

**REVIEW OF THE INVESTIGATION AND OVERSIGHT OF POLICE CRITICAL INCIDENTS**

**Legal Aid NSW submission to the  
Hon Robert McClelland  
via  
Ministry of Police and Emergency Services**

**October 2013**

**About Legal Aid NSW**

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Programs.

Legal Aid NSW also has a state-wide specialist service which assists in coronial inquests called the Coronial Inquest Unit (CIU). The CIU provides free legal advice and minor assistance, and may provide legal representation in matters where a police critical incident has occurred.

Legal Aid NSW values the opportunity to make this submission to the review of the investigation and oversight of police critical incidents being conducted by the Hon Robert McClelland.

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## **INTRODUCTION**

Legal Aid NSW endorses the decisions already made by the NSW Government to enhance transparency of critical incident investigations undertaken by police, namely that the NSW Police Force *Guidelines for the Management and Investigation of Critical Incidents* (Critical Incident Guidelines) will be publicly available, and the NSW Police Commissioner will advise the NSW Ombudsman of all critical incidents, not just those that are the subject of a formal complaint.

Legal Aid NSW also welcomes the decision of the NSW Government to establish an independent review of the investigation and oversight of police critical incidents (the Review).

However, Legal Aid NSW is concerned that the premise of the Review is that the NSW Police Force retain responsibility for investigating and reviewing critical incidents, and therefore, that the terms of reference do not include consideration of the issue of investigative responsibility.

Given the importance of that issue, the first part of this submission addresses investigative responsibility for critical incidents. The second part of the submission is the Legal Aid NSW response to the issues the Review will specifically consider on the basis that the NSW Police Force will retain responsibility for investigating and reviewing critical incidents.

## **INVESTIGATIVE RESPONSIBILITY FOR CRITICAL INCIDENTS**

### **The issue**

Legal Aid NSW is concerned that the premise of the Review is that the NSW Police Force should retain responsibility for investigating and reviewing critical incidents, and is of the view that significant value could be added to the outcome if the Review considered the issue of investigative responsibility for critical incidents. Put simply, the issue is whether an agency independent of the NSW Police Force should undertake critical incident investigations.

### **Experience in NSW**

#### NSW Ombudsman's Report

In the *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti*<sup>1</sup> (the NSW Ombudsman's Report), the NSW Ombudsman identified numerous deficiencies with the critical incident investigation by the NSW Police Force. One specific finding being that the police failed to adequately identify and deal with police misconduct.

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<sup>1</sup> Ombudsman NSW, *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti*, A Special Report to Parliament under s.161 of the *Police Act 1990*, February 2013, p 7 at: <http://www.ombo.nsw.gov.au/news-and-publications/publications/reports/police/ombudsman-monitoring-of-the-police-investigation-into-the-death-of-roberto-laudisio-curti>

The NSW Ombudsman's Report identifies independence as central to community confidence in the integrity of the investigation process, stating:<sup>2</sup>

*We decided that it was in the public interest to monitor the investigation so as to provide reassurance to both Mr Laudisio-Curti's family and the community that there would be a level of independent scrutiny of the investigation and to ensure that the investigation was conducted in an appropriate, accountable and transparent manner. We were also mindful of the community's understandable concern about police investigating the conduct of their fellow officers. **We hoped the knowledge that an independent body would be actively monitoring the investigation might allay some of these concerns.***

#### NSW Police Integrity Commission report

Similar deficiencies to those found in the NSW Ombudsman's Report were highlighted in the NSW Police Integrity Commission (PIC) report, Operation Calyx<sup>3</sup> (the PIC Report) on the recent inquiry into the death of Adam Salter, a mentally ill young man who was shot dead by police. The inquiry, in which NSW Police Force members were accused of lying to protect their colleagues, was commissioned after a Coroner found the police investigation was "deeply flawed". Key criticisms included the coaching of police suspects by police investigators and omissions of "basic tests" in the collection of forensic evidence.

#### Recent case conducted by Legal Aid NSW

The Legal Aid NSW Coronial Inquest Unit represented the family of Mr Rodney Elkass who was fatally shot by police. Following evidence highlighting considerable flaws in the police investigation of this critical incident, the Deputy State Coroner, the Honourable Hugh Dillon, recommended consideration be given to the establishing a body independent of the NSW Police Force to investigate police critical incidents. Problems with the investigation acknowledged in the findings by Deputy State Coroner included:

- failure of the review of the critical incident investigation to occur before the inquest, as required under the current guidelines
- failure of police to conduct walkthroughs and give adequate weight to evidence by police and civilians. The investigating officer discounted civilian versions of the evidence that did not match the police version
- flaws in the police version of events
- the expert's review was of limited assistance.

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<sup>2</sup> Ibid, p 1

<sup>3</sup> NSW Police Integrity Commission, *Operation Calyx*, Report to Parliament, June 2013 at <http://www.pic.nsw.gov.au/files/News/PIC%20Calyx%20Report.pdf>

## Conclusions on experience in NSW

The critical incident findings by the NSW Ombudsman and PIC together with the findings of the Deputy State Coroner, the Honourable Hugh Dillon in the case referred to above, raise questions of conflict of interest when the NSW Police Force investigates the potential misconduct of a member of its own agency. For this reason, Legal Aid NSW is of the view that the Review should explore the investigations of critical incidents by an independent body.

## Approaches in other jurisdictions

Legal Aid NSW notes that fully or hybrid independent critical incidents investigative models operate in Canada, New Zealand, Wales, Britain, Northern Ireland and South Africa. In addition, Queensland's Crime and Misconduct Commission recently took over the responsibility for investigations of deaths in custody from the Queensland Police Service.

A 2011 report of the Victorian Office of Police Integrity (OPI) (the Victorian OPI Report) invited the government to consider the following principles when assessing and considering the 'optimal' framework for investigating deaths associated with police contact:

- independence
- effectiveness
- promptness (timeliness)
- next of kin involvement, and
- sufficient public scrutiny (transparency).

The Victorian OPI Report canvasses the possibility of establishing an independent agency to conduct critical incident investigations, including a consideration of the resource implications.<sup>4</sup> The Victorian OPI Report highlights the benefits of independence for both the public and police on the basis that independence negates any perceptions of potential conflict of interest, and avoids officers being "tarnished by real deficiencies in investigations and oversights."<sup>5</sup>

In response to the Victorian OPI Report, the Victorian Human Rights Law Centre and Community Legal Centres paper *Effective Transparent Accountable: An independent system to investigate police-related death in Victoria*,<sup>6</sup> argues that establishing an independent investigation system in Victoria would be cost effective, transparent, fair and ultimately in the best interest of police officers.

Legal Aid NSW is of the view that there would be utility in the Review developing an 'optimal' framework model for investigating critical incident deaths in New South Wales.

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<sup>4</sup> Office of Police Integrity Victoria, 2011. 'Review of the investigation of deaths associated with police contact', Issues paper

<sup>5</sup> Ibid, p 30

<sup>6</sup> Human Rights Law Centre, 2011. 'Effective Transparent Accountable: An independent system to investigate police-related deaths in Victoria'. Report by the Federation of Community Legal Centres (Victoria).

## SPECIFIC CONSIDERATIONS OF THE REVIEW

(a) Whether the NSW Police Force Critical Incident Guidelines provide adequate guidance and clarity to ensure critical incident investigations are rigorous, timely and objective.

Legal Aid NSW is of the view that the Critical Incident Guidelines do not provide adequate guidance and clarity to ensure critical incident investigations are rigorous, timely and objective. This is comprehensively illustrated in the NSW Ombudsman's report.<sup>7</sup> Legal Aid NSW supports the amendments to the Critical Incident Guidelines recommended in the NSW Ombudsman's report, specifically:

- i. *The NSW Police Force amend the Critical Incidents Guidelines to make it mandatory that critical incident investigators conduct question and answer interviews with civilian witnesses who are willing and able to provide information about the actions of police officers involved in critical incidents.*
- ii. *The NSW Police Force seek legal advice from the Solicitor General to clarify the issue of whether critical incident investigators are able to direct involved officers to participate in walk-through interviews or re-enactments.*
- iii. *The NSW Police Force amend the Critical Incident Guidelines to provide guidance on the legal issues and desirability of conducting walk-through interviews or re-enactments with involved officers.*
- iv. *The NSW Police Force amend the Critical Incident Guidelines to make it clear that the critical incident investigation team must consider all conduct and systemic issues and take or recommend appropriate action be taken in a timely manner to address any identified criminal conduct, misconduct or systemic issues before any coronial inquest. This should in all cases include a review of the complaint and use of force histories of the involved officer.*
- v. *The NSW Police Force amend the Critical Incident Guidelines to require the Region Commander with responsibility for the critical incident investigation to review the investigation before any coronial inquest to ensure that all conduct and systemic issues have been appropriately identified and addressed. The consideration of conduct and systemic issues, and the opinion of the Region Commander should be documented and recorded.<sup>8</sup>*

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<sup>7</sup> Ombudsman NSW, *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti* Special Report to Parliament, February 2013, p 7 at: <http://www.ombo.nsw.gov.au/news-and-publications/publications/reports/police/ombudsman-monitoring-of-the-police-investigation-into-the-death-of-roberto-laudisio-curti>

<sup>8</sup> *Ibid*, p 7

(b) Whether operational, legal and other barriers exist to the NSW Police Force, publicly reporting on the outcomes of critical incident investigations, and how these might be resolved

Legal Aid NSW is not in a position to comment on whether operational, legal and other barriers exist which prevent the NSW Police Force publicly reporting on the outcomes of critical incident investigations.

However, three recommendations contained in the PIC Report<sup>9</sup> are relevant to this term of reference as they relate to public reporting by the NSW Police Force on the outcomes of critical incident investigations.

#### Publication of reports and guidelines

The first is the recommendation that all reports of investigations into critical incidents should be published on the website of the NSW Police Force and that the Critical Incident Guidelines should be made publicly available on the website.

Legal Aid NSW notes and endorses the decision already made by the NSW Government that the Critical Incident Guidelines will be publicly available, which implements one aspect of this recommendation.

For the reasons given in the PIC report, Legal Aid NSW supports the other aspect of the recommendation, namely that all reports of investigations into critical incidents should be published on the NSW Police Force website.

#### Review of media policy

The second recommendation in the PIC report that is relevant to this term of reference is that the NSW Police Force should, to the extent to which it has not already done so, conduct a thorough review of its media policy concerning critical incidents.<sup>10</sup>

In relation to the investigation into the Situation Reports and statements released by NSW Police about the shooting of Adam Salter, the PIC report found:

*Each of the Situation Reports, the media statement and the media release contained a number of statements which were untrue and supplied senior police and the public with a seriously false version of the events which happened at 33 Wangee Road.<sup>11</sup>*

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<sup>9</sup> NSW Police Integrity Commission, *Operation Calyx*, Report to Parliament, June 2013 at <http://www.pic.nsw.gov.au/files/News/PIC%20Calyx%20Report.pdf>

<sup>10</sup> Ibid p 270

<sup>11</sup> Ibid, p x

The third recommendation of PIC related to the review of the media policy is that a police officer who issues a media release or prepares a Situation Report should be required to make a record of the person or persons supplying the various items of information contained in the media report or Situation Report.<sup>12</sup>

For the reasons given in the PIC report, Legal Aid NSW supports both of these recommendations concerning the NSW Police Force media policy concerning critical incidents.

In addition, Legal Aid NSW recommends that guidelines be developed to ensure that media reports or Situation Reports are only issued where it is in the public interest and that the contents are true. However, the guidelines should make it clear that information should not be released where there is a possibility that it will damage the critical incident investigation.

(c) whether improvements can be made to the oversighting of critical incidents to guarantee accountability and transparency, including:

- (i) how and when oversight responsibilities are allocated between different agencies,
- (ii) what gives rise to, and the purpose of, that oversight, and
- (iii) whether there is any unnecessary duplication of roles or responsibilities;

While the three parts of the issue are used as general headings, there is considerable overlap in what is considered below.

**(i) Allocation of oversight responsibilities are between different agencies**

Legal Aid NSW notes and endorses the decision already made by the NSW Government that the NSW Police Commissioner will advise the NSW Ombudsman of all critical incidents, not just those that are the subject of a formal complaint.

Consistent with recommendation (iv) in the NSW Ombudsman's Report, Legal Aid NSW is of the view that the NSW Government decision should be supported by legislation and specifically, the *Police Act 1990* (NSW) should be amended to require the NSW Police force to notify the NSW Ombudsman immediately following all critical incidents involving the death or serious injury of a person during policing activities.<sup>13</sup>

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<sup>12</sup> Ibid, 272

<sup>13</sup> Ombudsman NSW, *Ombudsman monitoring of the police investigation into the death of Roberto Laudisio-Curti* Special Report to Parliament, February 2013, p 7 at: <http://www.ombo.nsw.gov.au/news-and-publications/publications/reports/police/ombudsman-monitoring-of-the-police-investigation-into-the-death-of-roberto-laudisio-curti>

In other words, Legal Aid NSW supports legislated mandatory notification by police to the NSW Ombudsman of all critical incidents involving the death or serious injury of a person during policing activities.

In this context, Legal Aid NSW notes that the timing of such notification is critical to efficient, effective and robust oversight of critical incidents and their investigation, in terms of the taking of first statements from witnesses, control of the scene and preservation of evidence, for example. Immediate notification by police to the NSW Ombudsman is essential.

## **(ii) What gives rise to and purpose of oversight**

What gives rise to oversight by the NSW Ombudsman is the critical incident, and the determination by the NSW Ombudsman that it is in the public interest, because of the identification of any possible misconduct issues, that it is in the public interest to oversight the critical incident investigation.

The purpose of NSW Ombudsman oversight of the critical incident investigation is to scrutinise the investigative process to ensure that the critical investigation team conducts an appropriate, accountable and transparent investigation into the critical incident.

What gives rise to oversight by the Coroner is the death arising from the critical incident. The purpose of the Coronial Inquest is to examining the circumstances of the critical incident in order to determine manner and cause of death.

What gives rise to oversight by PIC is police misconduct, which may or may not arise from critical incident. The purpose of PIC is to determine whether a police officer has engaged in misconduct, or not, and to make recommendations about the appropriate response to any misconduct for that the particular police officer.

## **(iii) Any unnecessary duplication of roles or responsibilities**

The purpose of oversight by the NSW Ombudsman and the role of the Coroner and PIC as it applies to the critical incident investigation is set out in (c)(ii) above.

It is the view of Legal Aid NSW that there is no unnecessary duplication of roles or responsibilities of the NSW Ombudsman or the Coroner or PIC.

The Victorian OPI Report referred to above<sup>14</sup> noted that unnecessary duplication of roles and responsibilities can be avoided by introducing statutory provisions that assign specific responsibility for various stages of the investigation.

While Legal Aid NSW does not see any unnecessary duplication of roles or responsibilities of the NSW Ombudsman, the Coroner or PIC, if the Review considers this to be problematic, it could explore whether improvement could be made to the statutory allocation of roles to assist with unnecessary duplication of roles and responsibilities in NSW.

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<sup>14</sup> Office of Police Integrity Victoria, 2011, 'Review of the investigation of deaths associated with police contact', Issues paper

## **Other improvements to the oversight of critical incidents**

### Deaths related to police operations

Legal Aid NSW has encountered problems where the Critical Incident Guidelines may not be considered to be technically applicable, but the actions of police come under close scrutiny and criticism during the coronial inquest.

In a recent matter conducted by Legal Aid NSW the Coroner and police determined at an early stage that a death did not occur during a police operation and therefore did not arise from a critical incident to which the Critical Incident Guidelines applied. The matter was investigated by the OIC who was a work colleague of the police officers involved in the police operation. During the inquest the actions of police came under close scrutiny and criticism, one being a failure to appropriately categorise as serious and act on a matter repeatedly brought to the attention of police during the night when the person died.

Legal Aid NSW is of the view these criticisms and failings could have been avoided if the Critical Incident Guidelines applied to all deaths that may have occurred during police operations.

### Appropriate powers for NSW Ombudsman oversight

For the reasons given in the NSW Ombudsman's Report, Legal Aid NSW supports the implementation of recommendations (vii) of the Report, being:

*The NSW Parliament consider amending the Police Act 1990 to provide the NSW Ombudsman with appropriate powers to effectively oversight critical incident investigations involving the death or serious injury of person during policing activities.*

### Baff v New South Wales Commissioner of Police

Legal Aid NSW suggests that the Review should investigate the impact that *Baff v New South Wales Commissioner of Police [2013] NSWSC 1205* may have on critical incident investigations. In that case, the Supreme Court NSW decided that the NSW Police Commissioner can not force a police officer to answer questions about their conduct on duty if the officer claims privilege against self-incrimination. This decision may create obstacles for an oversight agency reviewing a critical incident. It would be useful for the Review to provide some analysis of the impact this case may have on critical incident investigations, and how such problems may be addressed.

## **CONCLUSION**

Legal Aid NSW endorses the decisions already made by the NSW Government that the Critical Incident Guidelines will be publicly available and the NSW Police Commissioner will advise the NSW Ombudsman of all critical incidents.

However, Legal Aid NSW is concerned that the premise of the Review is that the NSW Police Force should retain responsibility for investigating and reviewing critical incidents, and is of the view that significant value could be added to the outcome if the Review considered the issue of investigative responsibility.

Evidence in NSW outlined in this submission indicates numerous deficiencies with the critical incident investigation by the NSW Police Force and raises questions of conflict of interest when the NSW Police Force investigates the potential misconduct of a member of its own agency. Fully or hybrid independent critical incidents investigative models operate in other jurisdictions. Independence benefits both the public and the police, negating perceptions of conflict of interest, and avoiding officers being tarnished by deficiencies in investigations and oversights. There would be utility in the Review developing an 'optimal' framework model for investigating critical incident deaths in NSW.

The Critical Incident Guidelines do not provide adequate guidance and clarity to ensure critical incident investigations are rigorous, timely and objective, and those objectives could be better achieved by adopting the amendments recommended in the NSW Ombudsman's report.

In terms of public reporting by the NSW Police Force on the outcomes of critical incident investigations, the recommendations in the PIC Report should be adopted, specifically, that all reports of investigations into critical incidents should be published on the NSW Police Force website, that the NSW Police Force should conduct a thorough review of its media policy concerning critical incidents, and that a police officer who issues a media release or prepares a Situation Report should be required to make a record of the person or persons supplying the various items of information contained in the media report or Situation Report. In addition, guidelines be developed to ensure that media reports or Situation Reports are only issued where it is in the public interest and that the contents are true.

Improvements that can be made to the oversighting of critical incidents to guarantee accountability and transparency include applying the Critical Incident Guidelines to deaths that may have occurred during police operations, amending the *Police Act 1990* (NSW) to provide the NSW Ombudsman with appropriate powers to effectively oversight critical incident investigations, and providing some analysis of the impact *Baff v New South Wales Commissioner of Police [2013] NSWSC 1205* may have on critical incident investigations, and how such problems may be addressed.