itself resistant to change through a combination of factors including deliberate blocking from some quarters, and deep-seated traditions and attitudes that are not easily abandoned; and because
- the Service is unpractised in many of the measures recommended in this Report, even though they have long been adopted by progressive and well-managed organisations in the community.

9.5 In this respect the Commission is persuaded that the Service will need considerable external assistance to ensure that reform is implemented.

¹¹⁴⁸ See Volume I, Chapter 3 of this Report.

A. EXTERNAL OVERSIGHT OF THE SERVICE

9.6 In its First Interim Report, this Commission highlighted the importance of establishing a model in which:

- the Service retained a direct responsibility to combat corruption within its ranks; and
- an external agency, staffed by skilled lawyers and investigators independent of the Service, assumed an overseeing role and a capacity to undertake direct investigations into selected cases.¹¹⁴⁹

9.7 Retention of a role within the Service to respond to corruption was seen as essential, otherwise there was a risk that it might abandon all responsibility and interest in maintaining high standards of integrity. On the other hand, external oversight was seen as advantageous in enhancing police accountability, guaranteeing independent and aggressive pursuit of serious corruption, and increasing public confidence in the Service.¹¹⁵⁰

POLICE INTEGRITY COMMISSION

9.8 The Police Integrity Commission (PIC) was established in response to that Report, as the external agency¹¹⁵¹ primarily responsible for the detection, investigation and prevention of police misconduct and corruption in NSW, and to complete the work commenced by this Royal Commission.¹¹⁵²

9.9 It is tasked with:¹¹⁵³

- undertaking inquiries into or audits of any aspect of police activities for the purpose of ascertaining whether there is police misconduct or any circumstance that may be conducive to police misconduct;
- monitoring the quality of investigations conducted within the Police Service;
- making recommendations concerning police anti-corruption education programs, police corruption prevention programs, and similar programs; and
- advising police and other authorities on ways in which police misconduct may be eliminated.¹¹⁵⁴

9.10 In addition, the PIC has functions of assembling and disseminating evidence for criminal prosecutions.¹¹⁵⁵ It may make recommendations as to whether consideration should be given (by the DPP or the Service) to the prosecution of, or the taking of other disciplinary action against, particular persons although it cannot make a specific finding or form an opinion that such a person has committed a criminal or disciplinary offence, or recommend his or her prosecution.¹¹⁵⁶

9.11 The following features may be noted:

¹¹⁴⁹ RCPS, *First Interim Report*, February 1996, pp. 94-98.

¹¹⁵⁰ The advantages of external oversight were similarly recognised in the Mollen and Fitzgerald inquiries. See also D. Bayley, 'Preface' & A. Goldsmith, 'External Review and Self Regulation', in A. Goldsmith (ed.), *Complaints Against the Police: The Trend to External Review*, Clarendon Press, Oxford, 1991, p. ix & p. 13; E. Horne, 'Making the Police More Accountable', *IPA Review*, 45(3), 1992, pp. 34-35; D. Landa & C. Lewis, 'Making the Police Accountable for their Conduct', in D. Chappell & P. Wilson, *Australian Policing*, (2nd edition), Butterworths, Sydney, 1996; M. Palmer, 'The trend to external review' in D. Moore & R. Wettenhall, *Keeping the Peace - Police Accountability and Oversight*, University of Canberra, 1994, pp. 52-61; J. Skolnick, 'Police Accountability in the US' in D. Moore & R. Wettenhall, *Keeping the Peace - Police Accountability and Oversight*, University of Canberra, 1994, p. 106.

¹¹⁵¹ It is a statutory body created by the *Police Integrity Commission Act 1996* (PIC Act).

¹¹⁵² RCPS, *First Interim Report*, February 1996.

¹¹⁵³ *Police Integrity Commission Act 1996* (PIC Act), s. 13 (2).

¹¹⁵⁴ *ibid.*, s. 14.

¹¹⁵⁵ *ibid.*, s. 15.

¹¹⁵⁶ *ibid.*, s. 16(1).

- the PIC may conduct an investigation on its own initiative, in response to a police complaint made or referred to it or of which it has become aware, or in response to a report made to it;¹¹⁵⁷
- the PIC is subject to a specific restriction not to employ serving or former members of the NSW Police Service;¹¹⁵⁸
- it is empowered to make arrangements for the establishment of State or Commonwealth task forces, and may work in co-operation with such task forces or with other investigative agencies;¹¹⁵⁹
- the *Drug Trafficking (Civil Proceedings) Act 1990* applies to the PIC in the same way that it applies to the NSW Crime Commission but it may only exercise such a function after consultation with the Crime Commission;¹¹⁶⁰ and
- the PIC is subject to supervision by an Inspector, with a duty to investigate complaints made against its staff, to audit its operations, effectiveness and compliance with the law, and to report to a Parliamentary Joint Committee¹¹⁶¹ which is to oversee the PIC.¹¹⁶²

9.12 The structure of the PIC is similar to that of the Royal Commission, with a multi-disciplinary team approach to investigations. The PIC may conduct public or private hearings for the purposes of an investigation, it is not bound by the rules of evidence and it can inform itself in such a manner as it thinks appropriate.¹¹⁶³ It is instructed to conduct its proceedings with as little formality and technicality, and with as little emphasis on an adversarial approach, as are possible.¹¹⁶⁴ Answers given and documents produced by a witness at hearings are not admissible in evidence against that person in civil or criminal proceedings (unless given without objection), but are admissible in disciplinary proceedings and in proceedings for contempt or for an offence under the legislation governing the PIC.¹¹⁶⁵

9.13 The Royal Commission, which was closely involved in the preparation of the legislation which provided the basis for the formation of the PIC and in its establishment, is satisfied with that legislation and with the capacity of the PIC to continue the work it has begun.

OMBUDSMAN

9.14 The NSW Ombudsman is an independent statutory officer¹¹⁶⁶ whose mission is to 'safeguard the public interest by providing for the redress of justified complaints and promoting fairness, integrity and practical reforms in public administration in NSW'.¹¹⁶⁷ The functions of the office include:

- the oversight of police investigation into complaints about police, and direct investigations into such conduct where this is considered appropriate;¹¹⁶⁸
- the determination of appeals in respect of decisions concerning the Witness Protection Program of the Service,¹¹⁶⁹ and

¹¹⁵⁷ *ibid*, s. 23.

¹¹⁵⁸ *ibid*, s. 10(4).

¹¹⁵⁹ *ibid*, ss. 17 & 18.

¹¹⁶⁰ *ibid*, s. 19. Or in conformity with s. 84 which authorises the Commission to refer a matter to the Director of Public Prosecutions or the Crime Commission for action under the *Confiscation of Proceeds of Crime Act 1989* or the *Drug Trafficking (Civil Proceedings) Act 1990*. The Commission may enter into arrangements with the DPP or NSWCC regarding the class or kind of matters that might appropriately be dealt with.

¹¹⁶¹ PIC Act, Part 6. This is the Committee on the Office of the Ombudsman.

¹¹⁶² *ibid*, Part 7.

¹¹⁶³ *ibid*, ss. 20, 32 & 33.

¹¹⁶⁴ *ibid*, s. 20.

¹¹⁶⁵ *ibid*, s. 40.

¹¹⁶⁶ Appointed under the *Ombudsman Act 1974*.

¹¹⁶⁷ NSW Ombudsman, *Annual Report 1995-96*, RCPS Exhibit 2904/56, p. 12.

¹¹⁶⁸ *Police Service Act 1990*.

- the audit of records concerning telecommunications intercepts.¹¹⁷⁰

9.15 The NSW Police Service is required to provide the Ombudsman with copies of complaints about police conduct that it has received,¹¹⁷¹ except an 'agreed class or kind of complaint' (as agreed between the Ombudsman and the Commissioner of Police).¹¹⁷²

9.16 The Ombudsman's powers in relation to police complaints are considerable, and effectively permit it to oversee the performance by the Service of its duty to investigate and deal with complaints according to the law, and in appropriate cases, where the Service has fallen short of the proper discharge of its responsibilities, to intervene or deliver a specific report to Parliament.¹¹⁷³

9.17 The Ombudsman occupies a key role in relation to the existing complaints system, which will continue if the management-oriented complaint and discipline system earlier discussed is adopted.¹¹⁷⁴

INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC)

9.18 The ICAC is a statutory body created by the *Independent Commission Against Corruption Act 1988* (ICAC Act), the role of which is to expose and minimise corruption within the NSW public sector.¹¹⁷⁵ Apart from an investigative function, its functions include:

- the examination of public sector laws, practices and procedures;
- advice and assistance in respect of corruption prevention;
- education and advice on strategies to combat corrupt conduct;
- the enlisting and fostering of public support in combating corrupt conduct; and
- the development, supervision and participation in educational or advisory programs.¹¹⁷⁶

9.19 The creation of the PIC effectively removed the powers formerly vested in the ICAC to inquire into and deal with police corruption, save to the extent that:

- it may assist the Service with its general expertise in developing anti-corruption plans and educational programs;
- it may investigate a matter involving the conduct of police officers if the matter also involves the conduct of public officials who are not police;¹¹⁷⁷ and
- it may investigate matters involving public tendering and contracting in which it has considerable experience.

9.20 The ICAC has a dedicated Corruption Prevention and Education Unit and that unit may be in a position to provide assistance to the PIC and the Service, on request, in:

- formulating specific anti-corruption plans; and in
- providing education and development training.

¹¹⁶⁹ *Witness Protection Act 1995*.

¹¹⁷⁰ *Telecommunications (Interception) (NSW) Act 1987*.

¹¹⁷¹ *Police Service Act 1990*, s. 127. Or the PIC if a Category 1 complaint.

¹¹⁷² eg. 'internal management' matters have been agreed as non-notifiable. These matters include 'debt matters, failure of an officer to attend court, loss or damage of police property, absence from duty, failure to complete a shift, minor police driving and traffic offences'. Ministry for Police and Emergency Services, *Police Complaints Procedures: Recommendations for Reform*, Discussion Paper, May 1995, RCPS Exhibit 1018/11.1, para. 2.5.

¹¹⁷³ *Police Service Act 1990*, Part 8A.

¹¹⁷⁴ See Volume II, Chapter 4 of this Report.

¹¹⁷⁵ ICAC, *Annual Report 1993*, RCPS Exhibit 2904 /37, p. iii.

¹¹⁷⁶ ICAC Act, s. 13.

¹¹⁷⁷ PIC Act, s. 129.

9.21 This Commission does not, however, see any additional ongoing role for the ICAC in overseeing the reform process in view of the arrangements proposed later in this chapter involving:

- an Internal Reform Committee; and
- an external strategic audit.

NSW CRIME COMMISSION (NSWCC)

9.22 The NSWCC is constituted as an independent statutory authority¹¹⁷⁸ with a charter to combat illegal drug trafficking, and organised and other crime in NSW.¹¹⁷⁹ Among its statutory functions is a function to review police inquiries into matters relating to criminal activity referred to it by its Management Committee.¹¹⁸⁰

9.23 It has extensive coercive and investigative powers including powers:

- to conduct hearings *in camera* at which witnesses may be compelled to give evidence on oath;
- to compel the production of documents and things relevant to an investigation of the Commission; and
- to apply for special search warrants.¹¹⁸¹

9.24 The NSWCC employs police task forces to conduct investigations and these have normally been drawn from the Drug Enforcement Agency in view of its concentration in recent years on drug crime. Police involved in these task forces are subject to the control and direction of the Commissioner of Police, rather than the Chairman of the NSWCC.¹¹⁸²

9.25 The NSWCC has only rarely exercised its function to review police investigations, and it does not consider the investigation of police corruption to be part of its role 'except where it arises incidentally in the course of a criminal investigation'.¹¹⁸³ There are good reasons for that approach:

- the Management Committee of the NSWCC includes the Commissioner of Police;¹¹⁸⁴ and
- there is a tension in the NSWCC combining a corruption investigation function with a role which requires it to work in partnership with police on criminal investigations.

9.26 Of course, this is not to say that the NSWCC is ignorant of the danger which corruption presents to its own inquiries and evidence extended therefrom. The NSWCC has worked on joint projects with the Professional Integrity Branch (PIB) and the ICAC to produce evidence of corruption arising from criminal investigations,¹¹⁸⁵ and on occasions it has provided additional investigative and technical resources.¹¹⁸⁶ It has worked co-operatively and to very good effect with the Royal Commission. The Royal Commission does not see any need, however, for the NSWCC to have an enlarged role in relation to police corruption, but it does encourage the PIC to continue the valuable relationship which it formed with that Commission.

AUDITOR-GENERAL

9.27 The Auditor-General oversees the finances and performance of the Police Service, undertaking an annual audit as well as special audits.¹¹⁸⁷ This Royal Commission does not suggest

¹¹⁷⁸ Under the *NSW Crime Commission Act 1985* (NSWCC Act) (Previously the *State Drug Crime Commission Act 1985*). It also possesses functions under the *Drug Trafficking (Civil Proceedings) Act 1990*, 'to conduct investigations and litigation with a view to confiscating assets derived from drug trafficking'. NSWCC, Submission to RCPS for Interim Report, 15/11/95, RCPS Exhibit 1018/13.

¹¹⁷⁹ NSWCC, *Annual Report 1995-96*, p. 7.

¹¹⁸⁰ *New South Wales Crime Commission Act 1985*, (NSWCC Act), s. 6(1).

¹¹⁸¹ NSWCC, *Annual Report 1995-96*, p. 9.

¹¹⁸² NSWCC Act, s. 27A. Subject Management Committee directions and guidelines to the NSWCC and to the Commissioner of Police.

¹¹⁸³ NSWCC, Submission to RCPS for Interim Report, 15/11/95, RCPS Exhibit 1018/13.

¹¹⁸⁴ NSWCC Act, s. 24(1)(b).

¹¹⁸⁵ NSWCC, Submission to RCPS for Interim Report, 15/11/95, RCPS Exhibit 1018/13.

¹¹⁸⁶ *ibid.*

¹¹⁸⁷ Division 2A of Part 3 of the *Public Finance and Audit Act 1983* provides for a Special Audit function, which may focus on a single issue or system within an agency, or be more broadly based and encompass a number of related agencies, or focus on particular matters on a Service-wide basis. Auditor-General of NSW, *Special Audit: Training and Development for the State's Disciplined Services: Stream 1: Training Facilities*, 24/9/92, p. 73.

any change in this regard and expects that the Office of the Auditor-General could have a valuable role to play in framing Service policy and practices in unearthing financial corruption.

THE STATE CORONER

9.28 The State Coroner plays a small but significant role in the oversight of the Police Service. The Coroner is responsible for inquiries into deaths in police custody, such as deaths in police cells, shootings, or police pursuits. The Coroner's findings may include recommendations concerning the individual police officers involved (including discipline, training and/or managerial action), as well as recommendations for change to Service policy.

9.29 As highlighted by the Royal Commission into Aboriginal Deaths in Custody, the State Coroner plays a vital role in ensuring public confidence in the impartiality of such investigations. The Deaths in Custody Royal Commission highlighted the 'general inability of coroners to control the quality of preliminary police investigations which lay the foundation for the subsequent coronial inquest'.¹¹⁸⁸ Under the system proposed in this Report, the PIC will be able to conduct inquiries into police shootings and deaths in custody, and in other cases where it is considered unlikely that there would be public confidence in a police investigation. It might be expected that it would work closely with the Coroner, and help improve the quality of police investigations generally in these cases.

MINISTRY FOR POLICE

9.30 The Ministry for Police provides policy advice to the Minister. It has produced significant discussion papers, including those on the police complaints and disciplinary systems which suggested major restructuring of these areas.¹¹⁸⁹ It has an important role to play in identifying and analysing major policy issues.

COUNCIL ON THE COST OF GOVERNMENT

9.31 The Council on the Cost of Government was formally established in October 1995 by the *Public Management Amendment Act 1995*. It is required to report to Parliament twice yearly on its current operations. Its functions are to:

- assist the NSW Government to minimise costs;
- improve efficiency;
- maximise the amount of taxpayers' funds spent directly on the delivery of services; and
- improve the effectiveness of those services.¹¹⁹⁰

9.32 The Council comprises three senior public servants and four members from the private sector. Further to its charter, when requested by the Premier, the Council is required to review an individual agency or, specific activities within such agencies.¹¹⁹¹ In view of concerns about the management of the Police Service raised by the Royal Commission, in November 1996 the Council was commissioned by the Minister for Police, through the Premier, to conduct a Scoping Study Report of the NSW Police Service to identify resource and information management issues and suggest options to address them.¹¹⁹² The Council made findings and suggested options for reform in relation to organisational management, property management, information management and business

¹¹⁸⁸ Royal Commission into Aboriginal Deaths in Custody, *National Report*, vol. 1, 1991, p. 130.

¹¹⁸⁹ Ministry for Police, *Police Disciplinary Procedures: The Need for Reform*, Discussion Paper, July 1995, RCPS Exhibit 2461/1; Ministry for Police & Emergency Services, *Police Complaints Procedures: Recommendations for Reform*, Discussion Paper, May 1995, RCPS Exhibit 1018 /11.1.

¹¹⁹⁰ Council on the Cost of Government, *First Report*, For the period 13/10/95 to 12/4/96, June 1996, Sydney, p. 5.

¹¹⁹¹ *ibid*, p. 6. This includes the Police Service.

¹¹⁹² Council on the Cost of Government, *NSW Police Service Review of Resource Management Scoping Study Report*, November 1996, RCPS Exhibit 2819, p. 1.

planning.¹¹⁹³ It could continue to provide valuable expert assessment of this kind on request during the reform process.

9.33 The Commission is satisfied that in combination these agencies now provide effective external oversight. So long as they work in conjunction with each other, no further recommendation for enhanced external oversight is required.

B. A CHARTER FOR THE SERVICE

9.34 The Service has suffered in the past from a lack of meaningful or reliable performance indicators. The Commission sees it as a useful starting point if the Service were to develop a charter in accordance with the basic recommendations of this Report and to have it enshrined in statute. This should be part of a rewriting of the Police Service Act, which would now seem appropriate. This charter should focus upon:

- the compact between the police and the community;
- professionalism and ethical behaviour by the Service and its members in all dealings;
- efficiency in the delivery of service; and
- a modern humanitarian management approach to its members.

C. RISK ASSESSMENT

9.35 Constant monitoring and attention must be applied by the PIC, the Office of Internal Affairs, and commanders, to those areas where there is heightened risk of exposure to corrupt influences. Training in ethics, provision of mentoring and role models, proper leadership and supervision will assist. The development of a sophisticated database to highlight problem areas and relationships, and communication and co-ordination of effort between the Office of Internal Affairs and regional commanders is essential.

9.36 Individual managers need to identify high-risk areas and implement strategies to reduce that risk. They also need to be aware of the conditions which allow or lead to corruption, and of the staff who are vulnerable. In this regard, they need to look for a pattern of disciplinary charges or complaints involving matters such as excessive force and identify any danger signs.

9.37 Risk assessment and management should be part of a comprehensive anti-corruption program of the Service in which supervisors are given specific training.

D. THE POLICE ASSOCIATIONS

9.38 If professionalism within policing is to be truly achieved, then the move towards it requires the full support of the two Police Associations.

9.39 One of the most difficult areas to be addressed in this regard is the reconciliation of Association support for the promotion of professionalism and integrity on the one hand, and the proper protection of the industrial rights of its members on the other.

9.40 A conflict of interest inevitably arises when a member accused of corrupt conduct calls for legal assistance in defending any charges brought. The conflict at a general level is between protecting an officer against criminal conviction or loss of a job, and the interests of the Service which

¹¹⁹³ *ibid*, pp. 2-3.

risks being undermined if corrupt conduct goes undetected or unpunished. At an individual level, the election is between supporting the officer under suspicion or the honest officer who has brought the relevant conduct to light.

9.41 In the past, it has been the former rather than the latter whom the Police Association in particular has tended to support. In cases where there is cogent evidence of misconduct, there is a persuasive reason for that Association to decline assistance since it does not serve the interests of the remaining members for a corrupt officer to continue in the Service. It is questionable whether any different view should be taken in other cases. Professional associations do not normally regard it as part of their role to fund legal representation for members charged with misconduct. In fact they often assume responsibility for the disciplining of their members. Whether the Police Association continues this funding or not, it needs to balance carefully the conflicting interests which arise. If it were possible, the establishment of an independent defence fund could assist in minimising the conflict.

9.42 In their submissions to the Commission, and at round table conferences, each Association embraced the need to move towards professionalism. To the extent that this can be genuinely advanced, there will be great benefit to the reform process. The proof of this will lie in their election now between supporting or opposing constructive reform designed to serve the best interests of honest members of the Service, and in the attitudes they take to those police who do not aspire to professional standards of honesty and competence. At the moment, the Police Association in particular stands to be counted as this Commission is far from convinced that it has in the past played an effective role in resisting corruption.

E. INTERNAL AUDIT

9.43 A system of internal audit was embraced by the Service in 1993.¹¹⁹⁴ The evidence of the Director of Quality Control showed that despite the 'fields of green' regularly reported, the internal audit progress had serious difficulties.¹¹⁹⁵ Among other considerations:

- it tended to focus on matters such as record-keeping and office procedures rather than on controls which might have been relevant for preventing or discovering poor performance and corrupt conduct; and
- in those cases where bad news resulted, the Service had a marked reluctance to hear, let alone respond to it.

9.44 In September 1996 the Service engaged an outside consultant to report on a restructure of the Internal Audit Section.¹¹⁹⁶

9.45 At Commissioner Ryan's request Mr Geoffrey Bell, as Director of Quality and Control, prepared a plan for implementation of the consultant's report.¹¹⁹⁷ Relevantly, the revised version of this report recommends the following action:

- merger of the Operational Readiness Audit Section and the Comprehensive Audit Section as one audit entity, to be called the Audit Group;
- reporting at least on a monthly basis by the head of the Audit Group directly to the Commissioner;

¹¹⁹⁴ G. Bell, RCT, 19/11/96, p. 34516.

¹¹⁹⁵ G. Bell, RCT, 19/11/96, pp. 34516-32.

¹¹⁹⁶ B. McLennan, *The Future Role of Audit and Review Functions*, September 1996, RCPS Exhibit 2818.

¹¹⁹⁷ NSW Police Service, Implementation Plan for the McLennan Report on Internal Audit and Review (after the Royal Commission), March 1997, Doc. 2677182.

- day-to-day administration of the Audit Group through the Director, Audit & Evaluation and the Executive Director, Management Services; and
- direct provision to the Commissioner of audit reports related to Management Service to prevent any filtering or sanitising of critical comment.

The Royal Commission endorses this approach.

9.46 The Internal Audit Section has an important role to play. The Commission considers it desirable that this Section:

- become entirely familiar with the overall structure, planning and direction of the reform process, so that it can closely liaise with the Commissioner's Reform Committee;
- carefully prioritise its activities so as not to over-reach its resources and become superficial in anything it does;
- pay careful attention to testing the effectiveness of supervision by commanders; and
- report directly to the Commissioner, who in turn should provide copies of any report to the PIC and the Police Minister.

F. REFORM OVERSIGHT

9.47 In the Second Interim Report this Commission foreshadowed the need for 'an external audit process to monitor implementation of the Final Report, and the continuing performance of the Service'.¹¹⁹⁸

9.48 This was accepted by Commissioner Ryan who said:

I am also wise to the need for regular independent assessment of progress against corporate goals and the reform agenda. Such an audit will provide both a challenge and an opportunity to the Service. I welcome it.¹¹⁹⁹

9.49 To the extent that it has been found necessary for public administration to provide adequate resources to the Royal Commission to investigate and report, it is now necessary for it to resource the implementation of those recommendations which are accepted. Otherwise, history will repeat itself.

9.50 In the view of the Commission, oversight of reform should occur at two levels:

- first, there should be an Internal Reform Committee, which can drive the reform process, and have access to external expertise;
- second, there should be an arms-length external audit, focused upon the progress of the transformational change.

INTERNAL REFORM COMMITTEE

9.51 It is important that the Service has a Committee able to drive the reform process which has access to external skills. The foundations for this arrangement already exist:

- in the first phase of the reform process, the Police Board and the Service established a subcommittee chaired by Dr Peter Crawford to focus the reform effort and to provide advice on future directions;

¹¹⁹⁸ RCPS, *Second Interim Report*, November 1996, para. 2.2.

¹¹⁹⁹ P. J. Ryan, *Reform of the NSW Police Service*, November 1996, RCPS Exhibit 2820/1, p. 54.

- more recently, the Police Commissioner has established an Internal Reform Co-ordination Committee, again chaired by Dr Crawford and comprising two Deputy Commissioners, the Executive Director Human Resources and a leading academic with expertise in conflict resolution co-opted in some matters. It will continue the work of the former subcommittee.

9.52 The Chairman of these committees has been able to remain closely linked to the planning and implementation process. His relationship with the Royal Commission as a consultant has enabled him to request the exercise of any of its powers, if necessary, to advance the process. The co-operation and commitment of the Service to date has meant that invocation of these powers has been unnecessary. Nevertheless, the need to maintain momentum makes it desirable that such reserve powers be available, to overcome any day-to-day obstacles that arise.

9.53 It is for this reason that the Commission considers it appropriate to involve the PIC in the reform process. Apart from its principal function to prevent serious misconduct,¹²⁰⁰ it has functions:

to undertake inquiries into or audits of any aspect of police activities for the purpose of ascertaining whether there is police misconduct or any circumstance that may be conducive to police misconduct.¹²⁰¹

It also has powers to appoint consultants¹²⁰² and to report to Parliament by special report¹²⁰³ or general report.¹²⁰⁴

9.54 Whilst it is important that the PIC be able to focus uninterrupted on the detection and prevention of serious misconduct, its involvement in the oversight of the reform process is likely to enhance, rather than detract, from the performance of that key role. To give practical effect to this it would be appropriate for the PIC to continue the engagement of Dr Crawford as a consultant, and for the Reform Committee to keep it, as well as the Minister and Police Commissioner, informed of progress.

EXTERNAL STRATEGIC AUDIT

9.55 The Commission recommends that the annual strategic audit be entrusted to an independent auditor engaged by the PIC. Its purpose would be to report on success and failures, and to advise on measures to improve the reform process. Appropriate amendments to the PIC Act should be made to permit it to discharge this function. It may also need to engage a consultant to co-ordinate this aspect of its work.

9.56 It would be appropriate for the auditors to report to the PIC, which would in turn report to the Minister and the Service on progress at least annually and more frequently as occasion requires. The PIC would also have the ability to deliver a special report under Section 98 of the PIC Act if this became necessary. Otherwise its report could be contained in the Annual Report.

9.57 The basis for this audit has been laid by a workshop attended by experts proficient in the field of management and transformational change, convened by Dr Crawford at the request of the Commission. A blueprint¹²⁰⁵ for the audit process has been prepared and endorsed by Commissioner Ryan.

9.58 This group of experts recognised that the rebuilding of the Service will take many years, making it important to identify high-impact areas in the reform agenda where progressive change can be monitored regularly.

¹²⁰⁰ PIC Act, s. 13(i).

¹²⁰¹ *ibid*, s. 14A.

¹²⁰² *ibid*, s. 10(3).

¹²⁰³ *ibid*, Part 8, s. 98.

¹²⁰⁴ *ibid*, Part 8.

¹²⁰⁵ The blueprint is found at Appendix 31 in Volume III of this Report.

9.59 Ten key areas have been identified as follows:

- effective leadership and management;
- changing culture and values;
- an honest Service which repels corruption;
- effective planning;
- focus on performance management and quality;
- focus on staff and teamwork;
- building new human resource systems;
- breaking down outmoded systems;

- the patrol as a service hub; and
- implementation of effective structural change.

which would be tested over a three-year period. Additionally, a survey is proposed of attitudes as to the progress of reform, both from within and outside the Service. This survey is an important element of an ethical audit, which would supplement the performance audit.

9.60 Without attempting to be comprehensive, the following examples are given as indicators that the reform is proceeding appropriately:

- the Service and its leaders seek and embrace training and assistance from experts from outside in areas such as management, planning, implementation and human relations skills;
- day-to-day crises and emergencies diminish as an orderly, long-term framework is put in place, and problems are solved in such a way that they do not recur;
- staff speak with confidence about what they are trying to do and why demonstrating that they increasingly share common objectives;
- staff become prepared to offer *bona fide* criticism of areas of the Service which they find wanting, and to report the misconduct of other members, and do these things openly and not under a cloak of anonymity;
- leaders stop issuing orders and work with their teams on problems;
- members of teams feel able to express views and contribute to solving problems and setting priorities;
- decisions become more consistent, understandable and transparent;
- patterns of behaviour become more consistent and standards rise;
- the Service becomes interested in its own performance, it sets targets and benchmarks itself against the outside world in key management, operational and service areas;
- the Service starts to recognise that it must deliver value for money and sheds activities that are unnecessary or better delivered by other agencies;
- the delivery of support activities or services are made subject to competition from outside agencies or service providers;
- the Service operates as an integrated unit in delivering its key roles;
- new approaches are pilot tested to achieve improved performance, to break through in areas of gridlock and to gain feedback in areas where dramatic change is proposed;
- unnecessary bureaucracy, worthless rules, traditions and plans start to disappear;
- systems are tested to see whether they help or hinder staff, and are kept simple and redesigned as needed;
- the community becomes the focus of policing in most Service endeavours, for example, in modifying complaints handling the needs and rights of the citizen move to top priority;
- the Service shows real concern for and interest in its staff, for example, the plight of the senior sergeants who are no longer in a position where they can contribute in new ways or advance professionally is addressed successfully;
- the organisation starts recruiting outside for the skills it lacks, and senior and management positions are filled by open recruitment;

- jobs in the Service start to match needs as opposed to traditions, and are no longer routinely categorised as requiring the services of sworn police;
- the rank structure is progressively replaced by new management and career structures, with barriers between sworn and unsworn members reduced;
- levels of self-discipline, equality and respect rise within teams;
- the Service stops trying to 'fix its problems' by making changes in structure;
- the Service improves its project management by setting clear objectives, reviewing available information, devising the means of achieving the desired result, actively reviewing progress and readjusting; and
- the size of headquarters support staff shrinks, and it turns to providing more strategic and policing guidance.

To the extent that these do not emerge, and the patterns of misbehaviour and the undesirable attitudes flagged in this Report continue, then the reform process must be regarded as faltering and in the need of revitalisation or modification.

9.61 Of these indicators perhaps the most positive sign of a change in the culture would be the emergence of a preparedness to admit mistakes. Refreshingly, in recent months the Service has openly acknowledged serious deficiencies in the co-ordination of information and resources in relation to the investigation of a series of alleged sexual assaults in areas spanning a number of patrols. The covering up of these mistakes would have been a negative indicator.

9.62 Care must be taken in the response to such admissions of error. It is superficial and counterproductive to further displays of honesty to call immediately for punishment or dismissal of those involved, at whatever level. Rather, what is needed is a thorough review to establish any root or systemic cause underlying the mistake which might ensure that the mistake is not repeated.

G. CONCLUSION

9.63 Together it is expected that these strategies will keep the reform process on the rails, and provide the expertise that the Service has lacked in the past when trying to implement reform. As has been stressed more than once in this Report, the making of recommendations for reform and the development of plans and strategies will achieve nothing if they are not properly implemented.

9.64 This Report concludes with the reminder of the benefits for the Service, its members, and the community, if the cycle of corruption can be broken this time around. For the Service it means a restoration of its credibility and effectiveness; for honest officers it means new career opportunities and job satisfaction; for the community it means greater safety in the streets and confidence that a call for assistance will be met with a professional and ethical response. It would also mean that the cost of this Commission, both financially and otherwise, will not have been in vain.

RECOMMENDATIONS

The Commission recommends:

- ◆ The external oversight arrangements in relation to complaints and corruption, established in response to this Commission's Interim Reports, and as summarised in paras 9.8 - 9.33, continue.
- ◆ The Police Service develop a charter in accordance with the basic recommendations of this Report to be incorporated into the *Police Service Act 1990* or any revision of it.
- ◆ The *Police Service Act 1990* be rewritten to embrace the further changes arising out of this Report.
- ◆ Implementation of the recommendations of the recent review of the Internal Audit process (paras. 9.44 - 9.45).
- ◆ The Internal Reform Committee, presently constituted, continue to drive the reform process from within, and report on progress to the Minister, the Commissioner, and to the PIC (paras. 9.50 - 9.53).
- ◆ Appointment of an external strategic auditor upon engagement to the PIC, to carry out a qualitative and strategic audit of the reform process, and to report to the PIC, which in turn should report to the Minister and the Service (paras. 9.55 - 9.56).

SUMMARY OF RECOMMENDATIONS

The Commission's recommendations as found in the body of this Final Report are set out below:

CHAPTER 2 - POLICING RESPONSIBILITIES IN NSW

EXISTING FUNCTIONS OF THE POLICE SERVICE

1. A thorough review of all current police functions be undertaken to determine whether they should remain within the charter of the Service (paras. 2.7 - 2.8).

DRUG LAW ENFORCEMENT

2. Consideration be given to the establishment of safe, sanitary injecting rooms, under the licence or supervision of the Department of Health, and to amendment of the *Drug Misuse and Trafficking Act 1985* accordingly (paras. 2.19 - 2.22).
3. Guidelines be published by the Service in conjunction with the Department of Health, setting out the basis on which the policing of the Needle and Syringe Exchange Program, the Methadone Maintenance Program and similar public health initiatives should occur (paras. 2.23 - 2.25).
4. Strategies be undertaken to increase public awareness of the problems of drug abuse, for the establishment of public detoxification and rehabilitation units, for greater availability of methadone, and street counselling and assistance for young users (para. 2.27).
5. Steps be taken to establish a national summit or commission, involving a wide range of experts and community interests, to address the problems of drug supply and use and the rehabilitation of drug users on a national basis (para. 2.26).
6. Support be given to a controlled heroin trial in the Australian Capital Territory in line with that developed by the National Centre for Epidemiology and Population Health (para. 2.28).
7. Consideration be given to amending the *Drug Misuse and Trafficking Act 1985* to create an offence where a person engaged in more than a certain number of acts of supply of a prohibited drug could be dealt with on indictment for an offence of 'engaging in the commercial supply of drugs' even though the quantity of drugs involved did not exceed in total the prescribed commercial quantity or was unknown (paras. 2.31 - 2.33).

GAMING AND BETTING

8. The report of the 1995 Gaming and Betting Task Force be implemented to rationalise and improve enforcement of the gaming laws (paras. 2.37).

POLICE & COMMUNITY YOUTH CLUBS

9. There be a further independent review of the continuing suitability of police involvement in the Police & Community Youth Clubs (para. 2.54).

CHAPTER 3 - TRANSFORMING THE NSW POLICE SERVICE

ORGANISATION AND MANAGERIAL STRUCTURE

Structure

10. The revised structure of the Service announced by Commissioner Ryan be adopted and implemented, thereby expanding the number of regions, removing districts, and making patrols the primary service delivery and management units (para. 3.24).
11. There be a continuing review to further flatten the structure of the Service and to return police presently carrying out administrative and support duties, capable of being carried out by clerical or unsworn staff, to operational duties (para. 3.24).

Policy

12. The *Police Service Act*, s. 8 be amended along the line of the *Australian Federal Police Act 1979* (Cth), s. 13 to draw a clear distinction between operational and policy responsibility, and to vest the former in the Police Commissioner and the latter in the Minister (paras. 3.29 & 3.26).

Flexibility

13. There be no return to the concept of authorised strength or any similar notion, and the Police Commissioner be given the authority and flexibility to determine matters of staffing structure and deployment to meet current needs and resources (para. 3.33).
14. Central agencies be kept to a minimum and confined to work that cannot be appropriately carried out at patrol level and by specific task forces (para. 3.44).

THE AGENCIES

Special Branch

15. The Commission records its support for the formation of a newly constituted agency, in the place of Special Branch, with the function of:
 - providing close personal protection for VIPs, internationally protected persons and other dignitaries, and carrying out related intelligence gathering and risk/threat assessment (para. 3.51); and
 - tactical/operational analysis, intelligence gathering, and liaison with other relevant agencies, in relation to approved targets who present a risk of politically motivated violence or terrorist activity, subject to the safeguards, audit, and review identified (paras. 3.54, 3.56, 3.57).

Special Agencies

16. The Commission records its support for the current review of the investigative function of the Service, in which careful consideration needs to be given to the retention of the Special Agencies and the alternatives identified (paras. 3.58 - 3.61).

EMPLOYMENT

Recruitment

17. The minimum entry age for police officers be increased to 21 years (para. 3.72).
18. Steps be taken to encourage through recruitment a greater diversity of membership of the Service, including the provision of bridging courses, scholarships and the like; such

programs to operate in tandem with training and development designed to make police more aware of cultural, racial and other issues affecting minority groups, and better equipped to deal with policing issues affecting such groups (para. 3.78).

Workforce

19. In working towards a flatter structure which reflects responsibility rather than rank, such legislative impediments as currently exist concerning appointment and transfer be repealed or amended to allow for:
 - appointment to positions;
 - the filling of positions by sworn or unsworn members of the Service as best meets the needs of the position and other commitments of the Service;
 - salary to be linked to positions rather than rank;
 - career growth to be possible within a rank (paras. 3.95 - 3.97).
20. Consideration be given to the development of separate career paths, permitting progression within various categories of operational and managerial work (para. 3.96).
21. The way be cleared for the development of multi-disciplinary teams combining the skills and experience of sworn police with those of other practitioners such as lawyers, financial and intelligence analysts and the like (para. 3.98).
22. Consideration be given to a merger of the two grades presently applying within each of the ranks of Sergeant, Inspector and Superintendent and to redesignating the last mentioned rank as Commander (paras. 3.103 & 3.104).

Term and Contract Employment

23. The Service move to a system of term employment, and enter into industrial negotiations to settle the terms upon which it might be introduced (para. 3.109).

Lateral Entry

24. All existing impediments to lateral entry, and to temporary secondment or transfer of police from other services be removed, and that each be adopted and pursued as a policy of the Service to break up inappropriate associations, and to gain an infusion of skills and experience from other services (paras. 3.113 - 3.114).

Registration

25. The concept of a national profession (and registration) be pursued to advance the development of uniform and acceptable standards of education, training and professionalism on an Australia-wide basis (paras. 3.115 - 3.121).

EDUCATION TRAINING AND DEVELOPMENT

Recruit Training

26. There be a restructure of recruit training to introduce a requirement for an entry qualification dependent on an externally acquired tertiary degree or diploma in an approved course followed by skills training delivered at the Police Academy supplemented by field training co-ordinated and controlled by the Academy (para. 3.151).
27. Consideration be given to a scholarship scheme for selected students to assist them to acquire the external academic qualification (para. 3.156).

28. Recruitment and remuneration of student police officers be deferred until the skills training phase (para. 3.156).
29. Civilian educators be given a more prominent role in such training (para. 3.154).

Continuing Education and Career Development

30. A review be undertaken of all existing courses (and of PREP) for their content and quality (paras. 3.150 & 3.159).
31. The proposal for distance education through TAFE colleges be implemented (para. 3.163).
32. Steps be taken to monitor the quality of the Mandatory Continuing Police Education Program, and compliance with it (para. 3.163).
33. Civilian educators be involved in such further training for all matters not involving specialist policing skills (para. 3.152).

The Police Academy

34. The Academy be retained, at a place and in a form to be determined, to deliver the skills training of PREP, as well as specialised career development courses (para. 3.164).
35. There be an increase in the input and involvement of specialist civilian educators in the management of the Academy, and in the delivery of its programs (para. 3.165).
36. An external review be undertaken to determine whether it is financially and otherwise advantageous to retain the Academy in its present location or to relocate (para. 3.167).
37. An external audit be undertaken to establish with some precision the extent of the financial investment of the Service in the Academy, and the annual cost of training and education, with a view to introducing greater accountability and cost-efficiency (para 3.167).

Management and Leadership Training

38. Commanders and supervisors be provided with training in modern management principles through external management courses (para. 3.170).

Ethics and Integrity

39. The teaching of ethics and integrity be integrated, in a practical way, consistent with adult education principles into every aspect of police education and training, that is at PREP level, and in development courses, continuing education and management training (para. 3.173).
40. The Service seek guidance from ethics experts such as the St James Ethics Centre on the way these subjects can best be integrated into police education and development programs (para. 3.174).

Advisory Committee/Policy

41. An Advisory Committee on Police Education be established, consisting of expert educators, particularly with experience in policing studies, and members of the business community, to advise on all aspects of police education training and development (para 3.159).
42. Education and training be identified as a matter of policy for the Minister (para. 3.175).

PROMOTIONS AND TRANSFERS

43. The Service continue to develop and adopt the assessment centre method, and apply it to all career moves which may be described as promotions (paras. 3.185 - 3.188).
44. Assessment centres be regularly monitored by external experts to ensure their effectiveness (para 3.189).
45. Selection panels include at least one person who is not a member of the Police Service (para 3.189).
46. The PIC, the Office of Internal Affairs and commanders pay particular attention to delivery of careful and realistic integrity assessments (para. 3.189).
47. The basis for transfers be confined to proper administrative and managerial considerations (para. 3.191).

APPEALS AGAINST PROMOTIONS AND TRANSFER DECISIONS

48. The right of appeal to GREAT in respect of promotion be removed, and in its place an internal review panel be established which might deal with appeals against promotional decisions involving non-executive staff and constables (para. 3.208):
 - such review should extend to the merits of the decision appealed from, and the fairness of the process by which it was reached (para. 3.208);
 - the review panel should not set aside a decision on the merits unless satisfied that it was one that a selection panel acting reasonably could not have reached (para. 3.209);
 - the review panel should remit the matter to the selection panel for reconsideration if satisfied that there has been a material unfairness in process, affecting the original decision, rather than substitute its own decision (para. 3.210).
49. The Commission does not make any recommendation for the introduction of an appeal system for transfers, save to encourage the Human Resources and Development Command to develop proper procedures to review transfer decisions when compassionate or other substantial grounds are shown, and to provide support to ameliorate any hardship involved (para. 3.213).

TERMINATION OF EMPLOYMENT

The Commission understands there is a working party in existence examining the *Police Regulation (Superannuation) Act 1906* with the aim, if possible, of separating out the worker's compensation provisions from the pension provisions and of examining various inequities including the matters raised in this section. That exercise or a similar exercise should be encouraged consistently with the views expressed in this Report. Otherwise the Commission recommends:

50. Prospective amendment of s. 10 of the 1906 Act to replace the one job test with a test that takes into account employability in areas other than policing (para. 3.229).
51. Return of the management of the Police Superannuation Fund to the State Trustee Corporation, revoking the delegation to the Police Superannuation Advisory Committee (para. 3.233).
52. Consideration be given to reactivating the redundancy scheme and/or permitting retirement with reduced benefits after 20 years' service (para. 3.239).

APPEALS IN SICK LEAVE AND HOD CASES

53. Amendment of section 186(1) of the *Police Service Act 1990* to provide for the appeal referred to therein to lie to the Compensation Court in place of GREAT (para. 3.243).
54. All decisions relating to whether or not an infirmity of a member was caused by that member being hurt on duty be vested in the administration of the Police Superannuation Fund, subject to appeal to the Compensation Court (para. 3.245).

CIVILIAN SUPPORT AND ADMINISTRATIVE SERVICES

While it is not appropriate for this Commission to state definitively the appropriate make-up of the Service, it recommends:

55. Sworn police officers be employed in positions which require the use of the special powers of police, and as a corollary there should be a greater involvement of administrative officers in positions which do not require an exercise of those powers (para. 3.259).
56. Greater emphasis be placed generally within the Service, in the designation of positions and remuneration, on the nature of the job and the skills required, and less reliance placed on the status of its holder at any given time (para. 3.256 - 3.257).
57. There be a move towards greater unity within the Service, in relation to pay and other conditions of employment, together with the removal of disparities which currently exist. Desirably, the Service should work towards a single industrial and disciplinary system applicable to all its staff (para. 3.258).
58. The Clinical Forensic Medical Section be removed from the Service and transferred to the control of the Institute of Forensic Medicine (para. 3.262).

SALARIES AND ALLOWANCES

59. For the reasons mentioned, the Commission considers it inappropriate for it to become involved in any review of salaries or allowances save to encourage adoption of the general principle that remuneration for police should represent value for the office performed, be related to the position occupied and responsibility attaching to it and take into account extra duties and changes in work practices resulting from this Report (paras. 3.265, 3.268 - 3.271, 3.275 - 3.276).

SECONDARY EMPLOYMENT

60. Secondary employment be prohibited in those areas in which police have a regulatory role such as commercial and private inquiry agents, transport, liquor, security, and gaming and racing (para. 3.288).
61. Existing secondary employment applications be reviewed on an annual basis (para. 3.289).
62. The Service develop effective mechanisms to audit officers undertaking secondary employment (para 3.289).

LEGAL SERVICES

63. It is appropriate to retain the Office of the Solicitor for the Police Service to conduct non-contentious matters. Some former police prosecutors may be assigned to regions to provide legal advice. Otherwise, all work of a contentious nature or involving disciplinary proceedings should be referred to the Office of the Crown Solicitor for carriage by that Office (para. 3.295 & 3.299).

64. The responsibility for all prosecutions be progressively transferred to the Office of the Director of Public Prosecutions (para. 3.318).
65. Such transfer to be co-ordinated by the Director of Public Prosecutions.
66. Arrangements be made to preserve the careers of police prosecutors by retraining and redeployment, or by assignment to regions as legal advisers, or by their integration into multi-disciplinary investigative teams, and to provide for redundancy for those who prefer to leave the Service. Where police prosecutors are assigned to regions they should be answerable to the region commander, and not seen as branch officers of the Solicitor for the Service (para. 3.321).

PERFORMANCE MANAGEMENT

67. The Service redouble its efforts to introduce effective and co-ordinated performance management schemes for all ranks (para. 3.344).
68. For that purpose, it seek external expertise to develop and implement such schemes (para. 3.344).
69. It ensure compliance with such schemes, and defer increments for non-complying officers (para. 3.344).
70. Such schemes be subject to on-going review (para. 3.344).

CHAPTER 4 - THE COMPLAINTS AND DISCIPLINE SYSTEM

71. The current complaints handling and discipline system be replaced by a new system, the Employee Management System (EMS), that has as its primary objective the enabling of patrol and other Local Commanders to deal with complaints and take remedial action or impose sanctions on a managerial basis, without recourse to formalities such as the preferment of disciplinary charges and hearings (paras. 4.12 - 4.17), and contemplates three categories of complaint (para. 4.24).
72. Under the EMS, on becoming aware of possible misbehaviour, the Local Commander be empowered to initiate an inquiry and to take such action as is considered appropriate in all the circumstances focused, if possible, upon managerial or remedial measures but in the more serious cases action which may include:
 - imposition of a reviewable managerial sanction such as a fine, deferral of an increment, loss of seniority, reduction in salary, demotion (para. 4.33);
 - initiation of the Commissioner's confidence process (paras 4.33, 4.34, 4.118).
73. A member who is dissatisfied with a reviewable sanction short of removal for loss of Commissioner's confidence has a single and final right to appeal to the Commissioner's Advisory Panel (para. 4.118).
74. In the event that the last mentioned recommendation is not accepted and the view is taken that a further avenue of appeal should reside in an external tribunal, then such appeal be conducted by a single judicial member of the Industrial Relations Commission, with similar procedures to apply as those which apply in relation to appeals from decisions by the Commissioner under s. 181D to remove members for loss of confidence (paras. 4.119 - 4.121).
75. The EMS be independent of the criminal justice system. The privilege against self-incrimination be abrogated for the purposes of managerial questioning notwithstanding that the privilege has been invoked for the purpose of official questioning in relation to a criminal investigation (para. 4.55).
76. Information about complaints, allegations of misconduct and the way in which they are managed be comprehensively recorded. (paras. 4.56 - 4.57).
77. The role of the Office of Internal Affairs extend to:
 - the investigation of category 1 complaints deemed unsuitable for the Police Integrity Commission and the relevant Local Commander;
 - the conduct of integrity tests;
 - the provision of advice and support services to Local Commanders;
 - the co-ordination and establishment of intelligence bases on corruption within the Police Service;
 - planning proactive investigations, in liaison with the Police Integrity Commission;
 - the provision of assistance with the development of anti-corruption strategies and training for the Police Service (paras. 4.76 - 4.78).
78. The role of the Police Integrity Commission extend to:
 - monitoring the progress of the EMS;

- undertaking direct investigations into serious matters of corruption or police misconduct;
 - monitoring investigations by the Office of Internal Affairs into those matters which it retains;
 - exercising its coercive powers to assist the Office of Internal Affairs where expedient to do so;
 - taking over inquiries into police shootings or serious accidents where it is considered desirable to ensure an impartial investigation (para 4.82).
- 79.** The role of the Ombudsman continue by:
- monitoring managerial actions taken by Local Commanders;
 - conducting random checks as to the progress of non-reportable matters;
 - as necessary carrying out investigations, and reporting to the complainant and to Parliament;
 - liaising closely with the PIC (paras. 4.83 - 4.85).
- 80.** The EMS apply to sworn officers only. However, negotiations between the Police Service, the Public Service Association and other relevant industrial organisations should be commenced as soon as practicable with a view to including all other members of the Police Service within the new scheme (para. 4.88).
- 81.** The EMS be implemented progressively by:
- continuing the pilot program for a further six months and carefully reviewing any problems that arise;
 - training Local Commanders within the pilot program in appropriate management tools and strategies with a heavy reliance on external expertise;
 - fully involving all staff by careful and comprehensive explanation of the system and by way of membership of a consultative committee at patrol level;
 - encouraging Local Commanders outside the pilot program to gradually implement a managerial approach to complaints handling and discipline (para. 4.72).
- 82.** The Police Service or the Ombudsman conduct research on the level of public satisfaction with the new complaints handling and discipline system. Such research should be repeated at regular intervals, for example, every two years (para. 4.69).
- 83.** The Commissioner's Instructions be re-drafted so as to constitute consistent and practical guidelines for the exercise of professional discharge of office which concept should be at the basis of the complaints and discipline system and displace, for example, the present test for 'neglect of duty' (paras. 4.46 - 4.49).

DISMISSAL

- 84.** Sworn officers not to be removed from the Police Service except for loss of Commissioner's confidence (paras. 4.89 - 4.95).
- 85.** If funding is allocated, a system akin to redundancy payments and early retirement be available to the Police Commissioner to be invoked in selected cases (paras. 4.101 - 4.102).

86. Members removed from the Police Service under s. 181D of the *Police Service Act 1990* for want of Commissioner's confidence have a right to seek a review of the Commissioner's decision (para. 4.120), in the nature of a determination of the validity of the Commissioner's decision, and conducted according to the procedural, jurisdictional and legal considerations set out at paras. 4.131 - 4.133.

POLICE TRIBUNAL AND GREAT

87. Subject to commencement of the EMS the Police Tribunal be abolished (para. 4.145).
88. Subject to commencement of the EMS police officers right of appeal to the Government and Related Employees Appeals Tribunal (GREAT) in disciplinary matters be abolished (para. 4.145).

CONSEQUENTIAL LEGISLATIVE AMENDMENTS

89. The *Police Service Act 1990* be amended, *inter alia* by:
- recognising the absence of any charge-based disciplinary proceedings;
 - empowering Local Commanders to take necessary actions under the EMS;
 - replacing the existing complaints categories in s. 162C with three categories of complaints as described in para. 4.24;
 - incorporating the protocol for exercise of the Commissioner's confidence power;
 - establishing a Commissioner's Advisory Panel with powers appropriate to the performance of functions recommended herein;
 - abolishing the requirement under s. 132 to attempt conciliation in favour of permitting the Local Commander to initiate conciliation only in those matters where it is considered appropriate;
 - permitting statements made during a conciliation or official questioning for managerial purposes to be admissible for the purpose of reviews of managerial action and decisions taken to remove officers for want of Commissioner's confidence;
 - repealing Part 9 Division 1 (discipline of members of the Police Service), save for those provisions which preserve the right of the Commissioner to take criminal or managerial action against members (see ss. 173(1), 173(2), 178(3), 179);
 - repealing Part 9 Division 2 (appeals to GREAT);
 - repealing Part 9A (appeals to the Police Tribunal) save for s. 197 which should be amended to enable the Minister to request any suitable person to conduct an inquiry of the kind formerly conducted by the Police Tribunal.
90. Suitable amendments be made to the *Police Service Act 1990* and other relevant legislation (for example, the *Industrial Relations Act 1996*) to give effect to the mechanisms for review of managerial action and decisions by the Commissioner under s. 181D for removal of the members from the Police Service.
91. Commencement of amendments to the *Police Service Act 1990* giving effect to the EMS be deferred to a date to be proclaimed (that is, after the Police Integrity Commission and the Ombudsman have informed the Minister to the effect that it is appropriate that the amendments be implemented) (paras. 4.70 - 4.72).

92. Relevant consequential amendments be effected to the Police Service Regulation 1990, the Police Department (Transit Police) Regulation 1989, the Ombudsman Act 1974 and the Government and Related Employees Appeal Tribunal Act 1980 to reflect the abolition of the Police Tribunal and the right of appeal to GREAT.

CHAPTER 5 - CIVILIAN ADVISORY COUNCILS

LOCAL CONSULTATION

93. A review be undertaken within each patrol to examine:
- its existing community consultation arrangements; and
 - the problems and outcomes specific to its area that would benefit from community consultation (para. 5.58).
94. In the light of such review, each patrol commander, in consultation with the region commander, put into effect such form of Community Consultative groups or strategies for community feedback as best meet its needs (para. 5.58).
95. In establishing such arrangements there be close consultation with local government and other bodies such as the local Chamber of Commerce, to ensure that there is effective community contribution to local policing (para. 5.58).
96. The effective establishment and use of community consultation be regarded as an important aspect in the ongoing assessment of the performance of patrol and regional commanders (para. 5.58).
97. Patrol commanders report to the region commanders and to the Police Commissioner on the use of community consultation in their patrols, and the Commissioner report on this matter in the Annual Report to the Minister (para. 5.58).

HIGH LEVEL COMMUNITY CONSULTATION

98. The Service retain the existing Standing Consultative Committees (paras. 5.59 - 5.60).
99. A secretariat be formed to support these Committees (paras. 5.64 & 5.68).
100. The Police Commissioner report on an annual basis to the Minister in relation to the working of these Committees (paras. 5.61, 5.64 & 5.68).
101. In addition the Commissioner establish specific advisory committees as appropriate, in consultation with the Minister, comprised by experts in the relevant fields (paras. 5.62 - 5.70).
102. The Commissioner establish as an urgent priority, a Standing Advisory Committee on Police Education (para. 5.74).
103. The members of the Advisory Committees be appointed by the Police Commission in consultation with the minister, each Committee to include one member of the Ministry for Police (para. 5.73).
104. The Committees keep minutes of their meetings, and forward copies of these minutes to the Minister (para. 5.73).

CHAPTER 6 - INTERNAL WITNESS SUPPORT PROGRAM

105. The Commissioner of Police show active support for internal witnesses both through his participation in the Internal Witness Advisory Council and by providing recognition to internal witnesses in appropriate cases (para. 6.103).
106. The Internal Witness Support Unit maintain its ability to provide personal contact and needs-based follow-up with registrants and that the staffing levels within the Unit be periodically reviewed to ensure that they are sufficient to meet demand (paras. 6.13 & 6.32).
107. There be wide publicity within the Police Service of the fact that the making of 'payback complaints', together with other forms of harassment of internal witnesses, (i) will invoke the Commissioners' confidence provisions of the *Police Service Act 1990*, and (ii) constitute a criminal offence (para. 6.61).
108. Patrol commanders (or other supervisor where the internal witness is not patrol based) be required to provide appropriate support for internal witnesses, and be made aware that failure to take steps to prevent the harassment of an internal witness may constitute grounds for removal from command (para. 6.102).
109. The assistance of an internal witness be recorded and taken into account as part of any integrity assessment (para. 6.64).
110. Internal witnesses be formally notified by a senior officer that the assistance provided was acknowledged and appreciated by the Service (para. 6.64).
111. Proper training be provided for police at PREP and in subsequent courses concerning the Internal Witness Support Program and need for its support (para. 6.104).
112. The Service employ a more flexible approach to permit the use of internal witnesses in proactive investigations (paras. 6.52 - 6.53).

CHAPTER 7 - INTEGRITY MEASURES (I) CRIMINAL INVESTIGATIONS

CRIMINAL INVESTIGATION PROCEDURES

113. Improvement of criminal investigations procedures by:
 - pursuit of the current NSW Police Service review (paras. 7.9 - 7.10);
 - the involvement of experienced field supervisors and duty inspectors in random inspections, during operations and interviews, to check professional performance and integrity (para. 7.14);
 - greater emphasis on the collection of physical evidence and surveillance, and less reliance on the evidence of criminal informants and confessions (para. 7.14);
 - the training of officers who have criminal investigation experience, and proven integrity, for the role of supervisor (para. 7.14);
 - greater involvement of uniformed officers in investigative work (para. 7.14); and
 - training of uniformed officers, and of PREP students in criminal investigation skills (para. 7.14).

PROCESS CORRUPTION

- 114.** Legislative consolidation of police powers:
- providing a procedural code regulating the manner in which police powers are exercised (para. 7.19); and
 - attaching a schedule listing all enactments in which powers are given to police (para. 7.19).
- 115.** The use of additional precautions in relation to the execution of search warrants, including:
- the use of civilian observers in cases where large amounts of cash or drugs are expected to be located (para. 7.22); and
 - save in cases of urgency, the preparation of a written operational proposal before the application for any search warrant, accompanied by confirmation by a supervisor of the reliability of the information on which it is based and of the regularity of the field activities proposed (para. 7.22).
- 116.** Amendment of Section 5 of the Listening Devices Act 1984 to permit all dealings between police and citizens to be electronically recorded (para. 7.25).
- 117.** The use of hand-held recorders to record official conversations with members of the public (para. 7.25).
- 118.** The supply of hand-held recorders to investigators to record dealings with suspects before formal interview (para. 7.25).
- 119.** The abandonment of the current procedure for the ‘adoption’ of records of interview, and its replacement by a check by a duty inspector or custody officer of the regularity of the arrest and interview (para. 7.25).

EXTERNAL INFORMANT MANAGEMENT AND REWARDS

- 120.** All officers who are potentially involved in the management of informants must be trained in the procedures required under the Informant Management Manual, and in the dangers associated with informants (para. 7.55).
- 121.** Failure to comply with informant management procedures lead to prompt management action or dismissal where the Commissioner cannot be satisfied that an association with a known criminal is maintained for proper policing reasons (para. 7.55).
- 122.** The informant management system be carefully monitored and reviewed regularly (para. 7.55).
- 123.** It be emphasised to supervisors and senior supervisors through training and specific statement in the Manual that its success depends on their reviews and that they are personally responsible and accountable for any failure to carry out this task effectively (para. 7.56).
- 124.** Provision should be made for regular random audits to determine compliance by officers who have an adequate security clearance and are sufficiently experienced to conduct a qualitative as well as a systems-based review. This could be carried out by the Office of Internal Affairs or the PIC (para. 7.56).
- 125.** It be emphasised to police that non-compliance or lack of understanding of the Manual will be regarded most unfavourably when assessing their integrity prior to promotion or transfer; (para. 7.56).

- 126.** The Service emphasise and re-emphasise through training and also on the job that (para. 7.57):
- informants are resources of the Service not the individual case officer;
 - particular care must be exercised with pre-registration assessment;
 - every meeting with an informant must be properly recorded in detail;
 - case officers must maintain control in their relationships;
 - case officers must be wary of over-familiarity with informants;
 - only active and reliable informants should remain registered;
 - informants are not to be led in the belief that their status protects them from prosecution or affords them special privileges;
 - care must be taken when using informants of the opposite sex to the case officer, including ensuring that meetings should take place only in the company of a second officer;
 - there must be strict accountability for and recording of all rewards and benefits received by the informant and no sharing of such rewards; and
 - operational commanders must ensure their staff understand and comply with the informant management procedures.
- 127.** Assistance from informants should be regarded as an aid to, rather than a substitute for, traditional lines of investigation (para. 7.57).

UNDERCOVER OPERATIONS

- 128.** The introduction of legislation, along the lines of that proposed by the ICAC convened Working Party, to regulate undercover operations and to provide an immunity from civil and criminal liability to officers involved in approved controlled operations, subject to suitable safeguards of the kind identified in this Report (paras. 7.76 - 7.79).
- 129.** The development of guidelines for the use of long-term undercover operatives (para. 7.81).
- 130.** The introduction of legislation to regularise the issue of false documents such as birth certificates, drivers' licenses, passports and the like to support false identities, both of protected witnesses and undercover operatives (para. 7.79).

ELECTRONIC SURVEILLANCE

- 131.** A systematic and comprehensive review of legislation and procedures regulating the use of telephone intercepts. The review should be conducted at Commonwealth level with input from all agencies interested in the use of intercept powers (para. 7.90) and should give consideration to:
- the inclusion of bail applications, 1206 proceedings for contempt, 1207 proceedings in Coroner's Courts, proceedings for injunctive or declaratory relief arising out of an

¹²⁰⁶ cf. *Director of Public Prosecutions v Serratore* (1995) 132 ALR 461.

¹²⁰⁷ cf. *The Hon JRT Wood v Beves*, unreported, NSW Supreme Court, Court of Appeal, 14/3/97.

- investigation by a relevant agency, and proceedings for the recovery of proceeds of crime under the *Drug Misuse (Civil Proceedings) Act 1990* within the definition of 'exempt proceedings' under the *Telecommunications (Interception) Act 1979* (Cth) (para. 7.91);
- the devolution by the Commonwealth of appropriate legislative and administrative responsibility for telephone intercepts from the Commonwealth to the States (para. 7.98);
 - an effective and workable regime for the continuous monitoring of advances in technology that can prevent their introduction until suitable capacity for intervention is established and that ensures timely and proper amendment of the *Telecommunications (Interception) Act 1979* to meet any such advance and current needs (para. 7.95); and
 - re-examination of the current funding model with a view to requiring carriers, as part of their licence conditions to provide at their own cost, interception capability on telecommunications services which they wish to introduce (para. 7.97).
- 132.** Amendment of the *Listening Devices Act 1984* in the ways outlined in para. 7.99 in order to overcome administrative and technical difficulties and to assist in the pursuit of law enforcement.
- 133.** A judicial warrant scheme similar to that established by the *Listening Devices Act 1984*, authorising the use and installation of video devices in private places and entry onto premises to facilitate the same (para. 7.103).
- 134.** A judicial warrant scheme similar to that established by the *Listening Devices Act 1984* authorising the use and installation of tracking devices and entry onto private premises to facilitate same (para. 7.108).

REGULATION OF POLICE POWERS

The Commission commends the Service initiative in examining the introduction of PACE style codes of conduct, to ensure that the rights of citizens and the powers of police are balanced and plainly articulated. It recommends:

- 135.** Enactment of the *Crimes Amendment (Detention after Arrest) Bill 1996* as speedily as possible (para. 7.130).
- 136.** Careful consideration of the Service review of the remaining PACE style codes of conduct, with a view to their implementation (paras. 7.120 - 7.122).

ALTERNATIVES TO ARREST

- 137.** The development of strategies to ensure that arrest is used as the intervention of last resort (para. 7.141).
- 138.** The employment of alternative strategies including cautions, Court Attendance Notices and Field Court Attendance Notices wherever possible (para. 7.139).
- 139.** The development of practical guidelines and training in informal problem solving and conflict resolution techniques to moderate behaviour and to defuse situations which have the potential to result in arrest (para. 7.140).

INFORMATION MANAGEMENT

- 140.** Attention by the Service, as a high priority, to the introduction of a co-ordinated and user-friendly Service-wide information management system, paying particular attention to administrative and management systems, as well as those systems which support

operational policing and criminal investigations; and to all aspects of storage, use and disposal (paras. 7.190 - 7. 192).

141. An education program to make all staff aware of the importance of good information management (para. 7.192).
142. The development of information management expertise as a career opportunity (para. 7.192).
143. The development of a more reliable and useable criminal histories system (paras. 7.182 - 7.184).

POLICE ASSISTANCE IN SENTENCING PROCEEDINGS

144. The introduction of a system to monitor, through the audit of the Informant Management Manual, compliance with the provisions governing the issue of letters of assistance (para. 7.198).
145. Amendment of the Commissioner's Instructions to cover those cases where a police officer gives evidence without a subpoena (para. 7.200).
146. The establishment of a protocol for notification to the Office of Internal Affairs when a police officer gives evidence in cross-examination which if given in chief would fall within the Manual or Commissioner's Instructions (paras. 7.201 & 7.202).

REVIEW OF CONVICTIONS

The Commission does not consider that there is any need for the creation of a separate tribunal to review convictions (para. 7.213) however it recommends:

147. Extension of the powers attached to a Part 13A inquiry to equate with the powers of the Police Integrity Commission (7.216).
148. Establishment of funding for the legal costs connected with Part 13A applications either by direct grant or by way of specific top-up funding to the Legal Aid Commission (para. 7.216).
149. Conferral upon the Court of Criminal Appeal of a power to award compensation in those cases where a conviction is quashed after inquiry (7.216).

REVIEW OF PROSECUTIONS

150. The establishment of Prosecution Review Committees within each region and within the Specialist Operations Command to review major prosecutions which have failed in circumstances suggestive of serious police incompetence or malpractice, including cases where judicial criticism is made of the integrity and conduct of the police concerned, or where the ODPP delivers an adverse report on the quality of the police investigation, co-operation or conduct (para. 7.221).

CHAPTER 8 - INTEGRITY MEASURES (II) INCIDENTS OF SERVICE

ETHICS AND INTEGRITY FIRST

151. The theme 'ethics and integrity first', be emphasised at all levels of the Service, and incorporated into the recruitment and promotion processes (paras. 8.2 & 8.15).
152. Procedures be adopted to encourage integrity through recognition and suitable acknowledgment of ethical behaviour (para. 8.7).

153. Commanders and supervisors take steps to ensure that ethical officers play a key role at patrol or equivalent level (para. 8.8) and to be trained in the means of recognising and encouraging integrity (para. 8.4).
154. Commanders and supervisors be made more accountable for the references and assessments they provide and be required to support their assessments (para. 8.14).
155. The Service continue to encourage the use of Professional Standards Councils, subject to ongoing evaluation as to their utility (para. 8.19).

A UNIFORMED SERVICE

No further recommendation is required, save to underline the need for compliance with the uniformed Service policy now introduced.

ROTATION AND TENURE

156. The careful development of a tenure and transfer policy that meets the interests of the Service and of its staff (para. 8.46 - 8.47).
157. The monitoring of the policy and its application to ensure that rotation is used as an effective anti-corruption tool (para. 8.47).
158. That rotation to the Office of Internal Affairs be encouraged for officers of proven capacity, as a step towards promotion to senior command (para. 8.47).

DRUG AND ALCOHOL TESTING

The Commission commends the introduction of the drug and alcohol testing legislation and the associated Service policies, and recommends:

159. Effective supervision and training of supervisors to detect officers with drug or alcohol problems.
160. Attention be paid to factors that might contribute to the development of drug or alcohol dependency, for example stress or exposure to activities that might increase the risk, such as undercover drug work.
161. Encouragement of police officers with problems to seek assistance, and the provision of confidential welfare support for such officers.
162. A clear explanation of and emphasis on the program during recruitment and training.
163. Careful monitoring of the discipline/welfare decisions made in relation to positive tests to ensure consistency.

INTEGRITY TESTING AND FIELD ASSOCIATES

No further recommendations are necessary. The Commission supports the introduction of targeted integrity testing as recommended in its Second Interim Report.

FINANCIAL STATEMENTS AND INTEGRITY DECLARATIONS

164. The introduction of the regulations which would allow the recommendation in this Commission's Second Interim Report to be fully implemented (para. 8.82).

165. Amendment of the *Police Service Act 1990* to limit access to the financial declarations save by direction of the Police Commissioner or Commissioner of the PIC, and to prevent their production in answer to subpoenae issued in civil or criminal trials (paras. 8.82 & 8.83).

GRATUITIES

166. The Commission commends the introduction of the Code of Conduct and Ethics and the Sponsorship and Endorsement Policy. It recommends that each be strictly applied and monitored and that it be made clear in relation to police fund-raisers that they should only occur:
- with the permission of a commander;
 - in circumstances of full accountability and record keeping;
 - on condition that no payment should be received from persons engaged in criminal conduct or in activities calling for police regulation, where a risk of favouritism might be seen by a reasonable member of the public; and
 - on condition that contributions are not to be received for suspended or dismissed officers from persons outside the Service (para. 8.90).

PERSONAL LIABILITY OF POLICE

Protection from Civil Liability

167. The exercise by the Service of its right to recoupment from an officer, on a full indemnity basis, of any damages or costs incurred which it is adjudged liable to pay to a third party, arising out of serious and wilful misconduct on the part of that officer (para. 8.100).
168. The vicarious liability of the Service be limited to ordinary damages, and not extend to punitive damages (para. 8.101).

Confiscation of the Proceeds of Corruption

No specific recommendation is made save that the Commission wishes to underline that every available step should be taken to discourage corruption, including recovery of the proceeds of such conduct, and co-operation with the Australian Taxation Office to ensure that corrupt officers do not retain the benefits of any corrupt activity (para. 8.103).

CHAPTER 9 - AN END TO THE CYCLE OF CORRUPTION

169. The external oversight arrangements in relation to complaints and corruption, established in response to this Commission's Interim Reports, and as summarised in paras 9.8 - 9.33, continue.
170. The Police Service develop a charter in accordance with the basic recommendations of this Report to be incorporated into the *Police Service Act 1990* or any revision of it.
171. The *Police Service Act 1990* be rewritten to embrace the further changes arising out of this Report.
172. Implementation of the recommendations of the recent review of the Internal Audit process (paras. 9.44 - 9.45).

- 173.** The Internal Reform Committee, presently constituted, continue to drive the reform process from within, and report on progress to the Minister, the Commissioner, and to the PIC (paras. 9.50 - 9.53).
- 174.** Appointment of an external strategic auditor upon engagement to the PIC, to carry out a qualitative and strategic audit of the reform process, and to report to the PIC, which in turn should report to the Minister and the Service (paras. 9.55 - 9.56).