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Police Integrity Commission

Protea Report 2015



Police Integrity Commission  
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The Hon Don Harwin MLC  
President  
Legislative Council  
Parliament House  
SYDNEY NSW 2000

The Hon Shelley Hancock MP  
Speaker  
Legislative Assembly  
Parliament House  
SYDNEY NSW 2000

Dear Mr President and Madam Speaker

In accordance with section 96(3) of the *Police Integrity Commission Act 1996*, the Commission hereby furnishes to you a Report regarding Operation Protea, being a Report in relation to a matter as to which the Commission has conducted a public hearing.

I draw your attention to section 103(2) of the *Police Integrity Commission Act 1996*, pursuant to which I recommend that this Report be made public forthwith.

Yours faithfully

**The Hon Bruce James QC**  
**Commissioner**

June 2015

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# EXECUTIVE SUMMARY

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## Introduction

The Commission's Operation Protea investigation arose out of three stories broadcast by the Australian Broadcasting Corporation ("the ABC") as part of its *Lateline* program and communications received by the Commission from the Department of Premier and Cabinet and the office of the Minister for Police and Emergency Services.

On 27 February 2013 in the ABC's *Lateline* program a story was broadcast in which it was asserted that a NSW Police Force ("Police Force") officer from the sex crimes squad had for a number of years been a member of a body known as the Professional Standards Resource Group ("the PSRG"), which had been established as part of *Towards Healing*, the Catholic Church's internal process for handling cases of alleged sexual abuse by Catholic clergy. It was asserted in the story that the police officer, in participating in the PSRG, had been subject to a conflict of interest. The police officer was not named in the story.

On 20 June 2013 a further story was broadcast by the ABC as part of its *Lateline* program. In this story the police officer who had been a member of the PSRG was named as being Inspector Elizabeth Cullen ("Cullen"). It was asserted in the story that Cullen had "*shredded*" all documents she had received while participating in the PSRG, thereby destroying evidence of offences of sexual abuse by Catholic clergy and other Catholic Church personnel.

On 25 June 2013 the Director-General of the Department of Premier and Cabinet wrote a letter to the Commission in which the Director-General referred to the story broadcast on 20 June and noted that allegations of serious misconduct on the part of a police officer fell within the jurisdiction of the Commission.

After receiving the Director-General's letter the Commission determined to conduct an investigation.

On 3 October 2013 the ABC broadcast as part of its *Lateline* program a further story in which it was asserted that police records accessed under Freedom of Information laws had revealed that the Catholic Church had tried to strike an agreement with the Police Force to allow the Church to withhold information about paedophile priests. In this story

it was asserted that, although no formal agreement between the Catholic Church and the Police Force had been signed, the Church had proceeded on an understanding that the provisions of a draft agreement which would permit the Church to withhold evidence from Police had been approved by the Police and were in operation.

On 9 October 2013 the office of the Minister for Police and Emergency Services forwarded to this Commission questions it had received from a journalist about an alleged informal arrangement between the Catholic Church and the Police Force.

After receiving this letter the Commission extended the scope and purpose of its investigation. The final statement of the scope and purpose of the Commission's investigation contained two limbs:-

*To investigate:-*

- 1. whether there was any police misconduct involved in the participation of any NSW Police Force officer in the Catholic Church Professional Standards Resource Group between 1998 and 2005*
- 2. whether there was any police misconduct involved in the participation by the NSW Police Force in any agreement, protocol or memorandum of understanding, whether or not formally entered into, between the NSW Police Force and the Catholic Church concerning the handling of complaints of sexual abuse committed by Catholic Church personnel or employees.*

## Overview of the investigation

In accordance with the statement of the scope and purpose of the investigation in Operation Protea the Commission was concerned, in both limbs of its investigation, in whether there had been any police misconduct. The Commission was not concerned with the actions or omissions of personnel or employees of the Catholic Church, except to the extent to which they were relevant to whether there had been misconduct by police officers.

The Commission used a number of investigative methods in Operation Protea.

The Commission obtained the production to it of a large number of documents, many of them voluminous. The documents produced included copies of the agendas and minutes for meetings of the PSRG during the period from 1999 to 2005 in which Cullen was a member of the PSRG. A detailed analysis of the documents was undertaken.

Commission investigators interviewed numerous individuals who had been members of the PSRG during some part of the period in which Cullen was a member. A number of other persons were also interviewed.

The Commission held two private hearings in which Cullen and Inspector Wayne Armstrong (“Armstrong”), a serving police officer who was the intelligence co-ordinator in the Police Force’s Child Protection and Sex Crimes Squad (“the CP&SCS”) between 2004 and 2014, gave evidence. Each of Cullen and Armstrong was legally represented at his or her private hearing.

Subsequently the Commission determined to hold a public hearing in Operation Protea.

Factors which the Commission took into account in determining that it was in the public interest to conduct a public hearing included that the matters being investigated had already received wide publicity, that the allegations which had been made had the capacity to seriously undermine public confidence in the Police Force and that there was a special need for an open and transparent investigation of allegations that there had been a secret agreement or understanding between the Catholic Church and the Police Force which had limited the ability of the Police Force to investigate allegations of sexual abuse by personnel of the Catholic Church.

The Commission held a public hearing on 13, 14, 15, 16 and 17 October 2014.

The witnesses who gave evidence at the public hearing were Cullen and Armstrong and the following persons:-

- (i) Mr John Davoren (“Davoren”), a former Director of the Professional Standards office (“the PSO”) of the Catholic Church for NSW and the ACT and a member of the PSRG from 1997 to 2003;
- (ii) Mr Michael Salmon (“Salmon”), the Director of the PSO and a member of the PSRG from 2003 to the time of his giving evidence;
- (iii) Mr Michael McDonald (“McDonald”), who was the Executive Director of the Catholic Commission for Employment Relations between 1996 and 2008 and who was a member of the PSRG between 1999 and 2005;



- (iv) Mr John Heslop (“Heslop”), a retired police officer who between 1996 and 2002 was the Commander (initially, the Acting Commander) of the Police Force’s Child Protection Enforcement Agency (“the CPEA”); and
- (v) Ms Kim McGee (formerly McKay) (“McGee”), a retired police officer who was the Commander of the CPEA in 2003 and then of the CP&SCS between 2003 and 2005.

On the first day of the public hearing the Commission authorised all of Cullen, Armstrong, Davoren, Salmon, McDonald, Heslop and McGee to be represented by legal practitioners and all of them were legally represented throughout the public hearing.

The Commission also authorised legal representation for two other persons who had been summoned to give evidence but who ultimately were not required to give evidence. The Australian Lawyers Alliance sought and was granted a right of limited appearance at the public hearing.

At the conclusion of the hearing directions were given for the lodging of written submissions. Written submissions by Counsel Assisting were served on all the legal practitioners who had been authorised to appear at the public hearing. Submissions in reply to Counsel Assisting’s submissions were received by the Commission from the legal representatives for Cullen, Armstrong, Salmon and McGee. No submissions in reply to Counsel Assisting’s submissions were received from the legal representatives for Davoren, McDonald or Heslop. Written submissions were received by the Commission from the Commissioner of Police and from the Australian Lawyers Alliance.

## Background to the matters investigated in Operation Protea

In May 1994 the Royal Commission into the New South Wales Police Service (“the RCPS”) was established. Its terms of reference included paragraph (d), which required the RCPS to inquire into:-

*(d) The impartiality of the Police Service and other agencies in investigating and/or pursuing prosecutions including, but not limited to, paedophile activity.*

Further terms of reference relating to aspects of paedophilia were subsequently added.

In August 1997 the RCPS handed down its “*Final report Volume V – The Paedophile Inquiry*”. In its final report the RCPS said that in its preliminary investigations it had uncovered cases where it appeared that:-

- *there had been a substantial incidence of sexual abuse involving clergy, members of religious orders, ministers of religion, acolytes, and others involved on a paid or unpaid basis in and around Churches or institutions associated with or conducted by Churches or religious bodies, including schools, residential homes, youth and fellowship groups and the like;*
- *in very many cases, investigations or prosecutions of these incidents had been suppressed, discontinued, or failed in circumstances suggestive of either protection or failure on the part of the official agencies involved to exercise their powers impartially;*
- *there was a serious absence of protocols, guidelines, accepted practices or established lines of communication with the Police Service, concerning the way that allegations of this kind should be managed; and that*
- *there had been a history of ignorance or misunderstanding of the existence of the problem, as well as a pattern of denial and repression of any allegations which happened to be raised.*

In its final report the RCPS noted shortcomings in the “*structures and procedures*” to deal with child sexual abuse adopted by the Police in the preceding fifteen years. The RCPS said:-

*The result has been one of ineffective policing, which has allowed those guilty of child sexual abuse to escape investigation and prosecution. In addition, there have been occasions where protection has been provided as a result of corrupt arrangements made with police...*

Although the final report of the RCPS was not published until August 1997, the NSW Government and the Catholic Church had already responded to the matters which were being inquired into by the RCPS and which had received considerable publicity.

## **The Government response to the RCPS – the Child Protection Enforcement Agency**

On 6 December 1995 the then Minister of Police announced that the CPEA would be created.

The CPEA was to be a specialist agency directed to responding to paedophile activity. The CPEA was to have an investigative function pursuant to which it would investigate

allegations of complex and protracted sexual abuse. The CPEA was also to maintain an intelligence group which would provide the Police Force with information to assist in the investigation of sexual offences.

The CPEA was established on 1 January 1996 and commenced operations in July 1996. During 1996 Cullen assisted in the establishment of the CPEA and was assigned to the implementation team. Heslop was appointed acting Commander and then Commander of the CPEA. In 2003 the CPEA became the CP&SCS. McGee, then Kim McKay, was the Commander of the CPEA and then of the CP&SCS between June 2003 and September 2005.

### The response of the Catholic Church to the RCPS – the *Towards Healing* protocols

In December 1996 the Catholic Church released the protocol “*Towards Healing*” which had the subtitle “*Principles and Procedures in responding to complaints of sexual abuse against personnel of the Catholic Church in Australia*”. In December 2000 the Catholic Church released a revised *Towards Healing* protocol.

A number of provisions of these two Protocols are set out or referred to by the Commission in the report. The Commission considers that the effect of some of the provisions of both Protocols can be broadly described as follows.

Complaints could be made by persons claiming to be victims of abuse by Church personnel. The complaints could include complaints of abuse which, if established, could amount to criminal offences, including serious criminal offences.

The complaints of abuse dealt with under the Protocols were complaints where, generally, the complainant had indicated to the Church that he or she did not wish to make a complaint to the Police or where any involvement the Police had had in relation to the matter complained of had, to the knowledge of the Church, concluded. Accordingly, it was intended that there would be no concurrent Church investigation of a complaint which was the subject of an existing Police investigation.

Where a complaint or part of a complaint was disputed one or two assessors would be appointed, who would conduct an assessment of the complaint. This assessment included the gathering of relevant evidence, which could include interviewing the

complainant, any witnesses and the alleged offender. The assessor or assessors would produce a written report of their assessment which could include recommendations. The report was provided to, at least, the Church authority to which the alleged offender was connected and the Director of the PSO.

The Director of the PSO was able to seek advice from the PSRG about the manner in which a complaint should be dealt with, including advice on the assessment process, the outcome of the assessment or the manner in which any recommendations had been responded to.

The PSRG was not a decision-making body. Decisions on complaints were made by Church authorities such as the relevant bishop or the leader of the relevant religious institute.

## Duties of police officers

In the report the Commission makes general observations about the duties of police officers at common law and under the *Police Act 1990* (NSW) ("the Police Act").

An important duty of a police officer is to prevent and detect crime including the collecting of evidence about an alleged crime and the keeping of that evidence for as long as is necessary.

## Police misconduct under the PIC Act

In the report the Commission discusses the concept of "*police misconduct*" under the PIC Act.

By the combined operation of provisions of the PIC Act and the Police Act police misconduct includes any matter about which a complaint can be made against a police officer under the Police Act.

Under s 122(1)(d) of the Police Act a complaint can be made against a police officer for conduct which arises wholly or in part from a decision by the police officer which has taken an irrelevant matter into consideration (s 122(1)(d)(iii)) or conduct which arises wholly or in part from a mistake of law or fact on the part of the police officer (s 122(1)(d)(iv)).

The Commission considers that s 122(1)(d) of the Police Act and consequently the concept of police misconduct under the PIC Act have a very wide scope, extending from quite minor matters to serious criminal conduct.

The Commission considers that conduct of a police officer may fall within the parts of s 122(1)(d) of the Police Act which have been referred to, with the consequence that there is police misconduct within the PIC Act, without it being necessary that the officer should have been aware that his or her conduct involved police misconduct.

This analysis of the concept of police misconduct is particularly relevant to the first limb of the Commission's investigation.

## Blind reporting and s 316 of the *Crimes Act 1900* (NSW)

A matter common to both limbs of the Commission's investigation was s 316 of the *Crimes Act 1900* (NSW) and its application to what was described in evidence before the Commission as "blind reporting".

The PSO made blind reports to the Police, that is reports in which the identity of the alleged offender and some of the circumstances of the alleged offence were disclosed but the identity of the victim was not disclosed.

Section 316 of the Crimes Act, so far as is relevant, provides:-

### ***Concealing serious indictable offence***

- (1) *If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.*

...

- (4) *A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.*

(5) *The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).*

Section 316 has been controversial. A report by the NSW Law Reform Commission (Report 93, December 1999) recommended that s 316 should be repealed. This recommendation has not been implemented.

Four advices about s 316 were given by internal Police Force advisers, namely by a solicitor Peter Kristofferson dated 23 October 2001, by a legal officer Acting Sergeant Treadwell dated 11 December 2001 and 7 May 2002 and by a solicitor Angela Friedrich dated 3 August 2003. The issue to which all of these advices were directed was whether the Police Force should enter into a memorandum of understanding ("MOU") with the Catholic Church in the terms of a draft MOU. The ground on which all of Kristofferson, Treadwell and Friedrich advised that the Police Force should not enter into the proposed MOU was the presence in the draft MOU of a clause authorising blind reporting. The advisers considered that the clause might be "*contrary*" to s 316, "*incongruent*" with s 316 or "*inconsistent*" with s 316.

The Commission is of the opinion that information about the identity of the victim of an alleged offence is information which might be of material assistance in securing the apprehension, prosecution or conviction of the offender and consequently is information which should be brought to the attention of a member of the Police Force or an appropriate authority.

For reasons given in the report, the Commission considers that, if information about the identity of an alleged victim is known at the time of making a report to the Police but is not disclosed, then, if all the conditions for the operation of s 316 are satisfied, an offence will be committed at the time of reporting, even though the person reporting may subsequently disclose the identity of the alleged victim.

A number of witnesses before the Commission gave evidence of matters which they believed justified blind reporting. These matters were put in different ways but in the opinion of the Commission can be summarised as:-

- (i) victims did not wish information they gave in confidence in a *Towards Healing* process to be communicated to the Police and the wishes of the victims should be respected; and

- (ii) if blind reporting was not permitted, many persons would not make complaints about sexual assaults even under the *Towards Healing* protocol and the flow of information to Police about offences of sexual assault which the Police were receiving through blind reporting would be diminished.

For the reasons given in the report, the Commission is of the opinion that these matters relied on as justifying blind reporting would not, in general, amount to a reasonable excuse within s 316(1) of the Crimes Act and that, in general, blind reporting contravenes s 316.

A number of witnesses before the Commission, both police officers and church officials, gave evidence of what they perceived to be the advantages of blind reporting and the disadvantages of not permitting blind reporting. The Commission considers that there should be an urgent review of blind reporting and s 316 of the Crimes Act.

## Assessment of the first limb of the Commission's investigation

The issues on the first limb of the Commission's investigation, concisely stated, were:-

- (1) What were the activities of the PSRG during the period in which Cullen was a member and what was Cullen's participation in the PSRG?
- (2) Was there any police misconduct on the part of Cullen in:
  - (a) participating in the PSRG in circumstances in which this involved a conflict of interest, given her understanding of the limited scope of her role as an officer of the NSWPF whilst participating in the PSRG;
  - (b) failing to take action as a police officer with respect to information received by her through her participation in the PSRG which suggested that criminal offences involving abuse had been committed;
  - (c) failing to retain documents suggesting that criminal offences had occurred, whether or not they also included information identifying the victim or alleged offender, including documents which might have assisted in the investigation and prosecution of criminal offences; or

(d) not advising about the inconsistency between the practice of blind reporting engaged in by the PSO and the requirements of s 316 of the Crimes Act in circumstances in which the Police Force had been put on notice of this inconsistency by four different legal advices.

(3) Was there any police misconduct in Heslop arranging that Cullen would participate in the PSRG or in McGee continuing that arrangement?

The Commission formed the following opinions on these issues.

### Activities of the PSRG

The PSRG provided advice to the Director of the PSO on matters arising under a *Towards Healing* protocol, both on general matters of policies and procedures and in relation to individual complaints of abuse.

As stated earlier in this Executive Summary, the complaints of abuse dealt with were complaints where, generally, the complainants had indicated to the Church that they did not wish to make a complaint to the police or where any involvement the police had had in relation to the matters complained of had, to the knowledge of the Church, concluded. The complaints included allegations of abuse which, if established, could amount to criminal offences, including serious criminal offences.

In order to facilitate the PSRG providing advice on these matters, members of the PSRG were provided with copies of documents relevant to particular complaints of abuse, including reports by assessors appointed under the *Towards Healing* protocols which contained records of statements made by relevant witnesses in interviews with the assessor, correspondence or draft correspondence including correspondence to complainants, completed standard form statement of complaint forms containing particulars of allegations made by the complainants and reports by medical experts.

The information about a particular case which was provided to the PSRG was generally “*de-identified*”, so that the identities of the persons involved in the particular complaint would not be disclosed to the PSRG. Nevertheless, there was enough information in the documents provided to the PSRG to indicate to a person reading the documents that criminal offences might have been committed.



It was a general practice that copies of documents provided to PSRG members at a meeting were left at the meeting place and collected by an officer of the PSO.

## Cullen's participation in the PSRG

Davoren, who was seeking to "*broaden the base*" of members of the PSRG, approached the CPEA to see if it was willing to put a person forward who could become a member. The CPEA suggested Cullen to Davoren. In making his approach Davoren was not specifically seeking a police perspective.

Cullen attended her first meeting of the PSRG in April 1999 and remained a member of the PSRG until May 2005. During that period the minutes of meetings of the PSRG record her as attending forty-four meetings.

While she was a member of the PSRG Cullen contributed to the discussions of the PSRG, including by providing advice drawn from her experience and expertise as a police officer in the area of paedophile behaviour. She provided information on how to identify "*grooming*" behaviour and other modus operandi of sex offenders. Cullen also provided the PSRG with information to assist in identifying less serious behaviour which might be indicative of serial or serious sexual offending.

When Cullen was a member of the PSRG, she did not act as a conduit for the exchange of information between the Police and the PSO. Cullen did not report to the Police Force any information she obtained about individual cases as a result of her membership of the PSRG.

Cullen occasionally asked Davoren or Salmon for more information about particular cases discussed at meetings of the PSRG but this was more the exception than the rule.

Cullen did not record in her police notebook any information acquired by her through her membership of the PSRG.

## Police misconduct by Cullen

The Commission considers that there was police misconduct on the part of Cullen in the following respects (a), (b) and (c).

- (a) Participating in the PSRG in circumstances in which this involved a conflict of interest given her understanding of the limited scope of her role as an officer of the Police Force whilst participating in the PSRG.

The Commission's reasons for forming the opinion that there was misconduct in this respect can be summarised as follows.

At all times between joining the PSRG and retiring from the PSRG in 2005 Cullen was a police officer.

Cullen was on duty as a police officer when she attended meetings of the PSRG, although in the Commission's opinion it was not material whether she was officially on duty.

As a police officer Cullen was subject to the duty police officers have to enforce the criminal law, including to prevent and detect crime and to collect evidence about an alleged crime.

At meetings of the PSRG and sometimes before meetings Cullen received information in documents about complaints of abuse made by individual complainants which were being dealt with pursuant to a *Towards Healing* protocol. At the meetings the convenor of the PSRG, whether it was Davoren or Salmon, spoke to the members about the documents.

The information in the documents was "*de-identified*" so that the identities of the alleged victim and the alleged offender and the full circumstances of the alleged offence were not disclosed. Nevertheless, in many cases the information which was disclosed amounted to an allegation that a serious criminal offence might have been committed.

The receipt of this information enlivened Cullen's duty as a police officer to enforce the criminal law, including to collect evidence concerning the alleged crime.

Cullen gave evidence before the Commission that she had not taken any of the steps a police officer might be expected to take, such as seeking to obtain further information about the alleged offence, on the grounds that the taking of any such step was not within her role, as a participant in the PSRG, of being an adviser.

The Commission accepts that Cullen acted in good faith in forming this understanding of her role while participating in the PSRG. On the evidence before it, the Commission does not consider that Cullen had this understanding of her role because of any agreement or arrangement between the Police Force and the Catholic Church about the role Cullen should have in participating in the PSRG.

The Commission considers that Cullen was in a position of conflict in which her understanding of her role while participating in the PSRG conflicted with her obligations as a police officer.

Even if not initially upon her joining the PSRG, there was police misconduct on the part of Cullen in continuing to be a member of the PSRG, while having this understanding of her role in participating in the PSRG. In considering that her role as a participant in the PSRG was that of an adviser and not that of a police officer required to enforce the criminal law, Cullen took an irrelevant matter into consideration and made a mistake of law (Police Act ss 122(1)(d)(iii) and 122(1)(d)(iv)).

Cullen was not aware that she was engaging in police misconduct but conduct can fall within ss 122(1)(d)(iii) and 122(1)(d)(iv), without it being necessary that the police officer should be aware that his or her conduct arises from a decision that has taken an irrelevant matter into consideration or from a mistake of law or fact.

There are a number of factors which significantly mitigate Cullen's misconduct. She had no intention of engaging in misconduct. There was no conscious dereliction of duty by any police officer, including Cullen. On the contrary, Cullen was well-intentioned. Cullen, drawing on her experience as a police officer, made a valuable contribution to the discussions of the PSRG.

Notwithstanding these mitigating factors, the Commission does not consider that it should exercise a discretion in favour of Cullen and make no finding of misconduct.

The Commission considers that the present case involves an important principle about the duties of police officers and the misconduct, although unintentional, was not trivial.

- (b) Failing to take action (including advising the PSO to report information to the Police Force, causing further inquiries or investigation, recording matters, reporting matters to the Police Force through the usual reporting channels, or making further inquiries herself) with respect to reports, complaints and/or information suggesting criminal offences involving abuse had been committed, which information was received by her through her participation in the PSRG.

Much of what the Commission has said in relation to (a) is relevant to (b). Cullen was a police officer who was subject to a duty to enforce the criminal law; through her participation in the PSRG she received information which indicated that criminal offences might have been committed; however, in general, she failed to take any of the steps referred to in (b). Her reason for not having taken those steps was her understanding of her role while participating in the PSRG, that she was an adviser and not an investigator or reporter of crime.

As to failing to advise the PSO to report information to the Police Force, Cullen understood, correctly, that the PSO was making reports to the Police Force. However, she was aware that the reporting by the PSO was by blind reporting and that, unless there was an inquiry by the Police, the only information communicated to the Police was the information in the blind report. Cullen did not see any of the blind reports being made to the Police Force and, hence, did not know how much, or how little, information was being conveyed.

In her evidence Cullen gave as an additional reason (as well as it not being her role) for her not taking some of the actions suggested by Counsel Assisting, such as making entries in her notebook and herself reporting matters to the Police Force, that the information she received while participating in the PSRG did not contain much detail and, in particular, did not identify the persons involved in the alleged criminal incident.

The information received by Cullen did not contain much detail and, as it stood, could not have been entered on the Police Force's Computerised Operational Policing System ("COPS"). However, Cullen knew that both Davoren and Salmon would, if asked, supply further information about a case without any restriction, including

information about the identity of the victim. Cullen did sometimes ask Davoren or Salmon for further information but it was exceptional for her to do this.

Although complaints which came before the PSRG were being dealt with in a Church process pursuant to a *Towards Healing* protocol, it did not necessarily follow that any steps taken by Cullen to enforce the criminal law would have been futile. In some of the completed statement of complaint forms which were in evidence before the Commission, there was no clear expression of unwillingness on the part of the victim to have any involvement by the Police. Furthermore, the Commission accepts that an indicated unwillingness on the part of victims to make complaints to the Police did not necessarily mean that the victims would be unwilling to cooperate with a Police investigation, if one was commenced. A further matter is that, as a number of witnesses testified, an initial unwillingness on the part of a victim to have the Police involved might change over time, for example, if the victim became aware that the offender had made admissions or had committed other criminal acts or that evidence corroborating the victim's account had been collected.

The Commission considers that there was police misconduct on the part of Cullen within ss 122(1)(d)(iii) and 122(1)(d)(iv) of the Police Act, particularly in not recording matters and not making further inquiries herself in that she did not generally ask Davoren or Salmon for further information about an alleged offence.

For similar reasons to those stated by the Commission in relation to (a), the Commission considers that there were circumstances mitigating Cullen's misconduct but does not consider that it should exercise in favour of Cullen any discretion to make no finding of misconduct.

- (c) Failing to retain documents suggesting that criminal offences had occurred, whether or not they also included information identifying the victim or alleged offender, including documents which may have assisted in the investigation and prosecution of criminal offences

The Commission notes that this particular of misconduct falls far short of the allegation made in the *Lateline* story of 20 June 2013 that Cullen had "*shredded*" all documents she had received while participating in the PSRG. There was no evidence before the

Commission that Cullen had destroyed any evidence, including any documents provided to her through her membership of the PSRG.

At meetings of the PSRG copies of documents were distributed to the members who were present, including Cullen. The originals of the documents were retained by the PSO. After a meeting had concluded Cullen, like other members of the PSRG, left the copy documents she had received at the venue of the meeting. The copy documents were then collected by the convenor of the PSRG or a member of his staff.

The copy documents about individual cases which Cullen received were “*de-identified*”, that is the identities of the alleged victim and the alleged offender and the full circumstances of the alleged offence were not disclosed in the documents. The information about the offence which was contained in the documents was remote hearsay and not an account given by the alleged victim.

Accordingly, the documents were of little value in themselves. They were certainly not evidence, in the sense of being documents which by themselves or in conjunction with other documents or oral evidence would have had any tendency to establish in any criminal proceeding the guilt of the alleged offender.

Nevertheless, the Commission considers that Cullen as a police officer should have retained the documents and that it was police misconduct within ss 122(1)(d)(iii) and 122(1)(d)(iv) of the Police Act not to have retained the documents. Despite their deficiencies, the documents might have assisted in the investigation of criminal offences. Cullen could have referred to the documents in making inquiries for further information from Davoren or Salmon.

For similar reasons to those stated by the Commission in relation to (a), the Commission considers that there were circumstances mitigating Cullen’s misconduct but does not consider that it should exercise in favour of Cullen any discretion to make no finding of misconduct.

It was submitted by Counsel Assisting that there was also police misconduct by Cullen in the following respect:-

- (d) Failing to advise the PSO or the PSRG as to the inconsistency between the blind reporting practice and the requirements of s 316 of the Crimes Act in

circumstances in which this had been notified to the Police Force by virtue of four different legal advices between 2001 and 2003 and when Cullen was, through her role on the PSRG, in the position of advising and providing guidance to the PSO.

Cullen gave evidence, which the Commission accepts, that the only one of the four legal advices she became aware of was Treadwell's advice of 11 December 2001 and that she became aware of that advice only some time after she received a promotion in May 2004. When Cullen saw that advice she understood that it was to the effect that blind reporting might be inconsistent with s 316.

Cullen gave evidence, which the Commission accepts, that there had been communication about the advice between her Commander and the PSO and that she did not consider that it was appropriate for her to intervene.

It is true that Cullen was a member of the PSRG and a function of the PSRG was to provide advice to the PSO but she was not a lawyer and the Commission does not consider that she had the function of giving legal advice to the PSRG or the PSO.

The Commission does not consider that it should find that there was police misconduct on the part of Cullen as alleged in particular (d).

### **Was there any police misconduct on the part of Heslop in arranging that Cullen would participate in the PSRG?**

In his evidence Heslop said he had little recollection of the circumstances in which Cullen became a member of the PSRG. However, the Commission is satisfied, on the basis of evidence given by Cullen and some documentary evidence, that Heslop was involved in Cullen joining the PSRG, that as Cullen's Commander he gave his permission for her to join the PSRG and that he discussed with Cullen whether there would be a conflict of interest in her accepting any payment from the Church for her participation in the PSRG.

It was submitted by Counsel Assisting that Heslop "*should be taken to have been aware that Cullen's participation in the PSRG potentially involved a conflict of interest*". However, the Commission is not satisfied that there is sufficient evidence to warrant the Commission drawing this inference.

The conflict of interest to which, as submitted by Counsel Assisting and as found by the Commission, Cullen was subject depended on Cullen's own understanding of her role as a police officer participating in the PSRG. There is insufficient evidence on which the Commission could find that Heslop as Cullen's Commander directed her to adopt this role or that Heslop agreed with Cullen that she should adopt this role or that Heslop was aware of Cullen's understanding of her role. Evidence was given by Heslop that he would have expected Cullen while participating in the PSRG to exercise her functions as a police officer, for example by reporting to the Police Force information she had received about child sexual abuse.

The Commission does not make any finding of police misconduct against Heslop in arranging that Cullen would participate in the PSRG.

### **Was there any police misconduct on the part of McGee in continuing an arrangement that Cullen would participate in the PSRG?**

Counsel Assisting submitted that, on the basis of certain circumstances which, it was submitted, the Commission should find had been established, McGee should be taken to have been aware of a conflict of interest inherent in Cullen's participation in the PSRG.

The Commission does not accept that, on the basis of the circumstances relied on by Counsel Assisting, the Commission should find that McGee "*should be taken to have been aware*" of the conflict of interest to which Cullen was subject.

As in the case of Heslop, there is insufficient evidence that McGee was aware of Cullen's understanding of her role. Indeed, to the extent that McGee had an understanding of Cullen's role, her understanding of Cullen's role would appear to have differed from Cullen's own understanding of her role.

The Commission does not make any finding of misconduct on the part of McGee in continuing the arrangement that Cullen would participate in the PSRG.

### **Assessment of the second limb of the Commission's investigation**

It is clear on the evidence before the Commission that no written agreement, protocol or memorandum of understanding concerning the handling of complaints of abuse



committed by Catholic Church personnel or employees was ever entered into between the Police Force and the Catholic Church.

The further issues on the second limb of the Commission's investigation were whether any informal agreement, protocol or memorandum of understanding ("arrangement") was entered into and, if so, whether there was any police misconduct in relation to it.

The Commission considered the following questions.

### **Was there an informal arrangement for blind reporting?**

The evidence before the Commission clearly establishes that the PSO consistently made reports of its handling of complaints of abuse by Catholic Church personnel or employees by means of blind reports.

The Commission considers that, while he was the commander of the CPEA, Heslop was aware of the practice of blind reporting by the Catholic Church even though he might not have been familiar with the term "*blind reporting*" and that McGee, while she was Commander of the CPEA and CP&SCS, was aware of the practice of blind reporting by the Catholic Church. No objection was made by the Police Force to blind reporting by the PSO.

The Commission considers that it should infer that there was an informal arrangement between the CPEA (and the CP&SCS) and the PSO permitting reporting by the PSO by means of blind reports. The circumstances on which this inference is based are that the PSO reported to the Police Force by means of blind reports which did not identify the victims of the alleged offences, the knowledge of the Commanders of the CPEA (and the CP&SCS) that the PSO was reporting by means of blind reports and the absence of any objection by the Police Force made to the PSO about its reporting by blind reports.

The Commission considers that Heslop became aware, while he was Commander of the CPEA, of Treadwell's advice of 11 December 2001.

In McGee's case, she was aware of the advice from Treadwell and Friedrich that blind reporting was contrary to s 316 of the Crimes Act but she declined to accept that

advice and permitted blind reporting to continue. The Commission considers that McGee, being aware of Treadwell's advice and having sought and received advice from Friedrich, which was to the same effect, was obliged to comply with that advice.

Earlier in this Executive Summary the Commission stated its opinion that, in general, blind reporting, whatever utility it might have and whatever advantages it might be perceived as having, contravenes s 316 of the Crimes Act. The Commission considers that it was police misconduct for Heslop to enter into an arrangement for general blind reporting by the PSO and for Heslop and McGee to continue this arrangement.

**Was there an informal arrangement that where a criminal offence was alleged and a blind report form was submitted, the Police Force would not seek (or use available statutory powers to compel disclosure of) the identity of the victim, or identifying information in respect of the victim, from the Catholic Church other than in exceptional cases?**

For the reasons given in the report, the Commission considers that there was no such arrangement between the Police Force and the PSO.

**Was there an informal arrangement that attempts would not be made on the part of the Police Force to contact victims of abuse in circumstances in which a blind report form had been submitted in respect of that abuse without first contacting the PSO?**

For the reasons given in the report, the Commission considers that, if there was such an arrangement for the Police not to contact a victim without first contacting the PSO, there was no police misconduct in entering into or continuing such an arrangement.

**Was there an informal arrangement that the Police Force would not further investigate complaints of abuse in circumstances in which a blind report form had been submitted other than in exceptional cases where the matter as reported was identified as being relevant to an existing or future investigation?**

The Commission considers that a consequence of the PSO reporting complaints of abuse by blind reports and the Police entering the information in those blind reports as information reports on COPS was that many of these complaints were not investigated by the Police. However, for the reasons given in the report, the Commission does not consider that there was an arrangement between the Police Force and the Catholic

Church that the Police Force would not investigate complaints of abuse which were the subject of blind reports other than where the matter reported could be linked to another investigation.

### **Alleged preferential treatment of the Catholic Church**

For the reasons given in the report, the Commission considers that there was no unique preferential treatment of the Church, in that blind reports of sexual assaults from organisations other than the Church were also accepted by the Police.

### **Alleged misconduct by Armstrong**

For the reasons stated in the report, the Commission considers that it should not find any police misconduct on the part of Armstrong.

### **Affected persons**

Section 97 of the PIC Act requires a report by the Commission to Parliament to include in respect of each “affected” person a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the prosecution of the person for a specified criminal offence or the taking of action or reviewable action under the Police Act against a person who is a police officer. An “affected” person is a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of or in connection with the investigation the subject of the report.

The Commission considers the following persons to be “affected” persons in connection with the Operation Protea investigation:-

- (a) Inspector Elizabeth Cullen;
- (b) Mr John Heslop;
- (c) Ms Kim McGee; and
- (d) Inspector Wayne Armstrong.

Counsel Assisting submitted that the Commission should form the opinion that consideration should not be given to the prosecution of any of the affected persons for any criminal offence. The Commission accepts this submission and, accordingly, is of the opinion that consideration should not be given to the prosecution of any of the affected persons for any criminal offence.

## Cullen

As to Cullen, the Commission is of the opinion that police misconduct on the part of Cullen occurred in the respects stated in the report and in this Executive Summary.

The Commission has found that there are a number of factors which significantly mitigate Cullen's police misconduct. In particular, Cullen had no intention of engaging in misconduct and there was no conscious dereliction of duty by her. On the contrary, Cullen was well-intentioned.

Cullen has an outstanding service record as a police officer. During her career as a police officer Cullen has made a significant contribution to the detection, investigation and prosecution of sex offenders.

The Commission also notes that Cullen is no longer participating in the PSRG.

Accordingly, in all the circumstances, and, in particular, taking into account the above matters, the Commission is of the opinion that consideration should not be given to the taking of action or reviewable action under the Police Act against Cullen.

## Heslop and McGee

The Commission is of the opinion that police misconduct on the part of Heslop and McGee occurred in the respects stated in the report and the Executive Summary.

Both Heslop and McGee have retired from the NSW Police Force and, accordingly, are no longer police officers. In these circumstances, the parts of s 97 of the PIC Act relating to the taking of action or reviewable action under the Police Act against a police officer have no application. The Commission accepts that both Heslop and McGee were well-intentioned and had no intention of engaging in police misconduct.

## Armstrong

The Commission has not made any finding of police misconduct on the part of Armstrong.

Accordingly, and in all the circumstances, the Commission is of the opinion that consideration should not be given to the taking of action or reviewable action under the Police Act against Armstrong.

## Recommendations

The Commission considers it should make the following recommendations:-

- (a) that officers of the Police Force should reconsider the practice of blind reporting;
- (b) that officers of the Police Force should seek to ensure that, in all cases of abuse from within the Catholic Church, steps are taken to ensure that the Church provides all available information to the Police Force, including information identifying victims who have not themselves indicated a willingness to report the matter to the Police;
- (c) that decisions as to how to respond to such reports, including whether or not to investigate any particular case, should be made on the basis of the merits of the particular case and not by reference to any agreement or understanding; and
- (d) that there should be no participation by an officer of the Police Force on any committee or body which would curtail the duties of that officer to enforce the law.

Blind reporting is controversial and there are arguments for and against it. What appear to the Commission to be the principal arguments on each side have been referred to by the Commission in the report. The Commission considers that there is an urgent need for a reconsideration of blind reporting and of s 316 of the Crimes Act, including whether it should be repealed or substantially amended.

# 1. INTRODUCTION

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- 1.1 On 27 February 2013 the Australian Broadcasting Corporation broadcast a story as part of its *Lateline* program in which it was asserted that a NSW Police Force ("Police Force")<sup>1</sup> officer from the sex crimes squad had for a number of years been a member of a body known as the Professional Standards Resource Group ("the PSRG"), which had been established as part of *Towards Healing*, the Catholic Church's internal process for handling cases of alleged sexual abuse by Catholic clergy. It was asserted in the story that the police officer, in participating in the PSRG, had been subject to a conflict of interest. The police officer was not named in the story.
- 1.2 On 20 June 2013 a further story was broadcast by the Australian Broadcasting Corporation as part of its *Lateline* program. In this story the police officer who had been a member of the PSRG was named as being Inspector Elizabeth Cullen ("Cullen"). It was asserted in the story that Cullen had "*shredded*" all documents she had received while participating in the PSRG, thereby destroying evidence of offences of sexual abuse by Catholic clergy and other church personnel.
- 1.3 On 24 June 2013 at a hearing of the *Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Catholic diocese of Maitland-Newcastle* a submission was made that the Commissioner should seek to have the terms of reference of the Inquiry amended so as to permit the Inquiry to investigate matters which were said to arise from the *Lateline* story of 20 June 2013.
- 1.4 Later on the same day the Special Commission of Inquiry issued a media release noting that the matters raised in the submission were not within the Special Commission of Inquiry's terms of reference. It was implicit in the media release that the Commissioner had decided not to seek to have the terms of reference of the Inquiry amended.

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<sup>1</sup> The organisation currently known as the NSW Police Force has had different names in the past. The organisation was known as the 'NSW Police Service' or simply as 'NSW Police' during the period in which the matters the subject of this investigation occurred. It is referred to in this report as the "Police Force" for consistency and convenience.

- 1.5 On 25 June 2013 the Director-General of the Department of Premier and Cabinet wrote a letter to this Commission. In his letter the Director-General referred to the submission which had been made to the Special Commission of Inquiry and to the Special Commission of Inquiry's media release. The Director-General stated that it was not proposed to amend the terms of reference of the Special Commission of Inquiry. The concluding paragraphs in the Director-General's letter were as follows:-

*To the extent that the matter may involve any possible allegation of serious misconduct on the part of any Police Officer, such allegations also fall within the standing jurisdiction of the Police Integrity Commission (PIC).*

*It is, therefore, appropriate that the matter be brought to your attention.*

*I am advised that the NSW Police Force is happy to provide the PIC with any further information or assistance it may require in relation to this matter.*

- 1.6 After receiving the Director-General's letter, this Commission determined to conduct an investigation which was given the name Operation Protea. The original purpose of the investigation was:-

*To investigate whether there was any police misconduct involved in the participation of any NSW Police Force officer in the Catholic Church Professional Standards Resource Group between 1998 and 2005.*

- 1.7 On 3 October 2013 the Australian Broadcasting Corporation broadcast as part of its *Lateline* program a further story in which it was asserted that police records accessed under freedom of information laws had revealed that the Catholic Church had tried to strike an agreement with the Police Force to allow the Church to withhold information about paedophile priests. In this story it was asserted that, although no formal agreement between the Catholic Church and the Police Force had been signed, the Church had proceeded on an understanding that the provisions of a draft agreement which would permit the Church to withhold evidence from Police had been approved by the Police and were in operation.

- 1.8 On 9 October 2013 the office of the Minister for Police and Emergency Services forwarded to this Commission questions it had received from a journalist about an alleged informal arrangement between the Catholic Church and the Police Force.

- 1.9 After receiving these questions the Commission amended the statement of the scope and purpose of Operation Protea by adding a second limb, namely:-

*To investigate...whether there was any police misconduct involved in the participation by the NSW Police Force in any agreement, protocol or memorandum of understanding, whether or not formally entered into, between the NSW Police Force and the Catholic Church concerning the handling of complaints of sexual abuse committed by Catholic Church personnel or employees.*



## 2. OVERVIEW OF THE INVESTIGATION

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- 2.1 In accordance with the statement of the scope and purpose of Operation Protea the Commission was concerned in both limbs of its investigation in whether there had been any police misconduct. The Commission was not concerned with the actions or omissions of personnel or employees of the Catholic Church, except to the extent to which they were relevant to whether there had been misconduct by police officers.
- 2.2 The Commission used a number of investigative methods in Operation Protea.
- 2.3 Notices were served pursuant to s 26 of the *Police Integrity Commission Act 1996* (NSW) ("the Act" or "the PIC Act"), requiring the production of documents. In compliance with these notices a large number of documents, many of them voluminous, were produced to the Commission. The documents produced included copies of the agendas and minutes for meetings of the PSRG during the period from 1999 to 2005 in which Cullen was a member of the PSRG. A detailed analysis of the documents was undertaken.
- 2.4 Commission investigators interviewed numerous individuals who had been members of the PSRG during some part of the period in which Cullen was a member. A number of other persons were also interviewed.
- 2.5 The Commission held two private hearings in which Cullen and Inspector Wayne Armstrong ("Armstrong"), a serving police officer who was the intelligence co-ordinator in the Police Force's Child Protection and Sex Crimes Squad ("the CP&SCS") between 2004 and 2014, gave evidence. Each of Cullen and Armstrong was legally represented at his or her private hearing.
- 2.6 Subsequently the Commission determined to hold a public hearing in Operation Protea.
- 2.7 Factors which the Commission took into account in determining that it was in the public interest to conduct a public hearing included that the matters being investigated had already received wide publicity, that the allegations which had been made had the capacity to seriously undermine public confidence in the Police Force and that there was a special need for an open and transparent

investigation of allegations that there had been a secret understanding or arrangement between the Catholic Church and the Police Force which had limited the ability of the Police Force to investigate allegations of sexual abuse by personnel of the Catholic Church.

2.8 The Commission held a public hearing on 13, 14, 15, 16 and 17 October 2014.

2.9 The witnesses who gave evidence at the public hearing were Cullen and Armstrong and the following persons:-

- (vi) Mr John Davoren ("Davoren"), a former Director of the Professional Standards office ("the PSO") of the Catholic Church for NSW and the ACT and a member of the PSRG from 1997 to 2003;
- (vii) Mr Michael Salmon ("Salmon"), the Director of the PSO and a member of the PSRG from 2003 to the time of his giving evidence;
- (viii) Mr Michael McDonald ("McDonald"), who was the Executive Director of the Catholic Commission for Employment Relations ("the CCER") between 1996 and 2008 and who was a member of the PSRG between 1999 and 2005;
- (ix) Mr John Heslop ("Heslop"), a retired police officer who between 1996 and 2002 was the Commander (initially, the Acting Commander) of the Police Force's Child Protection Enforcement Agency ("the CPEA"); and
- (x) Ms Kim McGee (formerly McKay) ("McGee"), a retired police officer who was the Commander of the CPEA in 2003 and then of the CP&SCS between 2003 and 2005.

2.10 On the first day of the public hearing the Commission authorised all of Cullen, Armstrong, Davoren, Salmon, McDonald, Heslop and McGee to be represented by legal practitioners and all of them were legally represented throughout the public hearing.

- 2.11 The Commission also authorised legal representation for two other persons who had been summoned to give evidence but who ultimately were not required to give evidence. The Australian Lawyers Alliance sought and was granted a right of limited appearance at the public hearing.
- 2.12 At the conclusion of the hearing directions were given for the lodging of written submissions. Written submissions by Counsel Assisting were served on all the legal practitioners who had been authorised to appear at the public hearing. Submissions in reply to Counsel Assisting's submissions were received by the Commission from the legal representatives for Cullen, Armstrong, Salmon and McGee. No submissions in reply to Counsel Assisting's submissions were received from the legal representatives for Davoren, McDonald or Heslop. Written submissions were received by the Commission from the Commissioner of Police and from the Australian Lawyers Alliance.
- 2.13 In preparing this report the Commission has taken into account all of the submissions it received.

### 3. REPORT UNDER THE POLICE INTEGRITY COMMISSION ACT 1996 (NSW)

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- 3.1 This report is made under the *Police Integrity Commission Act 1996* (“the Act”). Relevant provisions of the Act are as follows.
- 3.2 Part 8 of the Act is headed “*Reports to Parliament*”. Division 1 of Part 8 of the Act is headed “*Reports by Commission*”. Section 96(2) in Division 1 of Part 8 is headed “*Report where public hearing*” and provides that “*the Commission must prepare reports in relation to matters as to which the Commission has conducted a public hearing*”.
- 3.3 Section 97 in Division 1 of Part 8 is headed “*Contents of reports to Parliament*” and provides as follows:-

(1) *The Commission is authorised to include in a report under section 96:*

(a) *statements as to any of its assessments, opinions and recommendations, and*

(b) *statements as to the Commission’s reasons for any of its assessments, opinions and recommendations.*

(2) *The report must include, in respect of each “affected” person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*

(a) *the prosecution of a person for a specified criminal offence,*

(b) *the taking of action against the person for a specified disciplinary offence,*

(c) *the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services or otherwise terminating the services of the police officer,*

(d) *the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer.*

(3) *An “affected” person is a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of or in connection with the investigation concerned.*

*(4) Subsection (2) does not limit the kind of statement that a report can contain concerning any such “affected” person and does not prevent a report from containing a statement described in that subsection in respect of any other person.*

3.4 Part 3 of the Act is headed “*Functions of Commission*”. Division 1 of Part 3 is headed “*Functions generally*”. Section 16 in Division 1 of Part 3 is headed “*Provisions regarding assessments, opinions and recommendations*” and provides as follows:-

*(1) The Commission may:*

*(a) make assessments and form opinions, on the basis of its investigations or those of the Police Royal Commission or of agencies of which it has management or oversight under this Act, as to whether police misconduct or other misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer:*

- has or may have occurred, or*
- is or may be occurring, or*
- is or may be about to occur, or*
- is likely to occur, and*

*(b) make recommendations as to whether consideration should or should not be given to the prosecution of or the taking of action under Part 9 of the Police Act 1990 or other disciplinary action against particular persons, and*

*(c) make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter of its assessments or opinions or the results of any such investigations.*

*(2) However, the Commission may not:*

*(a) make a finding or form an opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or*

*(b) make a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).*

*(3) An opinion that a person has engaged, is engaging or is about to engage:*

*(a) in police misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer (whether or not specified conduct), or*

*(b) in specified conduct (being conduct that constitutes or involves or could constitute or involve police misconduct, misconduct of a Crime Commission officer or corrupt conduct of an administrative officer),*

*is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit a criminal offence or disciplinary offence.*

*(4) Nothing in this section prevents or affects the exercise of any function by the Commissioner that it considers appropriate for the purposes of or in the context of Division 2 of Part 9 of the Police Act 1990.*

3.5 The Commission will examine the provisions of the Act relating to “*police misconduct*” later in this report.

3.6 In making assessments and forming opinions within s 16(1) of the Act the Commission applies the civil standard of proof, which was described as follows by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361:-

*The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony or indirect inferences.*

3.7 Part 13 of the Act is headed “*Miscellaneous*”. Section 137A in Part 13 is headed “*Persons to be heard*” and provides as follows:-

*(1) Before including in a report any comment about a person that the Commission or the Inspector considers is adverse, the Commission or Inspector must, so far as practicable:*

*(a) inform that person of the substance of the grounds of the adverse comment, and*

*(b) give the person an opportunity to make submissions.*

*(2) The Commission is taken to have complied with this section if it has held a hearing under section 32 at which the person who is the subject of the adverse comment concerned was informed of the substance of the grounds of the adverse comment and given an opportunity to make submissions.*

*(3) This section applies only to the following reports:*

*(a) a report by the Commission in relation to any matter that has been or is the subject of an investigation by the Commission,*

*(b) a report by the Inspector in relation to any complaint.*

- 3.8 The Commission considers that it complied with s 137A of the Act, by serving the submissions of Counsel Assisting the Commission on each of the “*affected*” persons within s 97(2) of the Act and by providing them with an opportunity to make submissions in reply.
- 3.9 In this report the Commission has referred and will continue to refer to persons by their surnames only. No discourtesy is thereby intended.

## 4. BACKGROUND TO THE MATTERS INVESTIGATED IN OPERATION PROTEA

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- 4.1 In this part of its report the Commission will refer to certain matters which are not controversial and which form part of the background to Operation Protea.

### The Royal Commission into the New South Wales Police Service

- 4.2 In May 1994 the Royal Commission into the New South Wales Police Service was established ("the RCPS"). Its terms of reference included paragraph (d), which required the RCPS to inquire into:-

*(d) The impartiality of the Police Service and other agencies in investigating and/or pursuing prosecutions including, but not limited to, paedophile activity.<sup>2</sup>*

- 4.3 On 21 December 1994 the terms of reference of the RCPS were varied by adding paragraphs (d1) to (d3).<sup>3</sup> Those paragraphs were in the following terms:-

*(d1) Whether any members of the Police Service have by act or omission protected paedophiles or pederasts from criminal investigation or prosecution and, in particular, the adequacy of any investigations undertaken by the Police Service in relation to paedophiles or pederasts since 1983; however, you may investigate any matters you deem necessary and relevant which may have occurred prior to 1983.*

*(d2) Whether the procedures of, or the relationships between the Police Service and other public authorities adversely affected police investigations and the prosecution, or attempted or failed prosecution, of paedophiles or pederasts.*

*(d3) The conduct of public officials related to the matters referred to in paragraphs (d1) and (d2).<sup>4</sup>*

- 4.4 On 23 October 1996 the terms of reference of the RCPS were further varied so as to add paragraphs (g) to (j).<sup>5</sup> However, those additions to the Terms of Reference are not significant for the present investigation.

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<sup>2</sup> New South Wales, Royal Commission into the New South Wales Police Service, *Final Report – Volume IV: The Paedophile Inquiry* (August 1997), p.19([1.10]) & p.22 ([1.27])

<sup>3</sup> *ibid*, p. 20([1.17])

<sup>4</sup> *ibid*, pp.22-23 ([1.27])



4.5 In August 1997 the RCPS handed down its “*Final report Volume V – The Paedophile Inquiry*”.

4.6 In Chapter 11, which was the initial chapter in Volume V, the RCPS said:-

*While Churches and religious associations are not ‘public authorities’ or ‘Government departments and agencies’ and their leaders and members are not ‘public officials’ (and therefore do not fall directly within the Commission’s terms of reference) very early in its inquiries the Commission uncovered a number of cases where, after preliminary investigations, it appeared that:*

- there had been a substantial incidence of sexual abuse involving clergy, members of religious orders, ministers of religion, acolytes, and others involved on a paid or unpaid basis in and around Churches or institutions associated with or conducted by Churches or religious bodies, including schools, residential homes, youth and fellowship groups and the like;*
- in very many cases, investigations or prosecutions of these incidents had been suppressed, discontinued, or failed in circumstances suggestive of either protection or failure on the part of the official agencies involved to exercise their powers impartially;*
- there was a serious absence of protocols, guidelines, accepted practices or established lines of communication with the Police Service, concerning the way that allegations of this kind should be managed; and that*
- there had been a history of ignorance or misunderstanding of the existence of the problem, as well as a pattern of denial and repression of any allegations which happened to be raised.<sup>6</sup>*

4.7 Later in Chapter 11 in Volume V the RCPS said:-

*11.13 Generally speaking the approach of the Churches has been to reject complaints of sexual abuse by clergy, accompanied by failure to notify the appropriate authorities. Offenders have similarly exhibited denial, or have attempted to re-explain events or to expect forgiveness. There has been a closure of ranks and a reluctance to accept that an incident of this kind could happen within a good Christian family, or with a well respected priest.*

*11.14 Investigating police may also find it difficult to believe the allegations, and even more difficult to penetrate the protective cloak of the Church:*

*The Churches have a tendency to regard themselves as self-regulatory institutions that are ‘just’ and ‘sacred’ and therefore not in need of scrutiny. The reluctance of Church leaders to report sexual abuse allegations to law enforcement authorities stems from their misguided,*

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<sup>5</sup> *ibid*, p.21([1.22])

<sup>6</sup> New South Wales, Royal Commission into the New South Wales Police Service, *Final Report – Volume V: The Paedophile Inquiry* (August 1997), p.991 ([11.1])

*although fierce, loyalty to their institution whose image must never be tarnished.<sup>7</sup>*

...

*11.25 On the whole, Churches have been reluctant to report allegations of sexual abuse to the police, or to refer them into the criminal justice system. The preferred approach has been to deal with the issue within the Church.*

*11.26 There are obvious problems with organisations investigating complaints made against their own members. If these matters are investigated and determined by a Church in-house, there is:*

- limited accountability;*
- a risk of the Church losing credibility in the eyes of the public;*
- the possibility of a perception that it is interfering with the police role;*
- a danger that the inquiry will contaminate the evidence, alert suspects and in other ways jeopardise a police investigation; and*
- invite the suggestion that members of the religious order in question have been placed in a somewhat privileged position compared with the rest of the community.<sup>8</sup>*

4.8 At the commencement of Chapter 6 in Volume IV of the final report the RCPS said:-

*6.1 The Police Service has adopted a number of structures and procedures over the past 15 years to deal with child sexual abuse. The history over that period, prior to the Royal Commission has been one of:*

- insufficient recognition of the complexities of this form of criminality;*
- lack of proper commitment and application of sufficient resources to the problem;*
- inappropriate planning for, and assessment of, the various strategies employed; and of*
- insufficient liaison and co-operation with the Department of Community Services (DCS), which has itself suffered from similar problems.*

*6.2 The result has been one of ineffective policing, which has allowed those guilty of child sexual abuse to escape investigation and prosecution. In*

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<sup>7</sup> *ibid*, p.994([11.13]-[11.14]) (footnotes omitted)

<sup>8</sup> *ibid*, p.996 ([11.25]-[11.26])(footnotes omitted)

*addition, there have been occasions where protection has been provided as a result of corrupt arrangements made with police...*<sup>9</sup>

## Responses to the RCPS

- 4.9 Although the final report of the RCPS was not published until August 1997, the NSW Government and the Catholic Church had already responded to the matters which were being inquired into by the RCPS and which had received considerable publicity.

### The Government response to the RCPS – the Child Protection Enforcement Agency

- 4.10 On 6 December 1995 the then Minister of Police announced that the CPEA would be created.
- 4.11 The CPEA was to be a specialist agency directed to responding to paedophile activity. The CPEA was to have an investigative function pursuant to which it would investigate allegations of complex and protracted sexual abuse. The CPEA was also to maintain an intelligence group which would provide the NSW Police Service with information to assist in the investigation of sexual offences.<sup>10</sup>
- 4.12 The CPEA was established on 1 January 1996 and commenced operations in July 1996.<sup>11</sup> During 1996 Cullen assisted in the establishment of the CPEA and was assigned to the implementation team.<sup>12</sup> Heslop was appointed acting Commander and then Commander of the CPEA.<sup>13</sup>
- 4.13 In 2003 the CPEA became the CP&SCS.
- 4.14 McGee, then Kim McKay, was the Commander of the CPEA and then the CP&SCS between June 2003 and September 2005.<sup>14</sup>

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<sup>9</sup> New South Wales, Royal Commission into the New South Wales Police Service, *Final Report – Volume IV: The Paedophile Inquiry* (August 1997), p.658 ([6.1] – [6.2]) (footnotes omitted)

<sup>10</sup> see New South Wales, Royal Commission into the New South Wales Police Service, *Final Report – Volume IV: The Paedophile Inquiry* (August 1997), pp.675-678 ([6.102] - [6.118])

<sup>11</sup> PIC Transcript, John Heslop, 15 October 2014, p.235:5-16

<sup>12</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.504:25-29

<sup>13</sup> PIC Transcript, John Heslop, 15 October 2014, p.235:18-24

<sup>14</sup> PIC Transcript, Kim McGee, 16 October 2014, p.312:29-33

## The response of the Catholic Church to the RCPS – the *Towards Healing* protocols

### The December 1996 *Towards Healing* protocol

4.15 In December 1996 the Catholic Church released the protocol “*Towards Healing*” which had the subtitle “*Principles and Procedures in responding to complaints of sexual abuse against personnel of the Catholic Church in Australia*”. Part one of the Protocol dealt with principles for dealing with complaints of sexual abuse. Part two of the Protocol dealt with procedures for dealing with complaints of sexual abuse.<sup>15</sup> The Commission will quote, or refer to, only certain provisions of the Protocol, all of which are in Part two.

*1.3 These procedures are intended to apply to all complaints of sexual abuse by Church personnel, whether they be clerics, religious personnel, lay employees or volunteers.*<sup>16</sup>

...

*1.5 If a complaint concerns a criminal offence, Church authorities shall not jeopardise the right of the police or other civil authorities to investigate the matter and to take appropriate action.*<sup>17</sup>

4.16 In clause 2 of the Protocol “*sexual abuse*” was defined as including:-

*any form of criminal assault, sexual harassment, or other conduct of a sexual nature that is inconsistent with the public vows taken by a priest or religious, with the integrity of the relationship between a priest or religious and a person in their pastoral care, or with the duties or professional responsibilities of Church personnel.*<sup>18</sup>

4.17 Clause 3 of the Protocol was headed “*Structures and Personnel*” and included the following provisions:-

*3.1 The Australian Catholic Bishops Conference and the Australian Conference of Leaders of Religious Institutes have jointly established a National Committee for Professional Standards (National Committee) to oversee the development of policy, principles and procedures in responding to complaints of sexual abuse against Church personnel.*

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<sup>15</sup> Exhibit 33

<sup>16</sup> *ibid*, p.6 ([1.3]) (footnote omitted)

<sup>17</sup> *ibid*, p.6 ([1.5])

<sup>18</sup> *ibid*, p.7 (definition of “*sexual abuse*”)

*3.2 The bishops and leaders of religious institutes of each province of the Catholic Church in Australia have established and shall maintain a Professional Standards Resource Group (Resource Group) in each province.*

*3.2.1 The Resource Group shall consist of at least one priest and one religious and a suitable number of other persons (no more than ten), both men and women, of diverse backgrounds, skilled in the areas of child protection, the social sciences civil and Church law and industrial relations.*

*3.2.2 The Resource Group shall act as adviser to all Church bodies in the province in matters concerning professional standards, both in general and in relation to specific cases.*

*3.2.3 In addition to responding to requests for assistance, the Resource Group shall act in a proactive manner. It shall be free to offer advice within its mandate to any Church body in the province as it sees fit.*

*3.3 Each Resource Group shall nominate from among its members a Convenor (and deputy), who shall convene and chair meetings as required; liaise with the National Committee, other provincial Resource Groups, and individual Church bodies and other professional advisers; have an overview of all matter dealt with by the Resource Group; and be responsible for the safekeeping of all documentation connected with the Resource Group.<sup>19</sup>*

4.18 Clause 3.4 provided that each Resource Group should ensure that suitable persons were available to fulfil the roles of “*contact persons*” who would be the usual persons to receive complaints of sexual abuse and “*assessors*” who would be responsible for assessing any aspect of a complaint.<sup>20</sup>

4.19 Clause 3.5 provided for the appointment of “*facilitators*” who would facilitate meetings between victims and church authorities.<sup>21</sup>

4.20 Clause 3.6 provided that a Resource Group would draw up a list of reviewers, not from its own members, who would conduct reviews of process under the Protocol.<sup>22</sup>

4.21 Clause 5, which was headed “*Assessment*”, included the following provisions:-

*5.2 No Church Assessment shall be undertaken in such a manner as to interfere in any way with the proper processes of civil law, whether they are in progress or contemplated for the future.*

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<sup>19</sup> *ibid*, pp.7-8 ([3.1]-[3.3])

<sup>20</sup> *ibid*, p.8 ([3.4])

<sup>21</sup> *ibid*, p.9 ([3.5])

<sup>22</sup> *ibid*, p.9 ([3.6])

*5.3 When the complaint concerns an alleged crime, the Contact Person shall tell the complainant of the right to take the matter to police and, if desired, provide assistance to do so. The appropriate Church authority is to be notified of any action by the Contact Person.*

*5.4 If the victim indicates an intention not to take the matter to the police, this should be recorded by the Contact Person and confirmed by the signature of the victim*

*5.4.1 State or Territory law regarding the reporting of knowledge of a criminal offence must be observed.*

*5.5 The Resource Group shall liaise with civil authorities regarding the proper processes to be followed and the principles that should determine the time and manner of Church assessments.*

*5.6 If in the course of a Church assessment, what had been thought not to be a crime is in fact revealed as an alleged crime, the Church assessment procedure shall cease immediately and the complainant told of the right to take the matter to the police. The Contact Person is to assist the complainant if requested.<sup>23</sup>*

#### The December 2000 Towards Healing protocol

4.22 In December 2000 the Catholic Church released a revised *Towards Healing* protocol.<sup>24</sup>

4.23 Many of the provisions of the revised Protocol were the same as, or substantially similar to, corresponding provisions of the December 1996 Protocol.

4.24 A “*major change*” was to extend the definition of abuse so as to include physical and emotional abuse.<sup>25</sup>

4.25 The provisions of clause 35 of the December 2000 Protocol were the same as or similar to, the provisions of clause 3 of the December 1996 Protocol. Clause 35.1 was the same as clause 3.1 in the earlier Protocol. Clause 35.2 was substantially the same as clause 3.2 in the earlier Protocol. Clause 35.2.1 was the same as Clause 3.2.1, except that Clause 35.2.1 provided that the members of a Resource Group should be appointed by the Bishops and Leaders of religious institutes. Clause 35.2.2 was the same as clause 3.2.2,

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<sup>23</sup> *ibid*, p.10 ([5.2] – [5.6])

<sup>24</sup> Exhibit 34

<sup>25</sup> *ibid*, p.1

except that the concluding words of clause 3.2.2 “*both in general and in relation to specific cases*” were omitted. Clause 35.2.3 was the same as clause 3.2.3.<sup>26</sup>

4.26 Clause 35.3 of the December 2000 Protocol provided that the bishops and leaders of religious institutes for each state should appoint a Director of Professional Standards in each state who would have similar functions to the functions of the Convenor of a Resource Group under the December 1996 protocol.<sup>27</sup>

4.27 Clauses 35.4 and 35.5 of the December 2000 Protocol contain similar provisions to clauses 3.4, 3.5 and 3.6 of the December 1996 Protocol regarding contact persons, assessors, facilitators and reviewers.<sup>28</sup>

4.28 Clause 37 of the December 2000 protocol, which was headed “*Criminal offences and the reporting of child abuse*” contained the following provisions:-

*37.1 When the complaint concerns an alleged crime or reportable child abuse, the Contact Person shall tell the complainant of the complainant's right to take the matter to the police or other civil authority and, if desired, provide assistance to do so. The Contact Person should also explain the requirements of the law of mandatory reporting.*

*37.2 In all cases other than those in which reporting is mandatory, if the complainant indicates an intention not to take the matter to the police or other civil authority, this should be recorded by the Contact Person and confirmed by the signature of the complainant.*

*37.3 All Church personnel shall comply with the requirements for mandatory reporting of child abuse that exist in some States/Territories, and State or Territory law regarding the reporting of knowledge of a criminal offence must be observed. The appropriate Church authority shall also be notified of any such report.*

*37.4 No Church investigation shall be undertaken in such a manner as to interfere in any way with the proper processes of criminal or civil law whether they are in progress or contemplated for the foreseeable future. However, where the complainant has chosen not to report the matter to the police or other civil authority, or the civil authorities have decided not to take further action under the criminal law or child protection legislation, the Church authority must act on the complaint.*

*37.5 The Director of Professional Standards shall endeavour to establish a protocol with the police in each relevant State or Territory to ensure that Church assessments do not compromise any police action.*<sup>29</sup>

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<sup>26</sup> cf. Exhibit 33, pp.7-9 & Exhibit 34, pp.9-10

<sup>27</sup> Exhibit 34, p.9 ([35.3])

<sup>28</sup> cf. Exhibit 33, pp.8-9 ([3.4] – [3.5]) & Exhibit 34, p.10 ([35.4] – [35.5])

4.29 Clause 38.1 of the December 2000 protocol provided:-

*The following procedures apply only where the complaint does not concern a criminal matter, or where a complainant has chosen not to report the matter to the police or other civil authority, or the civil authorities have decided not to take further action under the criminal law or child protection legislation.*<sup>30</sup>

4.30 Clause 39.4 of the December 2000 protocol provided:-

*If in the course of a Church procedure, allegations emerge for the first time which indicate that a criminal offence may have been committed, the Church procedure shall cease immediately and the matter will be dealt with in accordance with 37.1-37.3. If the complainant indicates an intention not to take the matter to the police, this should be recorded and confirmed by the signature of the complainant before the Church procedure resumes.*<sup>31</sup>

Summary of the effect of some provisions of the *Towards Healing* protocols

4.31 The Commission considers that the general process of the making and consideration of a complaint under the Towards Healing protocols, as set out in the protocols and as explained in non-controversial evidence before the Commission, can be briefly summarised as follows.

4.32 Where a complaint of sexual abuse came to the notice of Church personnel those persons were to refer the matter to a “contact person”.<sup>32</sup> The contact person would obtain a written complaint from the complainant on a pro forma “Statement of Complaint” maintained by the PSO.<sup>33</sup>

4.33 It was not intended that a matter be dealt with under a Protocol where there was a concurrent police investigation into the complaint. Accordingly, the Protocol would only operate where the complainant had decided not to report the matter to the police or the police had decided not to take any further action with respect to the complaint.<sup>34</sup>

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<sup>29</sup> Exhibit 34, pp.11-12 ([37.1]-[37.5])

<sup>30</sup> *ibid*, p.12 ([38.1])

<sup>31</sup> *ibid*, p.15 ([39.4])

<sup>32</sup> Exhibit 33, [4.1]; Exhibit 34, p. 11 ([36.1])

<sup>33</sup> Exhibit 33, [4.6]; Exhibit 34, p. 11([36.5]); PIC Transcript, John Davoren, 13 October 2014, p.39:30-43

<sup>34</sup> Exhibit 33, p.10 ([5.2] – [5.6]);Exhibit 34,pp.11-12 ([37.1]-[37.4])



- 4.34 Where a complaint or part of a complaint was disputed, one or more assessors would be appointed to conduct an assessment of the complaint. The assessor was to be independent of the Church authority involved, the complainant and the alleged offender.<sup>35</sup> A “*Church authority*” was defined in the protocol as including “*a bishop, leader of a religious institute and the senior administrative authority of an autonomous lay organisation, and their authorised representatives, responsible for the Church body to which the accused person is connected*”.<sup>36</sup>
- 4.35 The assessor or assessors conducted an assessment of the matter, which included investigating the facts of the case where there was a dispute as to the facts, or a requirement for further information. The assessment process could include interviews with persons who could provide relevant evidence such as the alleged offender and the complainant.<sup>37</sup>
- 4.36 After the conclusion of the assessment the assessor or assessors would produce a written report which would include recommendations. A copy of this report was provided to the Church authority and the Director of the PSO.<sup>38</sup> The complainant and, in some circumstances, the alleged offender were entitled to be advised of the outcome of the report.<sup>39</sup>
- 4.37 Where a complaint was found to be established or partly established, the Church Authority concerned was to consider what action was to be taken as a result of that finding, including what action should be taken as a result of any recommendations in the assessment report.<sup>40</sup> This could include a facilitation process between the Church authority and the victim so that the needs of the victim could be addressed.<sup>41</sup>

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<sup>35</sup> Exhibit 33, pp.10-13 ([6]); Exhibit 34, pp.14-18 ([39] – [40])

<sup>36</sup> Exhibit 33, p.7; Exhibit 34, p.8; “*Church body*” is defined as including “*a diocese, religious institute and any other juridical person, body corporate, organisation or association, including autonomous lay organisations, that are generally perceived to be part of the Catholic Church*”: Exhibit 33, p.7 The 2000 protocol replaced the words following “*that*” in the definition with the following: “*exercise pastoral ministry within, or on behalf of, the Catholic Church*”; Exhibit 34, p.8

<sup>37</sup> Exhibit 33, pp.11-12 ([6.3] – [6.9]); Exhibit 34, pp.15-17 ([40.2] – [40.7])

<sup>38</sup> The first protocol instead refers to a “Convenor” of the PSRG. References to the Convenor in that protocol were replaced to references to the Director of the PSO in the 2000 protocol. For convenience, this position is referred to as Director in this part of the report.

<sup>39</sup> Exhibit 33, p.12 ([6.10]); Exhibit 34, pp.17-18 ([40.11])

<sup>40</sup> Exhibit 33, pp.10-13 ([6] – [7]); Exhibit 34, pp.18-21 ([40.12], [41] – [42])

<sup>41</sup> Exhibit 33, p.13 ([7.2]); Exhibit 34, pp.19-20 ([41.3])

4.38 If a complainant was not satisfied with decision taken by the relevant Church authority about any aspect of their complaint they were able to apply to the Director for a “review of process”. If the application was granted, a “Reviewer” was appointed and was to conduct a review to evaluate whether the procedures and principles within the Protocol had been adhered to. The Reviewer was to produce a written report containing recommendations.<sup>42</sup> The 2000 Protocol also gave an alleged offender a right to apply for a review if they co-operated with the assessment process.<sup>43</sup>

4.39 If the Director of the PSO intends to deny a request for a review, he or she had first to consult the PSRG.<sup>44</sup>

#### Charter for the PSRG

4.40 A Charter for the PSRG was endorsed in June 1998, parts of the Charter were in the following terms:-

*It is the role and function of the Resource Group:*

- *to act as adviser to the Bishops and Leaders (Church authorities) within the Province of Sydney in matters concerning professional standards and abuse, both in general and in relation to specific cases.*
- *to respond to requests from Bishops and Leaders for assistance, and to act in a proactive manner on its own initiative in regard to issues of appropriate professional standards and of abuse by representatives of the Church,*
- *to provide advice and recommendations to the responsible Church Authority specifically in relation to:*
  - a) assessment of complaints,*
  - b) determination of the substance of the complaint,*
  - c) outcomes relating to the complainant and or victim,*
  - d) outcomes relating to the accused, including the issue of whether or not an accused person should be required to stand down from office,*
  - e) preventive strategies.*
- *to implement and maintain, in collaboration with the Bishop and Leaders, the processes and procedures set down in Towards Healing.*
- *to monitor and appraise the processes and procedures in place, and to advise when the application of those processes and procedures does not meet the criteria set down by Towards Healing.*

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<sup>42</sup> Exhibit 33, pp.13-14 ([8]); Exhibit 34, pp.21-22 ([43])

<sup>43</sup> Exhibit 34, p.21 ([43.1])

<sup>44</sup> Exhibit 33, p.14 ([8.4.1]); Exhibit 34, p.21 ([43.3.1])

- *to provide training and developmental opportunities for those appointed to carry out the various tasks defined in Towards Healing.*
- *to participate in appropriate research programs aimed at achieving a better understanding of abuse within the Church.*
- *to select and train, with appropriate consultation, people suitable for appointment as assessors, and to monitor the standard of work of the assessors*

*In relation to the various roles and tasks defined in Towards Healing the Resource Group is charged, with the following functions:*

- *to select, train and appoint people as Contact Persons, and to appraise them in their carrying out of that role.*
- *to nominate for appointment by the Church Authority as assessors in a specific case,*
- *to select, train and appoint, with appropriate consultation, people as Victim Support Persons,*
- *to select and train, with appropriate consultation, people suitable for appointment by the Church Authority to the position of Accused's Support Person, and to seek to evaluate the quality of the support provided when this is feasible.*
- *to select, with appropriate consultation, people suitable for appointment by the Church authorities as facilitators in meetings between victims and Church Authorities.*

*In accordance with paragraph 8 of Towards Healing the Resource Group is required to respond to an application for review of process submitted by a complainant who is dissatisfied with the decisions of the Church Authority.*

*Except in those cases where the Resource Group concludes that the request for review should be denied, the Resource Group is charged with appointing a reviewer and informing the Church Authority that a review of process has been requested and approved.<sup>45</sup>*

### The Professional Standards Office and its Director

4.41 In evidence before the Commission was a job description for the position of Director of the PSO for NSW and the ACT which included the following provisions:-

#### **3. General Responsibilities**

*3.1 The Director is to ensure that the processes for responding to complaints of church-related abuse as defined in Towards Healing (Dec. 2000) are operating effectively.*

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<sup>45</sup> Exhibit 55

*3.2 In accordance with Para 35.3.1 of Towards Healing the Director shall*

*3.2.1.1. manage the process in relation to specific complaints,*

*3.2.1.2. appoint assessors, facilitators and reviewers when required,*

*3.2.1.3. convene and chair meetings of the Professional Standards Resource Group as required,*

*3.2.1.4. interact with the National Committee, other Resource Groups, and individual Church bodies and their professional advisers;*

*3.2.1.5. be responsible for the safe-keeping of all documentation connected with these procedures*

*...*

#### **4 Specific Responsibilities**

*4.1 The Director shall, in consultation with NSW Professional Standards Resource Group:*

*4.1.1 provide, as required, formal advice to Bishops and Leaders in regard to complaints received and the application of the policies and procedures in particular cases.*

*4.1.2 develop a panel of available contact persons, assessors, accused's support persons, facilitators and reviewers, as defined in the document.*

*4.1.3 arrange, as required, for the training for contact persons, assessors and others as defined in "Towards Healing".*

*4.1.4 interact with all relevant Church authorities, and Church and other service agencies, including government agencies.*

*4.1.5 interact with NSW Police Service and, in particular its specialist body, the Child Protection Enforcement Agency.*

*4.1.6 interact with the National Committee for Professional Standards and the Professional Standards Resource Groups of other States and Territories.*

*4.1.7 interact with Encompass Australasia*

*4.1.8 ensure continuing development of processes as outlined in "Towards Healing" and incorporate any changes that may need to be implemented from time to time.*

*4.1.9 oversee all expenditure; negotiate sitting and consultancy fees, travel expenses and all other costs incurred in implementing the Towards Healing processes.*

*4.1.10 have an overview of all matters dealt with under these procedures within NSW and the ACT.<sup>46</sup>*

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<sup>46</sup> Exhibit 236

## 5. SUMMARY OF THE EVIDENCE RELATING TO THE FIRST LIMB

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- 5.1 In this part of the report the Commission will summarise some of the oral evidence given by each witness which the Commission considers is relevant to the first limb of the Commission's investigation. The Commission recognises that some of the evidence which later in this report the Commission summarises as being relevant to the second limb of its investigation may also have some relevance to the first limb of the investigation. Likewise, some of the evidence which the Commission summarises as being relevant to the first limb of the investigation may also have some relevance to the second limb of the investigation. The Commission generally accepts the evidence which it will summarise. Later in the report the Commission will indicate parts of the evidence which it does not accept.
- 5.2 In its summary of the evidence of each witness the Commission has sought to group items of evidence under headings.

### The evidence of Davoren

#### Role as Director of the PSO

- 5.3 Davoren gave evidence that he was appointed as the Director of the PSO in 1997 and continued to be the Director until "*late March/early May 2003*".<sup>47</sup>
- 5.4 Davoren agreed that part of his role as Director of the PSO was to supervise the *Towards Healing* process including managing the process for specific complaints.<sup>48</sup> This included him having an "*active role*" in dealing with such matters, including receiving and reviewing complaints before sending them on to the relevant Church Authority, appointing assessors where necessary and

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<sup>47</sup> PIC Transcript, John Davoren, 13 October 2014, p.33:32-37 & p.39:12-16

<sup>48</sup> *ibid*, p.33:39-42 & p.34:21-30

ensuring that proper processes were followed in the assessment process and that any outcome was one that he considered to be appropriate.<sup>49</sup>

5.5 Davoren also agreed that part of his responsibilities in his role as Director was the “*safekeeping of all documentation that was collected by the Catholic Church in connection with the Towards Healing procedures*”.<sup>50</sup>

5.6 Davoren agreed that part of the role of Director involved taking responsibility for interacting with the Police Force and, in particular, the CPEA.<sup>51</sup>

5.7 Davoren said that he also had the responsibility for convening and chairing PSRG meetings.<sup>52</sup>

#### The taking and processing of complaints under the *Towards Healing* protocol

5.8 Davoren said a complaint under Towards Healing was “*taken by the contact person, who then sent me a copy*”.<sup>53</sup>

5.9 In his evidence Davoren said that he did not generally have any involvement with complainants completing the Statement of Complaint forms and that the part of that form where a complainant indicated whether or not he or she wished to take the matter to police was completed by the complainant and the contact person.<sup>54</sup> Any information about this he obtained from the contact person.<sup>55</sup> It was unlikely that he would have had discussions with contact persons about the choice of an individual complainant to approach police, other than in exceptional cases.<sup>56</sup>

5.10 Davoren gave evidence that it was a “*standard question*” for the contact person who was taking a complaint about a criminal matter to mention to the complainant that they were able to take the matter to the police and to advise

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<sup>49</sup> *ibid*, p.34:32-34& pp.39:30-40:6

<sup>50</sup> *ibid*, p.37:1-18

<sup>51</sup> *ibid*, p.37:38-47

<sup>52</sup> *ibid*, p.36:24-41

<sup>53</sup> *ibid*, p.39:41-42

<sup>54</sup> *ibid*, pp.52:45-53:8

<sup>55</sup> *ibid*, p.53:15-46

<sup>56</sup> *ibid*, p.53:41-46

the complainant that the PSO recommended that they do so.<sup>57</sup> Davoren said “*we advised the contact person to bring this up and give it at least equal status, if not more strongly recommend that they go to the police*”.<sup>58</sup> If a complainant decided to take a matter to the police the PSO would support them and provide them with assistance to do so, if they desired it.<sup>59</sup>

5.11 Davoren agreed that the written job descriptions for contact persons did not contain any indication that they should encourage every complainant to report their complaint to the police. However, he said that this would have been emphasised in group training sessions and that contact persons were “*advised that they were to address that subject directly*”.<sup>60</sup> Contact persons were also advised of this in conversations Davoren had had with them, when they were first appointed to the position.<sup>61</sup>

5.12 Davoren gave evidence that in the case of adult abuse or rape “*we’d have a discussion with the complainant and indicate this is a police matter and that she should take it to the police and that we couldn’t promise confidentiality in that matter and recommended strongly that she do so (take the matter to police) or that we would do so on her behalf*”.<sup>62</sup> Davoren said that the advice that confidentiality could not be promised was a reference to the PSO not being able to promise that it would not advise police about the complaint.<sup>63</sup> Davoren said that it was not part of the Towards Healing process to give a specific guarantee of confidentiality to all complainants.<sup>64</sup>

5.13 Davoren said that if a complainant under the *Towards Healing* process decided to take the matter to the police, and the police commenced an investigation, the *Towards Healing* process would be suspended.<sup>65</sup> Davoren said this approach

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<sup>57</sup> *ibid*, p.52:22-28

<sup>58</sup> *ibid*, p.53:17-20

<sup>59</sup> PIC Transcript, John Davoren, 13 October 2014, p.62:21-33 & p.69:24-31; see also PIC Transcript, John Davoren, 14 October 2014, p.105:30-40

<sup>60</sup> PIC Transcript, John Davoren, 13 October 2014, pp.82:22-83:22

<sup>61</sup> *ibid*, pp.52:45-53:22

<sup>62</sup> PIC Transcript, John Davoren, 14 October 2014, p.105:30-40

<sup>63</sup> *ibid*, pp.105:47-106:4

<sup>64</sup> *ibid*, p.141:4-7

<sup>65</sup> PIC Transcript, John Davoren, 13 October 2014, p.62:4-38 & p.63:37-47



was based on the view that it was undesirable that the Church undertake an investigation at the same time as a police investigation, because there was the risk that a concurrent Church investigation might contaminate potential witnesses in any subsequent prosecution.<sup>66</sup>

5.14 Davoren said that a complainant was not required to choose (irrevocably) between the *Towards Healing* process and a police investigation, as they could “opt for one and leave the other option open”.<sup>67</sup>

5.15 Davoren said that, after receiving a complaint, he would study it and send it to the Church Authority with a covering letter.<sup>68</sup> He would supervise the assessment process and ensure the outcome was one that he considered to be appropriate.<sup>69</sup>

5.16 Davoren agreed that part of the assessment process routinely involved the identification of potentially corroborative evidence, and it was expected that in the assessment process such evidence would be considered.<sup>70</sup> This process could involve interviews with the accused and a consideration of any documentation which could provide corroboration of the complaint.<sup>71</sup>

5.17 Davoren said that he, as Director, was not responsible for the outcome of a complaint.<sup>72</sup> If a Church Authority disagreed with a recommendation which resulted from the assessment process, it was required to provide reasons why in writing.<sup>73</sup>

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<sup>66</sup> PIC Transcript, John Davoren, 14 October 2014, p.126:31-40

<sup>67</sup> PIC Transcript, John Davoren, 13 October 2014, p.62:1-19; PIC Transcript, John Davoren, 14 October 2014, p.126:42-47

<sup>68</sup> PIC Transcript, John Davoren, 13 October 2014, p.39:41-43

<sup>69</sup> *ibid*, p.40:3-10

<sup>70</sup> *ibid*, p.41:11-31

<sup>71</sup> *ibid*, p.41:20-26

<sup>72</sup> *ibid*, pp.41:45-42:1

<sup>73</sup> *ibid*, p.42:9-21

## The PSRG

5.18 Davoren gave evidence to the Commission that the PSRG acted as an “*advisory body*” to him in his role as Director of the PSO.<sup>74</sup>

5.19 Davoren gave evidence to the Commission that the following matters were things that he would seek advice on from the PSRG:

- (i) any complications which arose in the assessment of a complaint;<sup>75</sup>
- (ii) any complications involved in reaching an appropriate recommended outcome for a particular matter;<sup>76</sup>
- (iii) where a Church Authority disagreed with the recommended outcome of a particular complaint;<sup>77</sup>
- (iv) where there were complicating factors relating to whether a person should be asked to stand aside from a particular role while a complaint was being investigated.<sup>78</sup>

5.20 During his evidence Davoren agreed that the PSRG was concerned in large part with the welfare of victims and that the Group’s core aim was to ensure that the welfare of the victim was looked after.<sup>79</sup>

## The appointment of Cullen to the PSRG

5.21 Davoren said that he was responsible for appointing members of the PSRG.<sup>80</sup> Davoren gave the following evidence about Cullen’s appointment to the PSRG:-

*Q. Are you able to explain, from your perspective, how it was that [Cullen] came to join the PSRG?*

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<sup>74</sup> *ibid*, p.34:1-4

<sup>75</sup> *ibid*, p.40:12-24

<sup>76</sup> *ibid*

<sup>77</sup> *ibid*, p.42:9-26

<sup>78</sup> *ibid*, pp.43:16-44:14

<sup>79</sup> PIC Transcript, John Davoren, 14 October 2014, pp.130:36-131:3

<sup>80</sup> PIC Transcript, John Davoren, 13 October 2014, p.33:44-46

A. Yes. I have a reasonable memory of that. The resource group was talking about members and they wanted to broaden the base so that it wasn't just fanatical Catholics in the show, that it was a broad base. I remember talking to my opposite number in the Anglican Church, Sydney, about the possibility that he might even join it, but - I didn't make a firm offer, I just said, "What would you think?" And he said, "Thanks all the same". And then I think I spoke - I can't swear to this, but I think I spoke to the Child Protection Enforcement Agency people and said, "What do you think about the possibility of having one of the people there from the Force?" And I think they thought about it and later put up a name.

Q. Why was it that you thought that it would be a good idea to have someone from the Child Protection Enforcement Agency on the PSRG?

A. I don't know that I specified that, but just whether there would be some use in having somebody looking at it from another perspective, and the police seemed to be one such avenue. In fact, I'm not sure that I even came with the proposal that it would be a police person, but somebody who Child Protection Enforcement Agency was aware of.<sup>81</sup>

#### 5.22 Davoren said later in his evidence:-

*My memory is that I had discussion with somebody at Child Protection Enforcement Agency, indicating we were looking for broad-based constructive members of this advisory group and from that discussion he suggested Beth Cullen.*<sup>82</sup>

5.23 Davoren said that he could not recall whether he was specifically seeking a "police perspective" on the PSRG. He was however aware that Cullen was a serving police officer working within the CPEA when her name was suggested.<sup>83</sup>

### Information provided to the PSRG

5.24 In his evidence, Davoren agreed that it was generally discussed at meetings of the PSRG that, where possible, in investigations of complaints under *Towards Healing* interviews of complainants, accused persons and other persons who could provide relevant evidence took place.<sup>84</sup> It was also generally discussed that there might be other forms of evidence collected during the assessment process.<sup>85</sup>

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<sup>81</sup> *ibid*, pp.50:29-51:6

<sup>82</sup> PIC Transcript, John Davoren, 14 October 2014, p.129:23-27

<sup>83</sup> PIC Transcript, John Davoren, 13 October 2014, p.51:8-19

<sup>84</sup> *ibid*, p.49:8-18

<sup>85</sup> *ibid*, p.49:20-25

5.25 Davoren said that, as the PSRG was an advisory group, it was not supplied with “a full report on everything that was happening” within the PSO.<sup>86</sup> However, in complex cases where Davoren required advice from the PSRG, the PSO would give the committee “all the information [the PSO] had”.<sup>87</sup> This would be in a summary form and the full documents would not be routinely provided.<sup>88</sup> However, Davoren agreed that there were occasions when individual assessment reports, individual medical reports and correspondence relating to individual cases would be provided to the PSRG.<sup>89</sup>

5.26 Davoren said that “a lot” of the documentation provided to the PSRG had had the identities of persons removed from them.<sup>90</sup>

5.27 During his evidence Davoren was asked questions as to how documents were supplied to PSRG members. The following question and answer occurred:-

*Q...when an agenda was sent out for a PSRG meeting, documents that it was proposed would be considered at the meeting would be sent out with the agenda?*

*A. I'm relying on my memory, and I can't swear to the accuracy of this, but I wouldn't have thought so. It would just be the agenda went out and the documents were available around the table when people came together.*<sup>91</sup>

5.28 Later in his evidence Davoren said it was his memory that confidential documents to be discussed at PSRG meetings were not distributed prior to the meeting.<sup>92</sup>

5.29 Davoren gave evidence that at the end of a meeting confidential documents were left at the meeting and were not retained by the PSRG members.<sup>93</sup> The documents were then collected by Davoren or a member of his staff.<sup>94</sup>

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<sup>86</sup> *ibid*, p.75:26-28

<sup>87</sup> *ibid*, p.49:20-32

<sup>88</sup> *ibid*, p.49:27-38

<sup>89</sup> *ibid*, pp.49:41-50:8

<sup>90</sup> *ibid*, p.58:7-8

<sup>91</sup> *ibid*, p.38:14-21

<sup>92</sup> PIC Transcript, John Davoren, 13 October 2014, p.50:10-13; PIC Transcript, John Davoren, 14 October 2014, p.126:12-20

<sup>93</sup> PIC Transcript, John Davoren, 13 October 2014, p.58:30-37; PIC Transcript, John Davoren, 14 October 2014, p.126:22-24

## Cullen's role on the PSRG

5.30 Davoren was asked the following questions by Counsel Assisting concerning whether, in his view, Cullen was a representative of the Police Force on the PSRG:-

*Q...From your perspective...was [Cullen on the PSRG] as a representative of the NSW Police Force?*

*A. No, I wouldn't have thought so, not officially. She was there because of her perspective but she wasn't an official representative. There were no such things as official representatives on that group.*

*Q. If she agreed with a proposed mode of resolving a particular complaint or a proposed step to be taken in the process, did you interpret her agreement as agreement given on behalf of the NSW Police Force?*

*A. No.*<sup>95</sup>

5.31 Davoren said that Cullen was given no lesser (and, it was clearly implied, no higher) standing on the PSRG than any other member. He agreed that she brought expertise in the area of child protection to the PSRG and this included experience in identifying how “grooming” by a paedophile may occur.<sup>96</sup>

5.32 Davoren said that it was not part of Cullen's role to provide legal advice to the PSRG.<sup>97</sup>

5.33 Davoren said that Cullen was not a liaison between the Church and the Police Force and information provided to her was not provided as a way of reporting to the Police Force.<sup>98</sup> Davoren gave evidence that he could not recall whether or not Cullen had ever stated that she intended to report information obtained by her as a member of the PSRG to the Police Force. However, he said that, in his view, if Cullen had felt something should be reported, she would have said so at the PSRG meeting.<sup>99</sup> Although he could not recall a specific instance of such

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<sup>94</sup> PIC Transcript, John Davoren, 13 October 2014, p.58:30-37

<sup>95</sup> *ibid*, p.57:1-13

<sup>96</sup> PIC Transcript, John Davoren, 14 October 2014, pp.129:45-130:20

<sup>97</sup> *ibid*, p.129:38-43

<sup>98</sup> PIC Transcript, John Davoren, 13 October 2014, p.57:27-41; PIC Transcript, John Davoren, 14 October 2014, p.126:26-29

<sup>99</sup> PIC Transcript, John Davoren, 13 October 2014, pp.59:26-60:5

advice from Cullen, Davoren said that he was “sure” that she had, as she had a very positive approach to such matters during PSRG meetings.<sup>100</sup>

5.34 Davoren also had no recollection of whether Cullen had indicated a desire to take a document away from a PSRG meeting.<sup>101</sup> He had no recollection of whether or not Cullen had asked to see material which had not already been provided to the PSRG.<sup>102</sup>

5.35 Davoren was asked whether Cullen was free to communicate to the Police Force information she had received while participating in the PSRG. The following questions and answers occurred:-

*Q. Did you consider that Beth Cullen was free to communicate all information passed to her on the Professional Standards Resource Group to her colleagues in the NSW Police Force?*

*A. My memory is that a lot of documentation that we presented to the resource group didn't have the names in.*

*Q. Irrespective of that, did you consider that she was free to pass all and any documents that were provided to her as a member of the Professional Standards Resource Group to her colleagues in the NSW Police Force?*

*A. No, I would have thought that for all members, the papers were put down, discussed and then picked up again, but the media put this down at one stage as destroying records, which it wasn't, of course.<sup>103</sup>*

## Reporting by the PSO to the police

5.36 Davoren said that a report to the police was not routinely made at the time the complaint was received.<sup>104</sup> During Davoren's examination by Counsel Assisting the following questions and answers occurred:-

*Q...I understand that it wasn't your routine practice during the assessment process to notify the police, either of the complaint or of additional information that you had received; is that not right?*

*A. We looked for - I looked for balance of probability evidence before we started to take the matter further. We did get a number of complaints that turned out not to be substantiated. So taking a complaint by somebody who reckoned that 25 years before he or she had been abused by X, we needed*

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<sup>100</sup> ibid, p.60:17-24

<sup>101</sup> ibid, pp.58:44-59:16

<sup>102</sup> ibid, p.61:34-40

<sup>103</sup> ibid, p.58:3-17

<sup>104</sup> ibid, p.45:9-44 & p.54:18-24

to get more information before we started the process that - notify the police, notify the church head.<sup>105</sup>

...

Q...Is it not right that you didn't notify the police unless or until an individual complaint was found to be substantiated?

A. That's true, yes.

Q. And even when a complaint was found to be substantiated, is it not also right that the general practice was only to notify the police by way of an anonymised blind report form?

A. My memory is that I let the police know precisely what the complaint was, but that at this stage the complainant was not prepared to have his or her name given.<sup>106</sup>

5.37 In the last question just quoted Counsel Assisting used the expression "*blind report*". Davoren gave evidence that "*blind report*" was not a term he himself had used while he was the Director of the PSO but he understood what the term meant.<sup>107</sup>

5.38 While Davoren was giving evidence, part of the minutes of a meeting of the PSRG held on 22 October 1999 was read, as follows:-

*Any abuse of a child is reported to police. If the complainant does not wish to complain to police, the information is passed to police without identifying the complainant. This communication is for police intelligence purposes, and is seen to meet the requirements of s 316 of the NSW Crimes Act.*<sup>108</sup>

Davoren agreed that this part of the minutes of the meeting accurately described the practice the PSO had used in making reports to the Police Force throughout the period that Davoren was the Director of the PSO.<sup>109</sup> It was common ground at the hearing that this practice was known as "*blind reporting*".

5.39 Later in this report the Commission will return to the subject of blind reporting and whether blind reporting contravenes s 316 of the *Crimes Act 1900* (NSW)("Crimes Act").

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<sup>105</sup> *ibid*, p.54:28-38

<sup>106</sup> *ibid*, p.55:2-13

<sup>107</sup> PIC Transcript, John Davoren, 13 October 2014, p.86:39-47; PIC Transcript, John Davoren, 14 October 2014, p.127:6-22

<sup>108</sup> PIC Transcript, John Davoren, 14 October 2014, pp.102:18-103:4

<sup>109</sup> *ibid*, p.103:8-11

5.40 Davoren said that if, during the *Towards Healing* process, an accused person made admissions, these would be provided to the Police Force “*when we reached the stage of reporting to the police*” and would “*probably*” be done by including information about the admission on the reporting form, rather than by providing a copy of the admission.<sup>110</sup>

5.41 Davoren agreed that, if a complaint was not substantiated under the *Towards Healing* protocol, no report would be made to the Police Force.<sup>111</sup>

5.42 Davoren said that, if after he sent a blind report form, “*the police came back and said, "We have other cases now, we would like to talk to your complainant", I would go to the complainant and say, "The police would like to talk to you. We recommend you do so and we will help you do so if you would like"*”.<sup>112</sup> Davoren said this kind of request happened “*reasonably frequently*”.<sup>113</sup>

5.43 During Davoren’s evidence the following questions and answers occurred:-

Q. *Did a police officer ever say to you, "you should give us identifying information in relation to the victim in every case."?*

A. *I don't recall that precise sentence but it could well have happened, yes.*

Q. *If you had been advised by the police that you should do that, would you have done that?*

A. *Yes, I think I would have and, in fact, I often did.*<sup>114</sup>

5.44 Davoren gave the following evidence about what he considered to be the value of the practice of withholding the identity of complainants (that is, blind reporting):-

*I think it touches lightly on the fact that many people were reluctant to go to the police and if we indicated that they should, they were inclined - in fact, if we said to them at the beginning of the interview, "what you say now will be handed on to the police", and that's at the beginning of the taking of the complaint, some of them would no longer make a complaint to us either.*

Q. *Upon what basis do you say that?*

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<sup>110</sup> *ibid*, p.118:21-35

<sup>111</sup> *ibid*, p.103:13-24

<sup>112</sup> PIC Transcript, John Davoren, 13 October 2014, p.55:40-44 & see also p.54:8-10

<sup>113</sup> *ibid*, p.56:26-27

<sup>114</sup> PIC Transcript, John Davoren, 14 October 2014, p.107:16-24



A. *That certainly quite a lot of people indicated their fear of going to the police.*

Q. *And did you ever consider that another option would be that you could report the matter, including the victim's details, to the police but tell the police that the victim didn't themselves want to make a statement to the police at this stage and leave it for the police to work out how best to handle that situation?*

A. *If we indicated to the would-be complainant that that's what we were going to do, they in many cases, I suspect, would have got up and left.*<sup>115</sup>

5.45 In examination by his own legal representative Davoren was asked what his view was of the suggestion that the identity of a complainant should be compulsorily disclosed. He said his view was the following:-

*That if it became mandatory, that we did that all the time and we'd have to tell the people at the beginning that we couldn't accept any obligation of confidentiality and certainly they would then hesitate to put the matter before us, so the whole point of having a Towards Healing procedure goes out the window.*<sup>116</sup>

5.46 Davoren gave evidence that he had experience in the field of social work and based on that experience it was his view that it was not in the interests of a victim for the identity of the victim to be compulsorily disclosed to the police.<sup>117</sup>

## The evidence of Salmon

### Role as Director of the PSO

5.47 Salmon commenced as Director of the PSO in April 2003 and he was still the Director on the day he gave evidence to the Commission.<sup>118</sup>

5.48 In his evidence Salmon agreed that his role as Director included the management of specific complaints being dealt with under *Towards Healing*.<sup>119</sup> This included ensuring that the *Towards Healing* processes were operating effectively.<sup>120</sup> It also included deciding whether or not a matter should be

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<sup>115</sup> *ibid*, p.113:11-31

<sup>116</sup> *ibid*, p.135:35-40

<sup>117</sup> *ibid*, pp.135:42-136:32

<sup>118</sup> PIC Transcript, Michael Salmon, 14 October 2014, p.144:7-30

<sup>119</sup> *ibid*, p.145:40-45

<sup>120</sup> *ibid*, pp.144:45-145:2

reported to the Police Force. It was also part of his role to liaise with the Police Force in relation to certain matters.<sup>121</sup>

5.49 Salmon agreed that part of his role was the safekeeping of documentation obtained during the *Towards Healing* process.<sup>122</sup>

5.50 Salmon gave evidence that the PSO acted as a secretariat for the PSRG. This included organising PSRG meetings, sending out agendas to PSRG members and taking minutes of meetings.<sup>123</sup>

#### The taking and processing of complaints under the *Towards Healing* protocol

5.51 In his evidence Salmon said that contact persons were advised and required to ask the question whether a complainant intended to notify the police, which appeared on the standard form statement of complaint form.<sup>124</sup> He said that as Director of the PSO he was involved in the training of contact persons, which would occur on an annual basis. It was part of that training that contact persons should inform all complainants that they had a right to go to the police and that they should “*actively encourage*” complainants to do that. On training days contact persons would be told that “*it was the preference of the church for complainants to go to the police in the first instance*”.<sup>125</sup> Salmon said that in all his dealings with contact persons he “*would always validate the importance of the complainant being aware of their rights, vis-a-vis the police and the criminal justice system*”.<sup>126</sup>

5.52 Salmon gave evidence that contact persons were a “*mixed bag*” of people. He said that he saw the main requirement of a contact person was to be “*somebody who was deeply empathetic and sensitive to victims of abuse*” and a “*common sense person*” who could handle the “*difficult*” task required of them.

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<sup>121</sup> *ibid*, pp. 145:47-146:3 & p.152:1-12

<sup>122</sup> *ibid*, p.150:42-45

<sup>123</sup> *ibid*, p.150:24-30

<sup>124</sup> *ibid*, p.186:26-38

<sup>125</sup> *ibid*, p.159:13-39

<sup>126</sup> *ibid*, p.160:19-34

Some contact persons would have been social workers who had supported victims of crime in the past.<sup>127</sup>

5.53 Salmon said that he had personally sought amendments to the Statement of Complaint form used in the *Towards Healing* process to reflect the “*strong position*” of the Church that “*people should be encouraged to go to the police in the first instance*”.<sup>128</sup>

5.54 In his evidence to the Commission Salmon said the following about the policy of the PSO, where a complaint under *Towards Healing* was also the subject of a police investigation:-

*...it's certainly been our policy and it continues to be the policy that if it's clear that the police are interested in a matter and there's the potentiality that we're aware of a police inquiry or we are aware that there's a police inquiry in train, that everything we do really is put on hold and put - other than supporting the complainant and I think we've got much stronger and better at doing that. So, you know, continuing to provide counselling and being there for the complainant and not simply saying, "Well, you're now with the police and there's a police process going forward. Therefore, we'd really kind of - you know, you're out of sight out of mind, until that's completed."*<sup>129</sup>

5.55 The following question and answer then occurred:-

*Q. And in the period 2003 to 2005, in relation to the police process, you're confident that, in effect, complainants had to make a choice between whether they wanted at a particular point in time to go through the church process, or the police process?*

*A. Well, I was confident and I still think that's the case, that, you know, they need to make a choice as to what they want to do, but the reality is, if they come into *Towards Healing*, they can change that choice at any time.*<sup>130</sup>

5.56 Salmon agreed that records connected with *Towards Healing* proceedings and kept by the PSO included assessment reports, transcripts of interviews with relevant witnesses, medical and psychological reports, records of admissions by accused persons, documentary records relating to the matter obtained from

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<sup>127</sup> *ibid*, p.196:19-38

<sup>128</sup> *ibid*, p.187:15-22

<sup>129</sup> *ibid*, pp.161:42-162:8

<sup>130</sup> *ibid*, p.162:11-19

the relevant Church authority and records of inquiries made in investigating the complaint.<sup>131</sup>

## The PSRG

5.57 Salmon gave evidence that the PSRG acted as an “*advisory body*” to him in his role as Director of the PSO.<sup>132</sup>

5.58 In his evidence Salmon said that he sought advice from the PSRG on the following matters:

- (i) his role as Director of the PSO in ensuring that *Towards Healing* processes were operating effectively;<sup>133</sup>
- (ii) whether a particular complaint fell within the jurisdiction of the *Towards Healing* protocol;<sup>134</sup>
- (iii) particular cases being dealt with by the PSO, where there were issues that Salmon would like to discuss with the PSRG;<sup>135</sup>
- (iv) whether, in some particular cases, a complainant should be advised to go to the police.<sup>136</sup>

5.59 In his evidence Salmon said he believed that it would have been known to, and understood by, the PSRG that its primary functions were victim welfare and support and assisting the PSO in carrying out its functions.<sup>137</sup>

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<sup>131</sup> *ibid*, pp.150:42-151:41

<sup>132</sup> *ibid*, pp.144:45-145:2

<sup>133</sup> *ibid*

<sup>134</sup> *ibid*, p.145:4-10

<sup>135</sup> *ibid*, p.156:5-12

<sup>136</sup> *ibid*, p.198:12-21

<sup>137</sup> *ibid*, p.194:22-24

## Information provided to the PSRG

5.60 Salmon said that the PSO held a number of documents relating to complaints being dealt with under the *Towards Healing* process, including transcripts of interviews with involved persons and witnesses, assessment reports, medical reports, records of admissions by accused persons and other documents relevant to the assessment of a complaint.<sup>138</sup> Salmon said it was his recollection that it was generally discussed within the PSRG that one of the methods of assessing a complaint was to interview persons who had been identified as potential witnesses.<sup>139</sup>

5.61 Salmon said that prior to PSRG meetings the PSO would send out an agenda to the various members.<sup>140</sup> Draft letters to complainants to be put before the PSRG would have been sent out prior to the meeting or tabled at the meeting.<sup>141</sup>

5.62 During his evidence Salmon was shown a copy of a “case report” document which was attached to an agenda for a PSRG meeting.<sup>142</sup> Salmon agreed that it was his practice to attach such reports to agendas sent out to PSRG members. He said that this “*was the practice that was in place when I assumed the position and it's a practice I continued*”.<sup>143</sup> When asked by Counsel Assisting whether the case report was “*the way in which you sought to report the individual complaints or cases that you were putting before the PSRG*” Salmon replied:-

*...it was the way of allowing the PSRG to get a sense of what the Office was dealing with and to take them to a particular case...if I had decided that there were issues that I wanted to discuss.*<sup>144</sup>

5.63 During Salmon’s evidence the following questions and answers occurred:-

*Q...Was it your practice to send out...supporting documents for discussion in relation to individual cases together with the agenda for the PSRG meeting?*

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<sup>138</sup> *ibid*, pp.150:42-151:41

<sup>139</sup> *ibid*, p.161:13-18

<sup>140</sup> *ibid*, p.150:25-27

<sup>141</sup> *ibid*, p.174:2-9

<sup>142</sup> *ibid*, pp.154:13-156:3

<sup>143</sup> *ibid*, p.154:22-25

<sup>144</sup> *ibid*, p.156:5-12

A. Often. I don't know whether that occurred - I'm not sure that occurred always but often that would have been the practice.

Q. And were any instructions given to the members of the PSRG in relation to what they should do with these documents, such as the case reports and the supporting correspondence or other documentation?

A. Well, they were never given any instructions by me. I just - I understood, having come into the role and joining the meeting for the first time, or early on, that it was practice that the members would leave the documents that had been provided to them in the room and not take them with them. So it was a - you know, a process that just continued. It's not a situation where I ever counted off the documents to see that, you know, if we had issued 10 sets, we had 10 sets left there, but it was just a practice that continued without any particular comment.<sup>145</sup>

5.64 Salmon gave evidence that he could not remember any discussion between 2003 and 2005 of any requirement that PSRG members keep confidential the information they obtained through the PSRG.<sup>146</sup> He could not remember any instance where a PSRG member had asked to communicate to someone outside of the PSO information the member had acquired while participating in the PSRG.<sup>147</sup>

5.65 Salmon said that discussion within the PSRG about individual cases occurred in a “*de-identified*” manner, such that the identity of individuals in a case would not become known to members.<sup>148</sup> Salmon said the purpose of this was “*ensuring the confidentiality of all parties and also mitigating against any conflict of interest where persons...sitting around the resource group may have known somebody*”.<sup>149</sup>

5.66 During his evidence Salmon was asked whether, despite the documents being “*de-identified*”, an alleged accused might be able to be identified from information in the documents about the circumstances of the complaint. Salmon said that he not think this could easily have been done.<sup>150</sup>

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<sup>145</sup> ibid, pp.154:34-155:7

<sup>146</sup> ibid, p.155:20-25

<sup>147</sup> ibid, p.155:27-31

<sup>148</sup> ibid, p.164:4-30

<sup>149</sup> ibid, p.164:40-43

<sup>150</sup> ibid, p.164:22-26

## Cullen's role on the PSRG

5.67 In his evidence Salmon was asked whether he considered Cullen to be participating in the PSRG as a representative of the Police Force. Salmon said:-

*I understood that she was a serving police officer and was there in police time but not as a representative of the police force in the sense of the general advice in that she was giving, it was not police-specific advice that I can recall.*<sup>151</sup>

5.68 Salmon said he did not see Cullen as being a liaison between the PSRG and the Police Force and she was not a means by which reports were provided to the Police Force. He said that her presence on the PSRG was not a means of ensuring that the Police Force was aware of what the PSRG was doing about particular cases.<sup>152</sup>

5.69 During Salmon's evidence the following questions and answers occurred:-

*Q. And can you recall any case in which Beth Cullen approached you, either within the PSRG or after the meeting or on some other occasion, and asked you for further information in relation to a case that had been discussed at the PSRG?*

*A. I can't recall any such instance.*

*Q. And can you remember any instance when Beth Cullen suggested to you that a particular case that had been discussed in the PSRG should be referred to the NSW Police for investigation?*

*A. I can't recall that being the case.*

*Q. And can you remember any case when Beth Cullen suggested to you that you should go back to the victim and seek to encourage the victim to report the matter to the police?*

*A. I can't recall that.*

*Q. And did Beth Cullen ever advise you to go back and check that an individual complainant had made a properly informed choice, either through completion of the statement of complaint form or through the assessment process, not to report the matter to the police?*

*A. I can't recall that.*

*Q. And if you'd received that advice from Beth Cullen during a PSRG meeting, would you have ensured that it was recorded in the minutes?*

*A. I expect it would have been recorded in the minutes, yes, for sure.*<sup>153</sup>

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<sup>151</sup> *ibid*, p.163:9-13

<sup>152</sup> *ibid*, p.163:24-45

<sup>153</sup> *ibid*, p.165:8-38

5.70 Salmon was asked by the legal representative for Cullen whether he allowed for the possibility that the above discussions with Cullen had occurred but that he could not recall them occurring. Salmon said he did allow for such a possibility.<sup>154</sup> He also agreed with a suggestion from the legal representative for Cullen that, if he had had conversations after the meeting with Cullen where such matters were discussed, those discussions would not be recorded in the minutes.<sup>155</sup>

5.71 During Salmon's evidence the following further questions and answers occurred:-

*Q. And did Beth Cullen ever advise you that you yourself should report a matter to the police other than through the blind report form that we've already referred to?*

*A. Not that I can recall.*

*Q. And you've said "Not that I can recall". If in any of those instances the advice had been given, do you believe that it's something that you would have recalled?*

*A. I think more likely than not. I mean, this is going back to the very - well, part of the - my time with Beth Cullen was at the very beginning of me taking on the job over 11 years ago, but I think probably more likely than not I might have recalled it.*

*Q. And in relation to Beth Cullen's role on the PSRG, did you rely on her to provide advice if a particular matter should be reported to the police other than through the blind reporting process?*

*A. Not that I can recall.*

*Q. And did you rely on Beth Cullen to provide you with any information that she might have through her police role in relation to any individual offender who was identified through the PSRG process?*

*A. Not that I can recall.*

*Q. And when you say "Not that I recall" those questions were whether you were relying on her. Are you saying that during the time that she was present on the PSRG and you were the director of the PSO, you were not relying on her to provide that sort of advice?*

*A. Well, I wasn't and I can't recall that there was any discussion along the lines that you're suggesting, but certainly we - I wasn't relying on her to provide that sort of information.*<sup>156</sup>

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<sup>154</sup> *ibid*, pp.192:32-193:1

<sup>155</sup> *ibid*, p.193:3-7

<sup>156</sup> *ibid*, pp.165:40-166:27



5.72 During his evidence Salmon was asked whether he considered that Cullen was free to communicate all information which was passed to her on the PSRG to her colleagues in the Police Force. Salmon gave the following answer:-

*I never really gave it any thought, to be quite honest. I mean, we spoke about the cases in a de-identified way, so I didn't believe there was any particular caveat with her generally discussing de-identified cases or the general workings of the resource group or the whole Towards Healing protocol, just as I would not have - I would have a similar view about other members on the resource group.*<sup>157</sup>

5.73 The following question and answer then occurred:-

*Q. And did you expect that she would discuss any particular case that she learnt about through the PSRG with her colleagues on the NSW Police Force?*

*A. Well, I don't know whether I expected anything, but it was - as I said, it de-identified cases, so I don't particularly see a caveat against her having discussions with whoever, just like I don't see a caveat against any other member having discussions about de-identified cases.*<sup>158</sup>

## Reporting by the PSO to the police

5.74 In his evidence Salmon said that the blind report form he used to make reports to the Police Force was in place when he assumed the position of Director of the PSO.<sup>159</sup> Salmon referred to the practice of blind reporting as one that he had “*inherited*”.<sup>160</sup> Salmon said:-

*...it was an arrangement in place that had been operational from when I came into the job and continued to be so and I believe that that was acceptable to the police.*<sup>161</sup>

5.75 Salmon gave evidence that, to the best of his knowledge, absent an inquiry from police about a matter blind reporting was the only reporting the PSO would make to police.<sup>162</sup> Salmon said that he would provide a summary of the

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<sup>157</sup> *ibid*, p.164:4-11

<sup>158</sup> *ibid*, p.164:13-20

<sup>159</sup> *ibid*, p.147:5-12

<sup>160</sup> *ibid*, p.171:29-31

<sup>161</sup> *ibid*, p.191:2-5

<sup>162</sup> *ibid*, p.146:14-16 & p.158:29-34

complaint on the reporting form and would not attach any further documents or information.<sup>163</sup>

5.76 Salmon said that, where a complaint was found to be established under the *Towards Healing* process, the only report sent to the Police Force would be a blind report.<sup>164</sup> If this report was made early in the *Towards Healing* process, there was no established procedure to ensure that any further information obtained during the assessment of that complaint was communicated to the Police Force.<sup>165</sup>

5.77 Salmon gave evidence that the point in a *Towards Healing* process at which a blind report would be made was variable and there was no set point at which the report would be made.<sup>166</sup> Salmon said there was no standard practice that a blind report would be made as soon as a complaint was received.<sup>167</sup> Salmon said the following in relation to the time at which a blind report was made:-

*Sometimes it was almost immediately, sometimes because of other exigencies it might be later and sometimes even considerably later, but there wasn't really an absolutely standard practice in terms that we had, you know, a definitive time frame that said that they would all be disseminated to the police within a certain period of time.*<sup>168</sup>

5.78 The time at which the report would be made was “*purely an operational decision within the Professional Standards Office*” and did not involve the PSRG.<sup>169</sup> The making of a blind report did not depend on the complaint being substantiated.<sup>170</sup>

5.79 During Salmon's evidence the following questions and answers occurred:-

*Q. In any of these cases, at the point when the complaint was found to be substantiated, did you ask that someone go back to the complainant and*

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<sup>163</sup> *ibid*, p.146:25-41

<sup>164</sup> *ibid*, p.158:29-34

<sup>165</sup> *ibid*, p.167:17-22

<sup>166</sup> *ibid*, p.167:13-15

<sup>167</sup> *ibid*, p.167:8-11

<sup>168</sup> *ibid*, pp.166:44-167:6

<sup>169</sup> *ibid*, p.167:24-28

<sup>170</sup> *ibid*, p.166:29-36

*identify whether or not at that point, given that the complaint had been substantiated, they might wish to take the complaint to the police?*

*A. Not in so many ways, no.*

*Q. Is it not in any ways?*

*A. No, that's not correct, because as the process went forward, either myself or the case worker would frequently have involvement with the complainant, sometimes considerable involvement, sometimes less, but I would routinely inform people at different stages that they have a right to take their matter to the police, that it is a matter that - so I attended a lot of the facilitations, a lot of the pastoral meetings, there might have been contact over the telephone. I can't say that I said that to every single complainant, but I believe I had a conversation of that sort with most of them going forward and it was very much about validating their right to go to the police at any time and that the fact that they were in Towards Healing can never extinguish that right. So frequently we had those sorts of conversations with complainants<sup>171</sup>*

5.80 In his evidence Salmon agreed with Counsel Assisting that, where a blind report was made early on in the *Towards Healing* process, there was an inherent risk that not all the information obtained during that process would be reported to the police.<sup>172</sup>

5.81 In his evidence Salmon agreed that on occasions complainants changed their position on whether or not they were willing to speak to the police and that the fact that a complainant indicated at a certain point in time that they were not willing to speak to police did not mean that they would always hold that view.<sup>173</sup> He also agreed that the indication given by the victims went to whether or not they themselves wished to approach police and not to whether they consented to a third party, such as the PSO, supplying their identifying details to the police.<sup>174</sup> The following questions and answers then occurred:-

*Q. And so on what basis did you consider it appropriate in these forms not just to indicate that the informant wasn't willing to speak to police, but also to withhold the victim's identifying details?*

*A. I've answered previously that it was an arrangement in place that had been operational from when I came into the job and continued to be so and I believe that that was acceptable to the police.*

*Q. And what was your understanding of the purpose of the arrangement in particular of the purpose of withholding the victim's identifying details?*

*A. I believe that the purpose of it was that it - a lot of people had issues around confidentiality and sensitivity around these sorts of issues and that it*

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<sup>171</sup> *ibid*, pp.158:36-159:11

<sup>172</sup> *ibid*, p.170:32-38

<sup>173</sup> *ibid*, p.190:4-33

<sup>174</sup> *ibid*, p.190:35-43

*enabled their information to be provided to the police for intelligence purposes, but respecting their wish for confidentiality and their sensitivities around issues.*<sup>175</sup>

5.82 Salmon said that occasionally after a blind report was made a request would be made by the Police Force for further information.<sup>176</sup> During his evidence the following question and answer occurred:-

*Q. And what was the, if you like, conduit or the way in which that request would be provided to you? Would it be through the criminal protection enforcement agency?*

*A. To the best of my knowledge, the bulk of those requests would have come from local area commands or other parts of the police force. I can't say that it's never come from the sex crime squad, as we called them, but – so to the best of my knowledge, it's come from the local area commands and from time to time they've requested that I go back to the complainant and ask them if they would be willing to talk to the police, which is what I've done, always done, but it has been my practice for the best part of my time there to say to the police at the end of the day, if they want the information then we provide it, simply upon them issuing a request in writing which could be via email, it didn't have to be hard copy. It was a decision for them. I mean, they knew that the – that we had that other information and it was a decision for them whether they were happy to rely on me talking to the informant and leave it at that or not.*<sup>177</sup>

5.83 Salmon said it was his practice to act on requests by the Police Force. Salmon said that *“very early in my career I adopted the view that at the end of the day...we're there to cooperate with the police and if they want information from us, then we need to provide that upon them issuing a written request”*.<sup>178</sup>

5.84 Salmon said that access to PSO material by police officers had occurred in a number of ways, including by permitting officers to attend the PSO's office and review the PSO's holdings.<sup>179</sup> On a written request information was provided by the PSO to the Police Force in full and not redacted in any way.<sup>180</sup>

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<sup>175</sup> *ibid*, pp.190:45-191:15

<sup>176</sup> *ibid*, p.146:43-46

<sup>177</sup> *ibid*, p.147:1-20

<sup>178</sup> *ibid*, p.147:31-35 & see p.177:15-23

<sup>179</sup> *ibid*, p.149:1-16

<sup>180</sup> *ibid*, p.149:1-5

5.85 Salmon gave evidence that he would not seek the victim's consent before providing information to the Police Force.<sup>181</sup> If the Police Force indicated that it wished to talk to a complainant, then the PSO would facilitate that.<sup>182</sup>

5.86 Salmon said that he could not recall ever refusing a request by police for information held by the PSO.<sup>183</sup>

5.87 Salmon said that he believed he had told the PSRG that "*the general policy of the Professional Standards Office is to cooperate with the police*".<sup>184</sup>

5.88 Salmon said that he had not been advised directly by anyone from the Police Force, including Cullen, that the practice of blind reporting was incongruent with s 316 of the Crimes Act.<sup>185</sup> Salmon said he could not recall any police officer advising him that the blind reporting system was flawed.<sup>186</sup>

5.89 In his evidence Salmon said that he believed that he was satisfying his obligations under s 316 of the Crimes Act through the practice of blind reporting.<sup>187</sup> Salmon said that this belief was not the result of any advice received from Cullen or any other member of the Police Force.<sup>188</sup>

## The evidence of McDonald

### McDonald's membership of the PSRG

5.90 McDonald was a member of the PSRG between 1999 and 2005.<sup>189</sup> McDonald was also the executive director of the CCER, but said that he was not on the

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<sup>181</sup> *ibid*, p.148:18-23

<sup>182</sup> *ibid*, p.148:25-39

<sup>183</sup> *ibid*, p.148:24-26

<sup>184</sup> *ibid*, p.149:35-36

<sup>185</sup> *ibid*, p.180:24-45 & p.181:5-13

<sup>186</sup> *ibid*, p.171:33-40

<sup>187</sup> *ibid*, p.173:15-30

<sup>188</sup> *ibid*, p.174:11-22

<sup>189</sup> PIC Transcript, Michael McDonald, 15 October 2014, p.209:38-40

PSRG as a representative of the CCER.<sup>190</sup> McDonald said he was not on the PSRG in any official capacity.<sup>191</sup>

#### Information provided to the PSRG

5.91 McDonald was asked questions by Counsel Assisting regarding material which had been supplied to him as a member of the PSRG.

5.92 McDonald agreed that agendas would be sent out in advance of PSRG meetings.<sup>192</sup> McDonald could not recall whether there were documents attached to the agendas. He thought that he might have received “*case summary documents*” in advance of a meeting and it was possible that such documents were attached the agenda.<sup>193</sup> McDonald said these case summary documents were “*basically a summary of fundamental aspects of individual cases*”.<sup>194</sup>

5.93 In questioning by the legal representative for Cullen McDonald agreed that he did not have a definitive recollection of what documents were sent out prior to PSRG meetings.<sup>195</sup> He said that he “*was not clear*” about what material was sent out but it was true that “*very often material was available to members once they came to the meeting*”.<sup>196</sup>

5.94 McDonald said it was his practice to leave all the documents he had received at the venue for a PSRG meeting when the meeting concluded.<sup>197</sup>

5.95 McDonald agreed with Counsel Assisting that as a member of the PSRG he would have been generally aware that only a small proportion of the

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<sup>190</sup> *ibid*, p.209:38-47 & p.215:7-22

<sup>191</sup> *ibid*, p.209:46-47

<sup>192</sup> *ibid*, p.210:7-9

<sup>193</sup> *ibid*, p.210:20-30 & p.212:19-24

<sup>194</sup> *ibid*, p.221:2-8

<sup>195</sup> *ibid*, p.229:15-20

<sup>196</sup> *ibid*, p.229:37-39

<sup>197</sup> *ibid*, p.229:44-46

information that was held by the PSO was shared directly with the PSRG.<sup>198</sup>

During his evidence the following questions and answers occurred:-

*Q...you knew, as a member of the PSRG, for example, that the PSO would hold records of interviews?*

*A. The PSRG may have been aware that some interviews were held by the PSO but I don't believe we - the PSO would have held all the records.*

*Q. And in the example I gave you earlier in a case report, there was a reference to "substantiated by admission"; do you recall that?*

*A. Yes, I remember the example that you provided, yes.*

*Q. So you agree that you were aware that, for example, the PSO would hold records of any admissions made by those who were accused of abuse through the Towards Healing process?*

*A. The PSO would have records and at various points they would have been able to draw conclusions about where that particular matter was in relation to finalising it.<sup>199</sup>*

## Cullen's role on the PSRG

5.96 In his evidence McDonald was asked by his own legal representative in what capacity, on his understanding, Cullen was a member of PSRG. He gave the following answer:-

*I thought she was there as a volunteer who had expertise in child protection who could make a contribution to the committee. In fact, she did that and she did it very well. She informed and educated the committee about the behaviours of perpetrators, she brought a sensitivity to the needs of victims, and she made a great contribution and the committee was enhanced by her presence.<sup>200</sup>*

5.97 During examination by Counsel Assisting McDonald said that he could not recall any instance during a PSRG meeting where Cullen had advised that a particular matter should be reported to the Police Force or that information tabled at a PSRG meeting or held by the PSO should be provided to the Police.<sup>201</sup>

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<sup>198</sup> *ibid*, p.221:1-6

<sup>199</sup> *ibid*, p.221:10-27

<sup>200</sup> *ibid*, p.232:3-9

<sup>201</sup> *ibid*, p.214:9-18

5.98 In his evidence McDonald said he could not recall Cullen giving any advice relating to the blind reporting practices of the PSO.<sup>202</sup>

## The evidence of Heslop

### The CPEA and Heslop's position as Commander

5.99 In his evidence Heslop said that the CPEA was established on 1 January 1996 and commenced operations in July 1996.<sup>203</sup> Towards the end of 1996 Heslop, then a Superintendent of Police, was appointed Commander of the CPEA. Prior to this appointment Heslop had been acting Commander of the CPEA.<sup>204</sup>

5.100 Heslop gave evidence that the CPEA had both an investigative and an intelligence function.<sup>205</sup>

### The appointment of Cullen to the PSRG

5.101 Heslop had only a limited recollection of Cullen being appointed to the PSRG.

5.102 Heslop said that he had no recollection of Cullen speaking to him about participating in the PSRG but did not exclude the possibility that such a conversation may have occurred.<sup>206</sup> Heslop said it was unlikely that he would have permitted Cullen to join the PSRG, without discussing the matter with her first.<sup>207</sup> Heslop had no recollection of any conversation with Cullen regarding whether or not there might be a conflict of interest in her participating in the PSRG but he could not say that such a conversation had not taken place.<sup>208</sup>

5.103 Heslop said that he could not recall who had recommended that Cullen be a member of the PSRG but in his view her membership was advantageous.<sup>209</sup>

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<sup>202</sup> *ibid*, p.228:30-33

<sup>203</sup> PIC Transcript, John Heslop, 15 October 2014, p.235:9-16

<sup>204</sup> *ibid*, p.235:18-24

<sup>205</sup> *ibid*, p.235:26-32

<sup>206</sup> *ibid*, p.286:42-45

<sup>207</sup> *ibid*, pp.286:47-289:7

<sup>208</sup> *ibid*, p.266:14-21

<sup>209</sup> *ibid*, p.292:22-33



Heslop said Cullen was “*well versed*” in the child protection environment and in serial offending and was “*very professional*”. Heslop agreed in his evidence that Cullen was highly qualified to provide assistance to a group such as the PSRG.<sup>210</sup>

5.104 During his evidence Heslop was asked the following question by the legal representative for Cullen and gave the following answer:-

*Q. From what you know of her and from your experience with her, she was a police officer who really dedicated herself to those sorts of duties?*

*A. Outstanding.*<sup>211</sup>

### Cullen’s role on the PSRG

5.105 Heslop had only a limited recollection of Cullen’s membership of the PSRG.<sup>212</sup>

He did remember that Cullen was a member of the PSRG.<sup>213</sup> During the period that she was on the PSRG she had been an officer of the CPEA.<sup>214</sup> Heslop said that for part of the period in which Cullen was on the PSRG she was on leave without pay from the Police Force and working for the NSW Ombudsman.<sup>215</sup>

5.106 During Heslop’s evidence the following questions and answers occurred:-

*Q. Do you have any recollection of what you expected in relation to her as an officer attending PSRG meetings?*

*A. No.*

*Q. Did you consider that she was there to ensure that all information held by the church which related to serious criminal conduct was appropriately reported to the NSW Police Force?*

*A. I would have expected her to convey anything to the Police Service had she become aware.*

*Q. And would you have expected her to convey to the Police Service any information she gained on the PSRG in relation to any child sexual abuse offending behaviour?*

*A. I would think that would be the case, yes.*

*Q. Would you have expected her to communicate that to the CPEA?*

*A. Yes.*

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<sup>210</sup> *ibid*, pp.292:35-293:4

<sup>211</sup> *ibid*, p.288:35-38

<sup>212</sup> *ibid*, p.257:1-38

<sup>213</sup> *ibid*, p.257:1-8

<sup>214</sup> *ibid*, p.257:26-34

<sup>215</sup> *ibid*, p.257:16-24

Q. *Did you consider that any information that the Catholic Church held in relation to such offending behaviour should have been reported to the NSW Police Force?*

A. Yes.

Q. *Including information identifying the victim?*

A. *That would be my desire, yes.*

Q. *And did you ever check that that was happening?*

A. *Not that I remember.*

Q. *Did you consider that if Beth Cullen received information through the PSRG, that process of her gaining the information on the PSRG amounted to a report to the NSW Police Force?*

A. *Probably, yes.*<sup>216</sup>

5.107 Heslop said that he could not remember taking any steps to ensure that Cullen reported to the Police Force information about criminal conduct obtained by her as a result of her position on the PSRG.<sup>217</sup>

5.108 In his evidence Heslop said he was aware that the *Towards Healing* process involved a process of investigation which sometimes included complaints of child sexual abuse.<sup>218</sup> Heslop was also aware that the *Towards Healing* process involved the conduct of interviews with complainants and with persons who might be corroborating witnesses.<sup>219</sup>

5.109 Heslop said that prior to the Commission's public hearing he had not known what the PSRG did. However, he accepted that while he was a member of the Police Force he might have been aware of what functions the PSRG performed.<sup>220</sup> He was not aware that material was distributed to PSRG members before or during meetings.<sup>221</sup>

5.110 During his examination by Counsel Assisting Heslop was shown a copy of a "cases list" document which had been before the PSRG. Heslop said he could not remember whether he had ever been shown a copy of a "cases list" by

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<sup>216</sup> *ibid*, pp.257:36-258:25

<sup>217</sup> *ibid*, p.258:18-19 & p.267:10-13

<sup>218</sup> *ibid*, p.259:2-6

<sup>219</sup> *ibid*, p.259:8-26

<sup>220</sup> *ibid*, p.287:9-17

<sup>221</sup> *ibid*, p.258:27-33

Cullen.<sup>222</sup> Heslop was shown part of the document which indicated that an allegation of sexual abuse against a child had been found to be substantiated. Heslop said he thought this was a matter which he would have expected to be reported to the Police Force as an event report. He said that he could not remember taking any steps to ensure that Cullen was reporting this kind of information.<sup>223</sup>

5.111 During his evidence Heslop was also shown a copy of a completed statement of complaint form.<sup>224</sup> Heslop agreed that the circumstances contained on the form potentially disclosed criminal conduct. Heslop said he would have thought that a matter of the nature disclosed in the form should have been reported to the Police Force.<sup>225</sup>

## Reporting by the PSO to the police

5.112 In his evidence Heslop said he had not heard the term “*blind reporting*” until the commencement of the Commission’s hearings.<sup>226</sup>

5.113 Heslop gave evidence that, when he was Commander of the CPEA, he was not aware of the PSO’s practice of blind reporting.<sup>227</sup> He could not recollect having seen the pro forma blind reporting document used by the PSO.<sup>228</sup>

5.114 Heslop said he was not aware that Davoren considered that he was making blind reports by virtue of an arrangement he thought had been established with the police.<sup>229</sup> Heslop could not recollect one way or the other whether he had been consulted on such an arrangement.<sup>230</sup>

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<sup>222</sup> *ibid*, p.266:23-43

<sup>223</sup> *ibid*, pp.266:45-267:13

<sup>224</sup> *ibid*, p.267:24-41

<sup>225</sup> *ibid*, p.268:4-19

<sup>226</sup> *ibid*, p.260:18-22

<sup>227</sup> *ibid*, pp.250:38-251:15, p.260:4-7, p.260:24-30 & p.270:38-45

<sup>228</sup> *ibid*, p.270:22-29

<sup>229</sup> *ibid*, pp.260:41-261:3

<sup>230</sup> *ibid*, p.261:5-11

5.115 Heslop could not recall having had any conversation with Cullen about the reporting practices of the PSO.<sup>231</sup> Heslop said that he did not conduct any checks of the database to see what reports were being made by the Church. The reason he did not do this “*may*” have been because of the size of his command and the large number of reports it was receiving.<sup>232</sup>

5.116 Heslop gave evidence that he was not aware of any practice of the CPEA whereby reports from the PSO were logged for information only and treated as “*intelligence-only*” documents.<sup>233</sup> Heslop did not recall what the the CPEA’s practice was for dealing with reports from the PSO.<sup>234</sup>

5.117 In his evidence Heslop said that it was one of his aims as Commander to establish a free exchange of information between agencies and that it “*might*” have been the case that, at the time, he was aware of the reporting practice of the Catholic Church to the CPEA.<sup>235</sup> Heslop said, that if he had been aware of the practice, he would “*probably not*” have been content with it, as “*having as much information as is available to convey to the police for intelligence purpose or other purpose...would be greatly beneficial*”.<sup>236</sup>

5.118 In his evidence Heslop said that he took over as the head of the CPEA after the conclusion of the RCPS.<sup>237</sup> Heslop agreed that, prior to commencing his position at the CPEA, he had had the view that there were difficulties in obtaining information and intelligence from organisations. Heslop agreed that it was his view and the view of the Police Force that it was necessary to find a way to get as much information as possible out of organisations, which could assist police.<sup>238</sup> Heslop agreed he took steps to try to ensure that as much information as possible was forthcoming from organisations such as the Catholic Church.<sup>239</sup>

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<sup>231</sup> *ibid*, p.251:30-42

<sup>232</sup> *ibid*, p.260:9-16

<sup>233</sup> *ibid*, pp.274:44-275:2

<sup>234</sup> *ibid*, p.275:8-20

<sup>235</sup> *ibid*, p.252:12-22

<sup>236</sup> *ibid*, p.260:37-39

<sup>237</sup> *ibid*, pp.289:42-283:2

<sup>238</sup> *ibid*, pp.290:16-291:10

<sup>239</sup> *ibid*, p.292:9-13 & p.296:8-14

## The creation of reports on the COPS system

5.119 Heslop agreed that within the CPEA there were intelligence managers, who would not necessarily carry out an investigative role but who would act as liaison with other police officers in order to ensure that appropriate intelligence was passed to officers who were investigators.<sup>240</sup>

5.120 Heslop agreed in his evidence that information in an intelligence report held by the CPEA would not itself be investigated but might be used to corroborate or provide relevant information for other investigations.<sup>241</sup> However, Heslop said that information which was the subject of an intelligence report and information to be investigated could be “*one and the same thing*”.<sup>242</sup>

5.121 In examination by the legal representative for the Commissioner of Police Heslop agreed that an intelligence report could be linked to other documents on the Police Force COPS system.<sup>243</sup> Heslop agreed that intelligence reports could be linked to a profile on COPS for a particular individual and, if a subsequent complaint was made about that individual, a police officer could access those intelligence reports. The officer would be informed that there were other holdings in relation to that individual and that there were other avenues of inquiry that might be able to be made.<sup>244</sup> This would be possible, even if the name of the victim whose complaint had been the subject of an intelligence report was not known.<sup>245</sup>

5.122 Heslop agreed that such intelligence information could also be used for other purposes, such as the identification of a particular region or area where the incidence of paedophilic activity was unusually high.<sup>246</sup>

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<sup>240</sup> *ibid*, p.236:29-47

<sup>241</sup> *ibid*, p.237:2-6

<sup>242</sup> *ibid*, p.242:41-44

<sup>243</sup> *ibid*, p.294:2-7

<sup>244</sup> *ibid*, pp.294:14-295:25

<sup>245</sup> *ibid*, pp.295:27-296:2

<sup>246</sup> *ibid*, pp.296:30-297:6

5.123 Heslop agreed that a police officer's ability to access information about a particular individual would be unaffected by whether that information was held as an information or event report on the COPS system.<sup>247</sup>

5.124 During his examination by Counsel for the Commissioner of Police Heslop was asked the following questions and gave the following answers:-

*Q. I come back to your experience, again, as head of the CPEA. If an embargo were to have been placed on organisations in terms of, "We are not going to accept any information from you and we are not going to record it if you don't give us the name of the victim", you may well lose that intelligence information?*

*A. Yes.*

*Q. Was that a fear that you had at the time?*

*A. It was a real concern, because we knew about serial offending and how they do move around. So if we didn't have necessarily a victim's name, we still had where they (the offenders) were and the likelihood of them offending.<sup>248</sup>*

5.125 Heslop agreed "absolutely" that this was a great advantage in the police receiving intelligence reports.<sup>249</sup> The following questions and answers occurred:-

*Q...I want to suggest to you is in your capacity as head of the CPEA at that time, the receipt of intelligence reports, even though on occasions not having complete details, was of immense benefit to police intelligence holdings?*

*A. Absolutely. You don't know where that information will take you.*

*Q. Sometimes it may take you nowhere, on other occasions it can lead you to a major investigation; is that correct?*

*A. Correct.<sup>250</sup>*

## Matters relating to the victim's wish not to approach police

5.126 In his evidence Heslop said that he could not recollect ever making inquiries about how the PSO satisfied itself as to whether or not any particular

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<sup>247</sup> ibid, p.301:1-16

<sup>248</sup> ibid, p.296:16-28

<sup>249</sup> ibid, p.296:4-6

<sup>250</sup> ibid, p.297:9-20

complainant wished to pursue a complaint with police or wanted their identifying details passed to police.<sup>251</sup>

5.127 During his evidence Heslop was asked by the legal representative for the Commissioner of Police about the practice of “cold calling” which was described as a police officer telephoning a victim of crime, including sexual assault, without any prior notice to that victim.<sup>252</sup> Heslop said the following in relation to his experience of “cold calling”:-

*We had had, I can remember, one particular investigation involving a serial offender where the passage of time from the offending to the time of the commencement of the inquiries for my investigators was a significant number of years, 25 years or so, and in one particular case our staff approached a victim and later that night he attempted suicide, such was the effect of being confronted after that passage of time by a police officer. It is very dangerous.*<sup>253</sup>

5.128 Heslop agreed that “cold calling” could also cause a victim to become uncooperative with police.<sup>254</sup>

5.129 Heslop agreed that because of these possible consequences it was considered more appropriate for contact to be made with a victim through a third party and it was “often the case” that this approach was adopted.<sup>255</sup>

5.130 Heslop gave evidence that it was “often the case” that police would seek to approach and interview a victim who had expressed a desire that their identity be kept confidential from the police.<sup>256</sup> This was done through a variety of mechanisms, such as a counsellor, a person whom the victim trusted or the person who had first received the complaint.<sup>257</sup> Heslop agreed this was done because it was important to investigate as fully as possible matters which might represent serious criminal conduct.<sup>258</sup>

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<sup>251</sup> *ibid*, p.269:6-15

<sup>252</sup> *ibid*, p.297:22-34

<sup>253</sup> *ibid*, p.298:12-20

<sup>254</sup> *ibid*, p.298:32-34

<sup>255</sup> *ibid*, p.298:36-47

<sup>256</sup> *ibid*, pp.248:41-249:4 & p.249:19-24

<sup>257</sup> *ibid*, p.249:6-17

<sup>258</sup> *ibid*, p.249:26-30

5.131 Heslop said that whether criminal proceedings were instituted against the wishes of a victim was a matter which depended on the merits of the particular case.<sup>259</sup> Heslop agreed that there might be prosecution cases which could be considered strong, even in the absence of a statement from the victim.<sup>260</sup> He said he could remember “*a large number of investigations where that was the case*” during the time in which he was the commander of the CPEA.<sup>261</sup>

5.132 Heslop gave evidence that it was not unusual for a victim of historical abuse to want to keep the matter confidential. However, this did not mean the matter could not be investigated by police.<sup>262</sup> The following question and answered occurred in his evidence:-

*Q...did you, as the commander of the CPEA, regard a victim's desire for confidentiality to be a valid reason for the police not investigating a complaint of an assault?*

*A. No. No, it's - the fact that a victim didn't want to go ahead with making a statement, the information we had might assist us in another investigation involving the same offender.*<sup>263</sup>

5.133 Heslop said that he was also aware of cases where an initial reluctance of a victim to make a statement changed over time, so that the victim was willing to make a statement on a later occasion.<sup>264</sup> Heslop agreed that factors relevant to this change of position included whether the offender had made an admission and whether there was other information which corroborated the victim's account or indicated that the offender had committed other acts against other victims.<sup>265</sup>

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<sup>259</sup> *ibid*, p.249:32-45

<sup>260</sup> *ibid*, pp.249:47-250:5

<sup>261</sup> *ibid*, p.250:7-10

<sup>262</sup> *ibid*, p.246:38-46

<sup>263</sup> *ibid*, p.247:1-7

<sup>264</sup> *ibid*, p.247:17-22

<sup>265</sup> *ibid*, pp.247:17-248:1



## The evidence of McGee

### McGee's position as Commander

5.134 McGee was Commander first of the CPEA and then of the CP&SCS between June 2003 and September 2005.<sup>266</sup> The CPEA changed its name to the CP&SCS “around 2003”.<sup>267</sup>

### Cullen's role on the PSRG

5.135 McGee gave evidence that she was aware while she was Commander of the CPEA or the CP&SCS that Cullen was a member of the PSRG.<sup>268</sup>

5.136 McGee gave evidence that she regarded Cullen's role on the PSRG as being one of “*liaison*” between the Police Force and the Church.<sup>269</sup> McGee was asked to explain what she meant by Cullen's “*liaison*” role. She answered: “*Liaison at that committee is for the purpose of giving advice, and from experience, and not so much an active role in management of what is occurring*”.<sup>270</sup> She said that she considered that Cullen was acting as a representative of the Police Force on the PSRG.<sup>271</sup>

5.137 McGee agreed with Counsel Assisting that she was aware when she was Commander that the PSO was an organisation set up to deal with abuse, including sexual abuse, physical abuse and child sexual abuse, although she was not aware that the PSO dealt with individual cases of abuse.<sup>272</sup> McGee agreed that she had been aware that the PSRG was to support Salmon in his functions as the Director of the PSO.<sup>273</sup>

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<sup>266</sup> PIC Transcript, Kim McGee, 16 October 2014, p.312:29-33

<sup>267</sup> *ibid*, p.335:7-12

<sup>268</sup> *ibid*, pp.312:40-313:2

<sup>269</sup> *ibid*, p.321:5-11

<sup>270</sup> *ibid*, p.330:30-38

<sup>271</sup> *ibid*, p.321:19-22

<sup>272</sup> *ibid*, pp.313:35-314:7 & p.316:25-31

<sup>273</sup> *ibid*, p.314:9-14

5.138 McGee said she did not have any recollection of her asking Cullen what occurred at PSRG meetings or of Cullen ever discussing with her what was discussed at PSRG meetings.<sup>274</sup>

5.139 During her evidence McGee was shown a document which had been before the PSRG. This document recorded a complaint containing certain allegations of abuse and the fact that the allegations had been admitted by the accused person. Both the accused person and the complainant had been de-identified in the document and were identified simply as “A” and “C” respectively.<sup>275</sup> The following question and answer then occurred:-

*Q...This is material that was drawn to Ms Cullen's attention through her role on the PSRG. Were you aware that that sort of material was coming to her attention through her role on the PSRG?*

*A. Not that I am aware of, but I know that they talked about abuse that was happening in the Catholic Church, but I don't know about this specific case.*<sup>276</sup>

5.140 The examination continued:-

*Q...You said you knew that they talked about abuse that was happening within the church. If you knew that Ms Cullen was, thereby, becoming aware of that, did you consider that she should have come back to the police force and reported it as an event report in COPS when she received information about a particular occurrence of abuse?*

*A. No, because she was there as a committee liaison officer and was there to give advice, and her role wasn't to take reports directly of crime, and this is third-party information; it's not directly from the people involved. So, at the very least (semble. most), it would be intelligence. It's not a report of a crime. That's not how crimes are reported, and that wasn't her role, to take reports of crime.*<sup>277</sup>

5.141 McGee said she did not consider the document to be “*information from a credible source that a crime had been committed*”.<sup>278</sup> Asked why not, McGee said:-

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<sup>274</sup> ibid, pp.315:35-316:9

<sup>275</sup> ibid, pp.326:40-327:26

<sup>276</sup> ibid, p.327:28-34

<sup>277</sup> ibid, pp.327:45-328:11

<sup>278</sup> ibid, p.328:13-17

*"Because there's no signature; you've got "A" and "C", I don't know what "A" and "C" is; and you've just got someone's opinion that something happened somewhere. I don't take that as a report of a crime".<sup>279</sup>*

5.142 McGee agreed that the document contained information from which it could be concluded that a report of conduct had been made to the Church.<sup>280</sup> However, she said it was information the veracity of which had not yet been "*tested*" and it was not "*something that you would put down as a report of crime in our system*".<sup>281</sup>

5.143 Counsel Assisting put to McGee an example of a teacher approaching a police station and disclosing the same information as was disclosed in the document before the PSRG. McGee said that that information would be recorded, "*if the person wanted it recorded by the police*", because it was information which disclosed a potentially serious crime.<sup>282</sup> The following question and answer then occurred:-

*Q. Why is that any different from Ms Cullen receiving that information in the context of the PSRG meeting, as we've discussed?*

*A. Well, my understanding was that it was a liaison role and she was there to help them. She may have given them advice for the matter to be - I don't know what her advice was, but she may have given them advice for them to report it to the police, but it wouldn't have been her role to sit down and take that report and bring it back, in my understanding of what she would do. She might have said, "We will make it a report. It needs to be further investigated." I think that's the way that it went, that this was her advice. You know, she would give advice when matters needed to be pursued or whatever.<sup>283</sup>*

5.144 McGee gave evidence that she did not make any enquiries about how much information held by the PSO was being passed to the Police Force and she did not check this with Cullen.<sup>284</sup>

5.145 On 20 October 2003 Salmon wrote a letter to McGee as Commander of the CP&SCS. In that letter Salmon said that Cullen had advised him that she would be resigning from her position on the PSRG. Salmon thanked Cullen for her participation and commended her for her contribution to the PSRG. Salmon

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<sup>279</sup> *ibid*, p.328:20-23

<sup>280</sup> *ibid*, p.328:25-31

<sup>281</sup> *ibid*, pp.328:33-329:7

<sup>282</sup> *ibid*, pp.329:1-330:2

<sup>283</sup> *ibid*, p.330:4-17

<sup>284</sup> *ibid*, p.320:10-18 & p.322:32-34

asked whether McGee “*would be in a position to recommend another officer who might be willing to succeed Beth Cullen*” stating “*it has been immensely helpful to receive regular input from a police perspective*”.<sup>285</sup> Despite this letter Cullen remained a member of the PSRG until May 2005.

5.146 An internal Police Force memorandum regarding Salmon’s letter recommended that Cullen be succeeded by the person who was appointed as “*Inspector – Support, CP & SCS*”.<sup>286</sup>

5.147 McGee gave evidence that she recalled receiving the letter from Salmon seeking a replacement for Cullen on the PSRG.<sup>287</sup> McGee said that, after receiving this letter, she did not arrange for a replacement for Cullen.<sup>288</sup>

5.148 McGee said that she had discussed with Cullen the matter of another police officer replacing Cullen on the PSRG and it was Cullen’s opinion that a replacement was not required. McGee said she could not remember the exact reason why a replacement was not thought to be required but said that in her recollection “*one of the reasons was the workload of our organisation was very great and that her value to the group wasn’t matched by what was required in her terms of her normal work*”.<sup>289</sup>

## Reporting by the PSO to the police

5.149 During her evidence McGee said she was aware while she was Commander of the practice of blind reporting by the Church<sup>290</sup> During McGee’s examination by Counsel Assisting the following question and answer occurred:-

Q. *And you knew that that amounted to selectivity about the information that was disclosed by the church to the Police Service?*  
A. *Selectivity? I guess so, yes.*<sup>291</sup>

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<sup>285</sup> Exhibit 1

<sup>286</sup> Exhibit 2

<sup>287</sup> PIC Transcript, Kim McGee, 16 October 2014, p.314:27-38

<sup>288</sup> *ibid*, pp.314:46-315:2

<sup>289</sup> *ibid*, p.315:4-14

<sup>290</sup> *ibid*, p.318:16-45, p.322:9-11& p.323:31-40

<sup>291</sup> *ibid*, p.348:7-10

5.150 McGee gave evidence that she had never seen a blind reporting form.<sup>292</sup>

5.151 McGee was not aware who had established the practice of blind reporting, including whether it had been established by the Police Force.<sup>293</sup>

5.152 McGee gave evidence that she was aware of “arrangement” for blind reporting.<sup>294</sup> During McGee’s evidence the following question and answer occurred:-

*Q. Would you agree with me that because you knew that there was the blind reporting arrangement, you knew that the CPEA, Child Protection Enforcement Agency, was not getting all available information even in cases of potentially serious criminal conduct?*

*A. I don't know if I turned my mind to it but it would be an assumption I would make if I had.*<sup>295</sup>

### The value of blind reporting

5.153 McGee agreed in evidence that it was her view that selectivity in reporting by the PSO was in conflict with the requirements of the Crimes Act.<sup>296</sup> When McGee was asked whether she should therefore have taken steps to change the Church’s practices she answered “no”.<sup>297</sup> McGee was asked “Why Not?” She replied:-

*Because it's something that had been a problem for a number of years in terms of collecting information about victims of sexual assault, and in some regard it kept conversations open between the church and the police, which may have closed down completely. It kept the ability for the future for victims to understand that police were generally around. It opened up a lot of things that the law made very problematic in this area.*<sup>298</sup>

5.154 McGee said it was her assumption that, if police had required further information from the PSO, a request could have been made to Salmon and he would have complied with such a request.<sup>299</sup>

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<sup>292</sup> *ibid*, pp.318:47-319:9, p.336:1-5 & p.353:19-28

<sup>293</sup> *ibid*, p.319:36-41

<sup>294</sup> *ibid*, p.323:17-40

<sup>295</sup> *ibid*, p.324:17-23

<sup>296</sup> *ibid*, p.350:13-16

<sup>297</sup> *ibid*, p.350:18-22

<sup>298</sup> *ibid*, p.350:25-32

<sup>299</sup> *ibid*, p.325:16-25

5.155 In examination by the legal representative for the Commissioner of Police McGee agreed that during her time as Commander she was aware of victims wishing to report information but wanting to remain anonymous.<sup>300</sup> This was for a number of reasons, including cultural reasons, the court process or fear of repercussions for the victims and their families.<sup>301</sup> McGee agreed this occurred “frequently”.<sup>302</sup>

5.156 During this examination the following question and answer occurred:-

*Q...Is it the case, then, that, notwithstanding attempts being made by the NSW Police Force back then to have people come forward and actually report crimes, you, in your capacity as commander, also wanted to encourage people to come forward and provide information which could be used as intelligence?*

*A. It was the second-best option. It wasn't our best option, but it provided a means of a further investigation, and sometimes, as a result of those intelligence reports, we were able to solve other crimes, and sometimes we were able to go back to that victim and they would then be prepared to go to court. And so even as an intelligence - something that started off as an intelligence report may end up in a conviction at court.*<sup>303</sup>

5.157 McGee said that this intelligence information was also used on a strategic level and informed discussions about changes of policy relating to sexual assault.<sup>304</sup>

5.158 McGee agreed intelligence information could be used by police to look for “indicators” which would identify where there might be a particular problem or a location of interest relating to paedophile activity.<sup>305</sup>

5.159 McGee gave evidence that the process of blind reporting was not peculiar to the Catholic Church.<sup>306</sup> McGee said other institutions, such as hospitals, had also used the practice as a means of providing information to police.<sup>307</sup>

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<sup>300</sup> *ibid*, p.357:44-47

<sup>301</sup> *ibid*, p.358:1-39

<sup>302</sup> *ibid*, p.358:38-39

<sup>303</sup> *ibid*, pp.358:47-359:13

<sup>304</sup> *ibid*, p.359:15-31

<sup>305</sup> *ibid*, p.359:44-47 & p.360:24-38 & pp.361:15-362:7

<sup>306</sup> *ibid*, p.319:11-34 & p.351:32-35

<sup>307</sup> *ibid*, pp.351:37-352:10

## The creation of reports on the COPS system

5.160 McGee agreed with Counsel Assisting that each blind report would probably disclose an instance of potentially criminal conduct.<sup>308</sup> McGee was shown a passage in the internal Police Force Handbook which provided that any serious crime should be recorded as an event on COPS. She agreed that, in general, any serious crime that came to the attention of a police officer should be recorded as an event.<sup>309</sup>

5.161 McGee said, however, that the Handbook was a guideline written for “*generic purposes*”, which was not necessarily applicable in all cases.<sup>310</sup>

5.162 During her evidence McGee was shown a copy of a blind report and asked if the information within it should have been made into an event report on COPS. McGee said she did not think she would have created an event report. She said “*you would need a bit more investigation before you would create an event. You don’t just create events from third party reports*”.<sup>311</sup> The following question and answer occurred:-

*Q. Is it not the case that any serious crime should be recorded as an event report?*

*A. In general, maybe not necessarily in practice.*<sup>312</sup>

5.163 McGee said that, once an event report was entered into the COPS system, an assessment would be conducted as to whether it would be further investigated.<sup>313</sup>

5.164 McGee said that all intelligence and information which came into the CPEA (or the CP&SCS) was assessed. She said that, if a matter was filed for “*intelligence*

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<sup>308</sup> *ibid*, p.332:15-18

<sup>309</sup> *ibid*, p.333:5-9

<sup>310</sup> *ibid*, p.340:23-42

<sup>311</sup> *ibid*, p.339:12-22

<sup>312</sup> *ibid*, p.339:24-26

<sup>313</sup> *ibid*, p.341:7-27

only”, it did not necessarily mean that there would be no active process of investigation of that matter.<sup>314</sup>

#### Matters relating to the victim’s wish not to approach police

5.165 McGee was asked whether she agreed that in cases where there had been an admission of abuse by a perpetrator there would be a possibility of a successful prosecution, even if the victim refused to provide a statement. McGee said that she did not agree.<sup>315</sup>

5.166 McGee did agree that there were occasions where a victim had first indicated that they did not want to make a statement to police but had later changed their mind about this.<sup>316</sup> McGee said this was “*more unlikely than likely*” but that it did happen.<sup>317</sup>

5.167 During her examination by the legal representative for the Commissioner of Police McGee said that contacting victims of sexual assault who had provided information anonymously was “*really problematic*”.<sup>318</sup> Asked why, McGee said:-

*...you could tip off the offender straight up by just knocking on door. That's the first - that's the first problem. You could bring them extra mental and physical trauma from contacting them. They're the two main ones that come up in terms of that. However, sometimes the seriousness of the offence and the ability that you think that you might gain a successful prosecution with their evidence would outweigh that and you might go and talk to them.*<sup>319</sup>

5.168 The following question and answer then occurred:-

*Q. In that situation, would you expect your officers to do it through the organisation that provided the information rather than directly?*

*A. No, not necessarily. Probably the latter; they'd do it directly.*<sup>320</sup>

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<sup>314</sup> ibid, p.343:31-39

<sup>315</sup> ibid, p.326:8-20

<sup>316</sup> ibid, p.326:22-26

<sup>317</sup> ibid, p.326:28-30

<sup>318</sup> ibid, p.362:9-18

<sup>319</sup> ibid, p.362:22-30

<sup>320</sup> ibid, p.362:32-36



5.169 McGee said it was her “*number one objective*” to get as much information as possible about potential crimes of abuse.<sup>321</sup> McGee gave evidence that as Commander of the CP&SCS she had engaged in public awareness campaigns to encourage victims of sexual assaults to come forward and make complaints to the Police Force.<sup>322</sup> McGee said that, despite these campaigns, there was still some difficulty in getting victims to approach police.<sup>323</sup>

5.170 At the end of her evidence McGee indicated to the Commission that she wished to raise an issue relating to s 316 of the Crimes Act. McGee said that s 316 was “*very problematic for victims of sexual assault*” and “*caused a lot of the difficulty around [the CP&SCS’s] dealings*” and “*setting up*” blind reporting<sup>324</sup>. McGee said s 316 was “*part of that law in terms of victims of sexual assault (that) would be beneficial to have a look at*”.<sup>325</sup>

## The evidence of Armstrong

### Armstrong’s position within the CP&SCS

5.171 Armstrong was the intelligence coordinator at the CP&SCS from 2004 to early 2014.<sup>326</sup> From 1994 to the time of giving his evidence at the public hearing Armstrong had worked in a series of roles in the field of intelligence and not in investigative roles.<sup>327</sup>

### Blind reporting to the Police Force

5.172 Armstrong gave evidence that he received and worked with blind reports from the PSO.<sup>328</sup> He said that he was “*familiar with Mr Salmon or his division or unit having involvement in preparing the blind reports*”.<sup>329</sup> He knew “*the definition of*

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<sup>321</sup> *ibid*, p.322:36-40

<sup>322</sup> *ibid*, pp.354:30-357:36

<sup>323</sup> *ibid*, pp.357:38-358:45

<sup>324</sup> *ibid*, p.365:15-19

<sup>325</sup> *ibid*, p.365:30-32

<sup>326</sup> PIC Transcript, Inspector Wayne Armstrong, 16 October 2014, p.367:38-41 & p.406:16-18

<sup>327</sup> *ibid*, pp.367:46-368:1

<sup>328</sup> PIC Transcript, Inspector Wayne Armstrong, 16 October 2014, p.376:12-33, p.392:7-9 & p.399:36-37; Exhibit 367 (PIC Transcript of Private Hearing, Inspector Wayne Armstrong, 7 August 2014), p.24:1-3

<sup>329</sup> PIC Transcript, Inspector Wayne Armstrong, 16 October 2014, p.376:32-33

*blind reports*” was where the victim was unwilling to report to the police themselves.<sup>330</sup> He was aware that information, other than that which had been disclosed in the blind report, was held by the PSO or bodies reporting to the PSO, including information relating to victims.<sup>331</sup> He said that in 2004 and 2005 he was “*most probably*” aware that blind reports “*were originated after there had been some period of engagement between a victim and some body, and that (the reports contained) a brief summary of some of the information about the original crime or abuse*”.<sup>332</sup>

5.173 Armstrong said the following about his awareness of any process of investigation being undertaken by the PSO prior to a blind report being submitted: “*at least initially I wasn't aware that there was a sequence where there was an investigation by them and then a blind report. I seem to recall cases with blind reports that appeared to have occurred before such a process, but that may have been much later*”.<sup>333</sup>

5.174 Armstrong gave evidence that he believed that he had had no knowledge of the process which led up to a blind report being submitted.<sup>334</sup> The following question and answer then occurred:-

*Q. And when you say you had no knowledge of such a process, are you saying that whilst you would have from time to time, from 2004 onwards, have seen these blind report forms, you had no understanding of what was involved by way of investigational process prior to that report coming to your attention?*

*A. I received and worked with these reports. I didn't necessarily see myself or the work of my unit being the extension of some other process of that nature at any stage and - but over time, through the work of the squad in general, I learnt something about how misconduct investigations occurred in other organisations and how there were various significant stages reached in those matters, yes.*<sup>335</sup>

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<sup>330</sup> ibid, p.388:32-34

<sup>331</sup> ibid, p.376:35-40

<sup>332</sup> ibid, p.377:4-8

<sup>333</sup> ibid, p.375:35-40

<sup>334</sup> ibid, pp.375:42-376:4

<sup>335</sup> ibid, p.376:6-19

5.175 In his evidence to the Commission Armstrong said that he did not consider blind reporting to be part of an “arrangement” between the PSO and the CP&SCS.<sup>336</sup> In Armstrong’s evidence at a private hearing of the Commission the following question and answer occurred:-

*Q. Were you aware of any arrangement between the NSW Police Force and the Professional Standards Office of the Catholic Church whereby it was agreed that in certain circumstances the church could properly report a matter to the police but not include the victim's name?*

*A. If we're excluding the work that I did to do with an MOU, I can't recall that there was any understanding or arrangement, neither was there a need for an understanding or arrangement. If any representative of any organisation or any individual in New South Wales were to forward us information of this nature, it would be received and it would be treated pretty much on the same basis by NSW Police. So there was no need for a specific arrangement.*<sup>337</sup>

## Dealing with blind reports

5.176 Armstrong gave the following evidence about his understanding of blind reports:-

*I don't and never have viewed the information given to us on those blind reports as reporting of crime. I've always had in mind that victims of crime, when we're talking about personal violence offences, can report crime, and they can report crime to law enforcement agencies. They don't report crime in the sense of making a criminal report to another member of the community. I considered I was being given information about crime, allegations of crime. I didn't see a particular organisation, a private organisation as I saw it, reporting crime to police.*<sup>338</sup>

5.177 Counsel Assisting put a hypothetical scenario to Armstrong where a university teacher attended a police station and made a report to Armstrong that one of their students had made a complaint to the teacher of being abused by another teacher. It was presumed in the hypothetical example that there was no child presently at risk. Counsel Assisting asked Armstrong whether he would regard the above scenario as a report of a crime. Armstrong answered:-

*In plain language, yes, but a report of a crime in a technical sense - what would occur immediately after that scenario you have presented me with is that we would endeavour to speak to the victim of the crime within hours, if not sooner, and the report of the crime would be taken from that victim and a*

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<sup>336</sup> *ibid*, p.394:29-31 & p.398:30-36

<sup>337</sup> Exhibit 367 (PIC Transcript of Private Hearing, Inspector Wayne Armstrong, 7 August 2014), p.24:20-33

<sup>338</sup> PIC Transcript, Inspector Wayne Armstrong, 16 October 2014, p.381:25-34

*record of that report would be created on some of our systems. Your initial interaction with me is a report, as I say, in plain language, but not a report in the technical sense, as I understand it.*<sup>339</sup>

5.178 Armstrong said that, if there was no ability to resolve or clarify the information by locating the victim and acquiring a report directly from the victim within “a few hours to a few days”, then a note should be made of the approach by the teacher and what had been said. This would be so, even if “there was no possibility of firming up” the information.<sup>340</sup>

5.179 Armstrong was asked how this situation differed from a blind report received from the PSO. Armstrong said the following:-

*One important difference is the indication on the blind reports that a victim had been made aware of the possibility - in fact, the desirability - of reporting it to the police but at this stage hadn't done so. In your scenario, such as it is, I've got no indication one way or the other about that.*<sup>341</sup>

5.180 In his evidence to the Commission Armstrong agreed that the general practice of the CPEA between 2004 and 2008 when it received a blind report was to enter the information in the report as an information report on the COPS system. This was “the most likely outcome”<sup>342</sup>. An event report would “very rarely” be generated.<sup>343</sup>

5.181 In a private hearing Armstrong explained the process by which blind reports were dealt with as being the following:-

*The reports would typically be assigned to a particular member of my team, an intelligence officer, who was tasked to research the name of the alleged offender and also the institution, if that was known, to find if it bore any relation to any current NSW Police investigation or any past NSW Police investigation.*

...

*If it did not relate to any current or previous investigation, it was assessed for its relevance or connection to any other NSW Police information and the*

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<sup>339</sup> *ibid*, pp.381:39-382:6

<sup>340</sup> *ibid*, p.382:8-18

<sup>341</sup> *ibid*, p.382:36-41

<sup>342</sup> PIC Transcript, Inspector Wayne Armstrong, 16 October 2014, p.385:28-32; see also Exhibit 367 (PIC Transcript of Private Hearing, Inspector Wayne Armstrong, 7 August 2014), p.24:35-39

<sup>343</sup> PIC Transcript, Inspector Wayne Armstrong, 16 October 2014, p.384:34-36

*officer doing that assessment and conducting that research would report to me if they found that they believed the appearance of this extra information somehow changed the view that NSW Police should hold of that alleged perpetrator, either in terms of their current employment, their past employment - if it was child-related employment - or any opportunity for investigation of these alleged offences or any other alleged offences.*

*At that point, the decision would be made whether there was any potential for any of those approaches. If there was, it would likely be referred offline, outside of the COPS system, to an investigator, whether within our squad or elsewhere. If there was no potential, if there was no notable circumstances apparent in the report, then it would be turned into an information report on COPS. If it was turned into an information report on COPS, it would be disseminated - it would first of all be available to all of our sworn staff around the state, but particular commands would be sent a manual dissemination of the report, which means a copy would be pushed to a particular command, so the command where the person now resided, the command where the alleged criminal behaviour might have been occurring at a past time, and it would be pointed out to the crime coordinator, or other officer who was receiving that report, that it related to alleged criminal activity in their area or to a person who was now residing in their area - in other words, inviting them to assess what that meant in terms of their knowledge of the person as well.<sup>344</sup>*

5.182 In that private hearing Armstrong said that, in respect of the dissemination of these intelligence reports to other officers, *“it would be fair for them to assume that it wasn't expected of them that an investigation must follow, certainly, and it would be the case that there would be no further investigation in the vast majority of cases”*.<sup>345</sup>

5.183 Armstrong said in evidence at the public hearing that, on occasion, the matters in the reports would be investigated by police within Local Area Commands. The information contained in the reports was accessible to officers in such Commands who would be able to take investigative steps with respect to that information.<sup>346</sup>

5.184 Armstrong said intelligence reports generated from the blind reports would, once entered on the COPS system, be available to all police officers who were COPS users and those officers *“would not understand that there was a*

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<sup>344</sup> Exhibit 367 (PIC Transcript of Private Hearing, Inspector Wayne Armstrong, 7 August 2014), pp.26:44-27:41

<sup>345</sup> *ibid*, p.28:2-6

<sup>346</sup> PIC Transcript, Inspector Wayne Armstrong, 16 October 2014, pp.385:38-386:23

*restriction on how they used that [information]”.*<sup>347</sup> This would include those reports becoming the subject of investigation by them.<sup>348</sup>

5.185 The information contained in blind reports and entered on the COPS system might also become a resource for police investigations which had been started by some other catalyst.<sup>349</sup>

5.186 Armstrong said that the only investigations undertaken by the CP&SCS in the field of historical child sexual assault were large scale, long running, protracted and difficult investigations. Such investigations were commenced as a result of a request of a local area command for the involvement of the CP&SCS in the investigation, as opposed to the CP&SCS itself electing to commence an investigation into a particular matter.<sup>350</sup>

5.187 Armstrong said that very few individual blind reports led to the kind of investigation that the CP&SCS would conduct. However, a number of those investigations would have included matters with victims who had been the subject of blind reports.<sup>351</sup>

5.188 Armstrong gave evidence that a reason why he did not introduce a system whereby, on receipt of a blind report from the PSO, he did not immediately make inquiries to identify what other information the PSO held, was that the blind report forms contained a notation to the effect that the victim did not want to approach the police. This was something that was able to be corroborated by looking at police systems and ascertaining that no complaint had in fact been received. Armstrong said that the general “*mode*” of the CP&SCS was that “*there was a need to respect victim’s wishes where possible, and that there were risks associated with making contact with victims, rather than victims making contact with [police]*”.<sup>352</sup>

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<sup>347</sup> ibid, p.389:20-23

<sup>348</sup> ibid, pp.385:38-386:7

<sup>349</sup> ibid, p.386:38-41

<sup>350</sup> ibid, p.386:15-23

<sup>351</sup> ibid, p.386:25-37

<sup>352</sup> ibid, p.377:21-36

5.189 Armstrong said that, when he had asked the PSO for more information, it had been provided.<sup>353</sup> However, these requests were generally made in the context of individual investigations and, in his view, if a more general demand was made the PSO “*would have suddenly felt they were compromised and could not follow the wishes of the victims as they knew them and meet our demands at the same time*”.<sup>354</sup> Armstrong said that he was therefore comfortable with an arrangement where he “*could ask for information when I needed it and receive it*”.<sup>355</sup>

5.190 The following question and answer occurred during Armstrong’s evidence:-

*Q...why, when you received these blind reports, did you not put in place a system whereby you went back to the PSO to ask what other information they held relating to the matters that were reported in summary form in the blind report?*

*A. Well, we did occasionally and I'm aware that other police did occasionally. That was done generally according to our need, as I saw it. Whether there was a need for a system, I didn't necessarily see it as my place to develop or impose a system of that nature. If I had considered it, I think I would have, without reference to anyone else, come up against that issue of did we want this flow of information to continue and, if so, would we risk that by trying to impose some sort of system along those lines*

*I think at some point not long after I started working in the squad, I was conscious of that being one of the considerations that we needed to take and if I had tried to devise such a system, nevertheless, I think that consideration would have been considered very carefully by my commander or others within the squad.*<sup>356</sup>

5.191 It was put to Armstrong by Counsel Assisting that he had made an assumption that the “*free flow of information*” would not continue and that he had not made any inquiries with the PSO about how they would respond if he had requested that additional information be provided on a routine basis. Armstrong said that he could not recall whether or not he had made such an inquiry. However, Armstrong said that he became aware at some point, although perhaps not by 2005, that “*organisations felt they had obligations towards victims as far as confidentiality goes*” and that some officers of those organisations “*were very conscious of New South Wales privacy legislation and believed that, to some*

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<sup>353</sup> *ibid*, pp.380:45-381:3

<sup>354</sup> *ibid*, p.381:9-18

<sup>355</sup> *ibid*, p.381:18-20

<sup>356</sup> *ibid*, pp.377:38-376:12

extent, restricted what they could do and how they could share that information”, although Armstrong said he did not think this included Salmon.<sup>357</sup>

5.192 When it was put to Armstrong by Counsel Assisting that he could not make a reliable assumption that, if the PSO had been asked for further information, the request would have been refused, Armstrong said:-

*Well, I've already said that I did ask for further information on occasions and the information was provided. I don't say that there was a blanket assumption that information couldn't be made available.*<sup>358</sup>

5.193 During his evidence Armstrong was asked whether he should be ensuring that the Church was not selectively reporting to him. Armstrong said the “selectivity” did not “degrade” his use of the information and the blind reports provided “adequate information” for the purpose to which Armstrong was putting it.<sup>359</sup> Armstrong continued:-

*I saw the significance, the strategic significance of this situation and my response to it as being one of wishing to maintain the access to this sort of information, to continue to receive it if it was possible. I thought at some point I would have developed a view that I could take action which could be damaging to that flow of information, both from this organisation and from others who would inevitably learn of that. I certainly wouldn't have taken that action on my own, and I think I had an understanding, even in 2004 and 2005, about the principles under which the squad operated, which included the principle that we wanted greater engagement and to show greater encouragement towards victims to report sexual assault to the police and that section 316, in every respect, was likely to be damaging to that.*<sup>360</sup>

5.194 Armstrong was asked by Counsel Assisting why he had not sought to bring about a system whereby the name of the victim was disclosed to police. He said he could not recall whether he had made a conscious decision not to take this course of action. He continued:-

*I think I would have been strongly influenced by the belief that I was getting the information that I fundamentally wanted, which was the name of alleged child sex offenders, some of whom we otherwise had been unaware of. The name of the victim was not a massive issue for me in*

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<sup>357</sup> ibid, p.378:14-29

<sup>358</sup> ibid, p.379:16-24

<sup>359</sup> ibid, p.393:17-25

<sup>360</sup> ibid, pp.393:35-394:3



*my role and I felt we were getting the most important detail which in earlier eras, I understand, was lacking.*<sup>361</sup>

5.195 Armstrong said the following about his dealings with blind reports:-

*My fundamental aim included exposing instances of sexual offences, including historical sexual offences. I would have been assisted - and the NSW Police would have been assisted - by having victims of crime report directly to us and that was our overall preference, but I think we were well aware of considerations in victims' minds and their needs and their concerns often led to the situation where they felt they couldn't or chose not to directly report information to police.*

*Here we had a situation where some of those victims were discussing their experience with other members of the community and for the first time, in that particular segment of the community, we were gaining fairly ready access to knowledge of those crimes.*

*In the sense of my role in understanding the criminal environment, that was valuable. It would have been valuable to know of those crimes even if we knew very little detail of them, in the sense of community protection and the potential at some point to apply criminal sanctions to offenders was also valuable in that regard. The possibility that we would find individual victims or people who hold particular roles, let's say, in Professional Standards Offices, in other agencies, would suddenly restrict the flow of that information, to me would have been a highly undesirable outcome.*<sup>362</sup>

5.196 Armstrong said that, in his view, he did not need to contact the victim whose complaint was the subject of a blind report in order to do his “duties” in respect of that information. Asked what he meant by “duties” in this sense, Armstrong said:-

*In the context of the typical trajectory they took, which was receipt of a document, a level of research and assessment, and then the creation of a COPS information report, that phase of it was my responsibility, or the responsibility of my unit. When that report went out into COPS and was available statewide and nationwide, other steps might also take place which were not my responsibility necessarily.*<sup>363</sup>

## The creation of reports on the COPS system

5.197 Armstrong said that information about the propensity of someone to commit a crime should be recorded in COPS and was normally entered as an information report on the COPS system. Information about a crime itself could end up as an

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<sup>361</sup> *ibid*, p.379:26-39

<sup>362</sup> *ibid*, p.380:17-43

<sup>363</sup> *ibid*, p.389:39-46

information report, an event report or that information might not be the subject of a report at all.<sup>364</sup>

5.198 Armstrong was shown a copy of the Police Force Handbook which suggested that any serious crime should be recorded on the COPS system as an event report. Armstrong agreed that this is what the Handbook suggested however, he said the Handbook provided for a particular scenario and role which was not widely applicable.<sup>365</sup>

5.199 Armstrong was shown the Police Force Policy regarding information reports. Armstrong said the policy was in conflict with other Policies of the Police Force and “*provides some difficulties for police in making decisions*” in relation to information reports. Armstrong said that he would not say that “*there is a clear position that applies in all circumstances for individual police officers*”.<sup>366</sup>

5.200 Armstrong was shown the part of the Policy under the heading “*What information should not be included in an IR (information report)?*”, which provides:-

*If information obtained describes an offence a COPS Event must be submitted. An IR is not a substitute for a COPS Event.*

Armstrong said the following about this part of the Policy:-

*This policy was in effect, most certainly. Whether the policy in general or that particular sentence, for instance, made clear how information should be dealt with in some circumstances - I know that simply not to be the case. That would lead to perverse and ludicrous results in some cases.*<sup>367</sup>

5.201 Armstrong said that that part of the Policy would dictate that reports of crime which he considered to be implausible, such as allegations from mentally ill individuals, would have to be entered on the COPS system as events and in his view this would be inappropriate.<sup>368</sup> Armstrong said that, in addition to concerns

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<sup>364</sup> ibid, pp.368:47-369:4

<sup>365</sup> ibid, p.369:17-21

<sup>366</sup> ibid, pp.369:32-370:14

<sup>367</sup> ibid, p.370:30-35

<sup>368</sup> ibid, pp.370:37-371:7

about the plausibility of such an alleged crime, he would also have concerns about creating a report where information purporting to indicate that a crime had occurred has come from someone other than the victim.<sup>369</sup> These concerns included the following:-

*There are...difficulties with knowing who the person was who conveyed the information, did they paraphrase the information, is it a direct quote, were certain other clarifying questions asked. Usually the situation was no, they weren't.*<sup>370</sup>

5.202 Armstrong gave evidence that information reports and event reports are not in a hierarchy but are of a “*different nature and character*”.<sup>371</sup> One difference between the two kinds of reports is the degree of plausibility attaching to the information being considered.<sup>372</sup> Asked to explain the “*different nature and character*” of the two types of reports, Armstrong said the following:-

*We can be freer with an information report about whether there is a basis for actually believing that something has occurred. If we feel there is some possibility, anything from certainty through probability to some possibility that information is valid, we can put it into an information report. We have to have a higher - a higher acceptance and belief of something to put it in an event report.*<sup>373</sup>

5.203 Armstrong said an investigation into the veracity of information received by police could occur, both where that information was entered as an information report and where it was entered as an event report. The logging of information as an information report did not preclude further investigation being undertaken.<sup>374</sup>

5.204 Armstrong said the Police Force policies regarding the manner in which information received by police is dealt with sometimes overlap and this causes difficulties. Armstrong said that in some circumstances the policies are contradictory.<sup>375</sup> He gave evidence that the parts of the policies examined in the hearing had been “*selective*” and that there are other parts which would support

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<sup>369</sup> *ibid*, p.372:17-23

<sup>370</sup> *ibid*, p.374:28-32

<sup>371</sup> *ibid*, pp.372:35-373:32

<sup>372</sup> *ibid*, pp.373:44-374:2

<sup>373</sup> *ibid*, p.373:34-42

<sup>374</sup> *ibid*, p.373:8-13

<sup>375</sup> *ibid*, p.371:27-34 & pp.407:44-408:2

decisions he had made for selecting information reports over event reports as a means of recording blind reporting information.<sup>376</sup>

5.205 Armstrong said he regarded *Crimestoppers* and Operation Paradox as being strong precedents for the approach of creating information reports, as opposed to event reports, where anonymous reports of sexual abuse are made.<sup>377</sup>

5.206 Armstrong said that in Operation Paradox, a police operation which ran throughout the 1990s and resulted in a large number of anonymous reports of child sexual abuse being made to the police, reports of abuse were not recorded on the COPS system, in accordance with the guidance then issued.<sup>378</sup> Armstrong said the following about *Crimestoppers*:-

*In relation to Crime Stoppers, that arrangement exists today. Basically, all information that is volunteered to Crime Stoppers - by email, by submission of an online form through their website, by telephone calls - is reduced to a COPS information report by Crime Stoppers staff and then distributed throughout the state for information, for action. Those reports number in the thousands every year.*

*They routinely frequently contain information about crimes, obviously, but the practice there is never - has never been to create event reports from those accounts, but, rather, information reports.*<sup>379</sup>

Matters relating to the victim's wish not to approach police

5.207 In his evidence Armstrong said that he would never say that police "*should consider any particular victim has absolutely concluded that they will never consider reporting to police*".<sup>380</sup> Armstrong said he could attempt, and had attempted, to speak to victims through intermediaries such as counsellors.<sup>381</sup> However, this was not something that he had done routinely or he had routinely asked anyone else to do.<sup>382</sup>

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<sup>376</sup> *ibid*, p.408:15-31

<sup>377</sup> *ibid*, p.408:33-38

<sup>378</sup> *ibid*, pp.408:33-409:16

<sup>379</sup> *ibid*, p.409:18-28

<sup>380</sup> *ibid*, p.383:23-25

<sup>381</sup> *ibid*, p.384:36-44

<sup>382</sup> *ibid*, pp.384:46-385:5

5.208 Armstrong was asked the following question and gave the following answer about the blind reporting forms received by the CP&SCS from the PSO:-

*Q. And you, in fact, have no first-hand account from the victim, and you have indicated you give great weight to things that come first-hand rather than second-hand, you have no first-hand account from the victim that they don't want to speak to the police, do you?*

*A. That's true. I'm assuming that all the victims are adults in these circumstances - the ones mentioned on these reports - and are able to form their own views and make their own decisions. I think there is a paradox, though, in the approach we are looking at here, in that in order to absolutely confirm some of those questions, I would have to contact the victim, who may have given an indication that they had no interest in talking to police. I must transgress, to some extent, their apparent wish, if that's what it turns out to be, in order to confirm their wish.*<sup>383</sup>

5.209 Armstrong gave evidence that the reason that further inquiries were not made of matters detailed in blind reports was “*fundamentally*” because of the absence of a victim reporting the matter to police. He said before a matter would be considered for prosecution “*an absolute requirement would be to have a statement of a victim who, in this case, has given an indication of an unwillingness to report to police or engage with police*”.<sup>384</sup>

5.210 In his evidence Armstrong indicated that the fact that a report of a complaint of sexual assault received by the police contained a notation, that the victim had been made aware of the possibility and desirability of reporting the matter to police, was a significant factor in the police deciding whether they would make any further inquiries.<sup>385</sup>

## Section 316 of the Crimes Act

5.211 Armstrong said that he was of the view that the terms of s 316 would likely have been damaging to the principles under which the CP&SCS operated which “*included the principle that we wanted greater engagement and to show greater encouragement towards victims to report sexual assault to the police*”.<sup>386</sup>

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<sup>383</sup> *ibid*, p.384:8-22

<sup>384</sup> *ibid*, p.388:8-21

<sup>385</sup> *ibid*, p.382:29-41

<sup>386</sup> *ibid*, pp.393:43-394:3

5.212 In his evidence Armstrong said the following about arrangements which may have existed during his time at the CP&SCS:-

*I think there was an understanding that extended to a variety of groups - and I've heard mention of the sexual assault units run by the Department of Health - that to some extent police could be trusted to engage with and discuss the existence of information and also the possibility that a particular case might be of interest to us and that we would not launch immediately into an investigation of conceal a serious offence on the part of employees let's say of sexual assault services and so forth.*<sup>387</sup>

5.213 During examination by his own legal representative Armstrong said that he had read the report of the RCPS and noted that the operation of s 316 had been discussed in that report.<sup>388</sup> The following questions and answers occurred:-

*Q. Would it be fair to say that you took away from what you read that there were some difficulties with that section?*

*A. In the field of investigating sexual assault, yes, that's described in the Royal Commission report.*

*Q. Was that something that was in your mind when you were dealing with your day-to-day operation of receiving blind reports?*

*A. Yes. I had heard the same problems or issues expressed by my colleagues by then, but its appearance in that report gave me the feeling that the problematic nature of that provision was not a flawed judgment on my part.*<sup>389</sup>

5.214 In evidence to a private hearing Armstrong, in the context of questions dealing with the difficulties of s 316 said the following:-

*...the Child Protection and Sex Crimes Squad had a number of roles to do with investigation and operational matters, but also in advocating the institution of appropriate systems within other agencies and the encouragement of the members of the public in general to report crimes of this type, to be receptive to victims who report crimes of this type or wish to discuss that with them, and we have been always very concerned about any suggestion that a relative or friend of a victim or the victim themselves would suffer any harm through legal processes for a failure to immediately contact police with this sort of information.*<sup>390</sup>

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<sup>387</sup> *ibid*, p.394:33-42

<sup>388</sup> *ibid*, p.407:15-22

<sup>389</sup> *ibid*, p.407:24-36

<sup>390</sup> Exhibit 367 (PIC Transcript of Private Hearing, Inspector Wayne Armstrong, 7 August 2014), pp.49:39-50:3

## The evidence of Cullen

5.215 Cullen gave evidence at the public hearing of the Commission and also gave evidence at a private hearing of the Commission.

### Cullen's career

5.216 Cullen gave evidence that she had joined the Police Force in 1986 and was assigned to general duties.<sup>391</sup>

5.217 Cullen said that "*most of her service*" was spent as an intelligence officer.<sup>392</sup> After serving at "*patrol level*" Cullen was seconded for four years to the Australian Bureau of Criminal Intelligence ("the ABCI").<sup>393</sup> During this secondment to the ABCI she was introduced to the area of paedophilia.<sup>394</sup> When she left the ABCI she assisted in the establishment of the CPEA and was "*on the implementation team while the (Wood) Royal Commission was running*".<sup>395</sup>

5.218 Cullen agreed that for the majority of her police service she had been involved in intelligence gathering in relation to sexual offences and, in particular, paedophilia.<sup>396</sup> She also agreed that the majority of her service as a police officer had been devoted to protecting vulnerable people from becoming victims of sexual offences, particularly by persons in positions of authority.<sup>397</sup>

5.219 Cullen was a participant in the PSRG between April 1999 and May 2005.<sup>398</sup>

5.220 Cullen said that for part of the period in which she was a member of the PSRG, namely, between April 1999 and March 2002, she was on leave without pay from the Police Force and employed by the NSW Ombudsman.<sup>399</sup> She said that

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<sup>391</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.504:7-10

<sup>392</sup> *ibid*, p.504:9-10

<sup>393</sup> *ibid*, p.504:11-13

<sup>394</sup> *ibid*, p.504:15-19

<sup>395</sup> *ibid*, p.504:25-29

<sup>396</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.505:7-14; Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), p.79:19-25

<sup>397</sup> Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), p.79:27-31

<sup>398</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.416:25-33; Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), p.5:22-45

<sup>399</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.417:23-32

she remained a police officer while she was employed by the Ombudsman in a kind of secondary employment.<sup>400</sup> Cullen returned to work at the CPEA in March 2002 and was employed by the CPEA for a period including the period from March 2002 to May 2005.<sup>401</sup>

## The appointment of Cullen to the PSRG

5.221 Cullen gave evidence to the Commission that, when she was invited to become a member of the PSRG, she had a discussion with Heslop about whether there would be a conflict of interest in her participating in the PSRG.<sup>402</sup> Cullen said that this conversation was about whether she would receive a stipend or other payment from the PSO for her attendance at meetings of the PSRG.<sup>403</sup> Cullen gave evidence that this was the “*only aspect*” of any conflict of interest that was considered by her with Heslop.<sup>404</sup> However, later in her evidence Cullen said she could not recall if any other aspects of a conflict of interest were discussed.<sup>405</sup> Cullen said Heslop asked her to submit a written report.<sup>406</sup>

5.222 Cullen gave evidence that her membership of the PSRG was considered to be beneficial from a Police Force perspective because it would enable her to gain a better understanding of the organisation itself and how it operated.<sup>407</sup> Cullen also said it was considered that there would be a benefit in her providing her expertise to members of the PSRG.<sup>408</sup> Cullen said that she and Heslop had formed a common view that there would be some benefit in Cullen being a member of the PSRG.<sup>409</sup>

5.223 Cullen gave evidence that every time she changed her position or role she sought approval from her superiors to continue to participate in the PSRG and,

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<sup>400</sup> *ibid*, pp.417:27-418:12

<sup>401</sup> *ibid*, pp.416:12-417:9

<sup>402</sup> *ibid*, pp.459:39-460:8

<sup>403</sup> *ibid*, pp.459:39-460:25 & p.500:18-27

<sup>404</sup> *ibid*, p.460:17-20

<sup>405</sup> *ibid*, p.500:25-27

<sup>406</sup> *ibid*, pp.459:39-460:8

<sup>407</sup> *ibid*, p.501:9-13

<sup>408</sup> *ibid*, p.502:19-23

<sup>409</sup> *ibid*, p.502:15-23



when seeking such approval, she had made it known what the activities of the PSRG were.<sup>410</sup>

## Cullen as a police officer on the PSRG

5.224 Cullen was asked whether she agreed that she was involved in the PSRG in her role as a police officer. Cullen replied:-

*I agree that I was invited to participate on the Professional Standards Resource Group when I was occupying a position as a police officer, yes.*<sup>411</sup>

5.225 The following question and answer then occurred:-

*Q. And do you agree that your role there was as a New South Wales police officer?*

*A. I regarded, because I had been invited to that committee in that position or for my expertise that I'd gained as a police officer, I always regarded myself, regardless of my status of employment, if you like, that it was likely that I was being perceived as a police officer...providing advice to the PSRG. So that was the way I treated my role, if you like, on the PSRG.*<sup>412</sup>

5.226 In a private hearing of the Commission Cullen was asked whether she agreed that her role on the PSRG was to act as a representative of the Police Force. She gave the following answer:-

*It was through my expertise as a police officer that I understand I was invited to participate in the group, and it was a specific invitation to me, through my commander, that I participated on the group rather than it being an invitation to a generic police officer and me being the nominated police officer, if you understand what I'm saying, ma'am. So it was in my role as a police officer, yes, that I participated, but it was through the relationship that I've built, that the express wish or the invitation initially was nominating or requesting me rather than a generic police officer, if that clarifies things for you a little.*<sup>413</sup>

5.227 Cullen was asked whether, if during a PSRG meeting she indicated her agreement with a practice or form, she was giving an agreement as a representative of the Police Force. She said the following:-

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<sup>410</sup> *ibid*, p.502:5-13

<sup>411</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.419:29-31; see also Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), p.8:8-10

<sup>412</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.419:33-42

<sup>413</sup> Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), p.7:30-41

*...[I] considered myself to be a police officer invited, because of my expertise. However, I didn't presume to provide a response on behalf of NSW Police. I believe there's a distinction in that regard, ma'am.*<sup>414</sup>

5.228 During her evidence Cullen was shown copies of her duty books where she had sometimes recorded attending time spent at PSRG meetings and time spent reading material in preparation for such meetings. Cullen agreed with Counsel Assisting that she had regarded these times as times in which she was on duty with the Police Force.<sup>415</sup>

5.229 In her evidence Cullen disagreed with a suggestion that it was a conflict of interest for her as a police officer to undertake a role which did not involve the reporting of information relating to serious criminal conduct of which she had become aware.<sup>416</sup>

## Cullen and the functions of the PSRG

5.230 Cullen agreed that while she was on the PSRG she knew that complaints being considered by the PSO were complaints being considered in a *Towards Healing* process.<sup>417</sup>

5.231 Cullen gave evidence that it was her understanding that complaints could be found to be substantiated through the *Towards Healing* process.<sup>418</sup> She said that although she did not have an independent recollection of it she had seen documents which showed that sometimes complaints were substantiated by admission.<sup>419</sup>

5.232 In her evidence to the Commission Cullen agreed that the majority of complaints that were brought to her attention through her role on the PSRG were complaints of sexual abuse and were complaints which involved serious criminal conduct.<sup>420</sup> Cullen agreed that she was also aware that the majority of

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<sup>414</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.425:4-8

<sup>415</sup> *ibid*, pp.420:42-421:24

<sup>416</sup> *ibid*, p.460:27-32

<sup>417</sup> *ibid*, p.426:43-47

<sup>418</sup> *ibid*, p.432:5-7

<sup>419</sup> *ibid*, p.432:9-13

<sup>420</sup> *ibid*, pp.468:36-469:7

allegations which came to her attention on the PSRG were found on the balance of probabilities to have occurred.<sup>421</sup>

5.233 Cullen gave evidence to the Commission about her recollections of the functions performed by the PSRG. Cullen agreed that she had understood the PSRG to be a body which provided advice to the PSO and understood the PSO to be entrusted with overseeing and taking primary responsibility for the handling of complaints made under the *Towards Healing* protocol.<sup>422</sup>

5.234 Cullen said the PSRG was “*simply an advisory body*” to the PSO and it was not responsible for “*supervising the functions*” of that Office. It was not the role of the PSRG “*to be looking at exactly the detail of how the Professional Standards Office was operating*”.<sup>423</sup>

5.235 Cullen said that the PSRG was also consulted about the wording and setting out of pro forma documents used in *Towards Healing* processes such as the “Statement of Complaint” form.<sup>424</sup>

5.236 Cullen gave evidence that in particular cases the PSRG discussed whether or not the matter had been reported to the police.<sup>425</sup>

5.237 During Cullen’s evidence to the Commission she was asked about the relationship between the *Towards Healing* process and police investigations. The following questions and answers occurred:-

Q. And [the *Towards Healing* process] was a process which was, in general terms, only pursued when there was no parallel police investigation being carried out?

A. The principle was that there were not concurrent church investigations while a police investigation was running. That was the principle for that. Whether it occurred on occasion, it may have, but that was the principle underlying the reason for one or the other, so that the evidence wouldn't be contaminated especially for - in the option of a police prosecution.

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<sup>421</sup> ibid, pp.469:45-470:2

<sup>422</sup> ibid, p.416:35-43

<sup>423</sup> ibid, p.451:27-35

<sup>424</sup> ibid, p.424:37-44

<sup>425</sup> ibid, p.457:16-26

Q. And so if during the course of a PSRG meeting you were told of the details of an individual case, you could be confident that those details were not at that time being investigated by the NSW Police Force?

A. No. Only because police quite often wouldn't tell the church if an investigation was running, so that may well have occurred that I didn't know about, ma'am.

Q. So there's a possibility that there may have been a parallel police investigation --

A. Yes.

Q. -- but the way that you understood the system to work was that it was intended that there was no parallel police investigation?

A. That's correct.

Q. So do you not agree with me that in most cases that you learnt of on the PSRG, you could have been confident that the police were not investigating the matter at the same time?

A. That's generally the case, yes, ma'am.<sup>426</sup>

5.238 Cullen gave evidence that it may have been the case that occasionally the PSRG advised the PSO to write to a church authority and recommend that a matter be reported to the police.<sup>427</sup> Cullen said advice as to what a Church authority had done in a particular matter was not invariably passed on to the PSRG. Cullen said *"the Professional Standards Office worked with the church authorities obviously regularly. The PSRG only sat once a month, so (the PSO) certainly didn't wait for the PSRG before...communications (about a particular matter) occurred and it certainly occurred regardless of that"*.<sup>428</sup> The following questions and answers then occurred:-

Q...If in any particular case the PSRG did recommend that the church authorities should report a matter to the police, you as a member of the PSRG might or might not have found out whether or not that report was actually made?

A. If it was a case that was under - that was brought before the PSRG for discussion and there was a recommendation made about that case by the PSRG to the Professional Standards Office to that effect, I would expect to see that reflected in the minutes of the meeting and, therefore, I would expect to have some feedback to the meeting possibly subsequently that that had occurred.

Q. And that's your expectation but you don't know whether that happened in every case?

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<sup>426</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.427:2-34; see also Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), pp.26:28-27:9

<sup>427</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.425:17-21

<sup>428</sup> *ibid*, p.425:23-42

A. *I can't recall.*<sup>429</sup>

5.239 During her evidence Cullen agreed to a suggestion put by Counsel Assisting that it was open to her to advise the PSRG that particular pieces of information should be provided to the police.<sup>430</sup>

#### What documents were provided to the PSRG

5.240 Cullen gave evidence to the Commission that she was sent material prior to meetings of the PSRG which consisted of the following:-

*...the draft agenda, the draft minutes of the previous meeting, and the final minutes of the meeting before, so the agreed final minutes of the meeting before, together with some open source material, which was often media articles.*<sup>431</sup>

5.241 Cullen said that in her recollection material sent out prior to meetings did not include case summary documents.<sup>432</sup> The following questions and answers occurred:-

Q. *So your recollection is some material was sent out in advance and the other documents that I've described, namely case summaries, PSRG reports, or individual case documents, is it right they were provided to you at the meetings themselves?*

A. *Certainly any of the sensitive material, my recollection is it was only tabled at the meetings. Some of the other material may have been sent out beforehand but I don't recall.*

Q. *And in terms of the material that was sent out beforehand, did you retain that material and file it?*

A. *I would have taken the material to the meeting and some of the material would be left at the meeting and some of the material I would bring back - I had a folder of documents which I used to retain relating to the PSRG which was usually, I would keep the final agreed minutes, I would not keep the draft minutes. I wouldn't keep the agenda once the meeting had concluded, but I would keep the policy documents that had been finalised, if you like, and any of the final pro forma type documents that were blanks.*

Q. *And did you keep any of the case summaries?*

A. *No. No, ma'am.*

Q. *Did you keep any of the documents that were considered in relation to discussion of individual cases?*

A. *No.*

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<sup>429</sup> *ibid*, pp.425:44-426:12

<sup>430</sup> *ibid*, p.448:6-12

<sup>431</sup> *ibid*, p.421:39-43

<sup>432</sup> *ibid*, p.422:7-8

Q. Did you keep any of the correspondence that was tabled at the meeting?

A. No.

Q. And did you keep any of the statistical reports in relation to the matters that had been considered by the PSO?

A. No.<sup>433</sup>

5.242 In her evidence Cullen said she understood that some of the information collected by the PSO included medical reports although she could not recall seeing such reports.<sup>434</sup> Cullen said she had no recollection of seeing any assessment reports.<sup>435</sup> However, Cullen later agreed that, if assessment reports had been tabled at PSRG meetings which she had attended, it was likely that she would have seen them.<sup>436</sup> Cullen said that she did not recall being sent “*case summary documents*” or other documents which went to individual cases to be discussed at the meeting.<sup>437</sup> She also did not recall receiving any statistical reports prior to PSRG meetings.<sup>438</sup> Cullen recalled letters in relation to complaints being “*occasionally*” tendered before the PSRG but also said that letters were sent from the PSO as a “*matter of course*” without PSRG approval or knowledge.<sup>439</sup>

5.243 Cullen also agreed that if documents had been tabled before the PSRG which indicated that a complaint of serious criminal conduct had been made, she would have been aware of such a complaint.<sup>440</sup> In a private hearing of the Commission Cullen said that, if a document was referred to by the PSO in a case report, she would have understood that the PSO held that document.<sup>441</sup>

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<sup>433</sup> *ibid*, pp.422:18-423:7

<sup>434</sup> *ibid*, p.471:26-31

<sup>435</sup> *ibid*, p.471:39-42 & p.474:15-18

<sup>436</sup> *ibid*, p.474:20-23

<sup>437</sup> *ibid*, p.422:3-13

<sup>438</sup> *ibid*, p.422:15-16

<sup>439</sup> *ibid*, p.424:17-35

<sup>440</sup> *ibid*, pp.474:43-475:1

<sup>441</sup> Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), pp.34:43-35:1

5.244 Cullen gave evidence that she did not read all the papers which were before the PSRG meetings.<sup>442</sup> During her evidence Cullen said the following about whether or not she may have seen documents tabled at PSRG meetings:-

*I can say that there were a number of documents that were tabled at PSRG meetings. I don't – not all of the documents - by virtue of the tables of the document doesn't - I don't - I know that not all the documents were able to be read at the meeting, so I'm disputing the fact that you may make the assumption that just because there's some record of a document being tabled at the meeting, that everyone who was at that meeting saw that document. Only in terms of the practice at the PSRG meetings when it came to cases was that the convenor, either Mr Davoren or Mr Salmon, would talk to the cases. There may well be information tabled relating to the cases but if they were talking to the cases and the status of the cases, there was - it was not necessary to read every document that related to those cases because he gave the briefing. So I'm not trying to avoid, you know, or trying to deny seeing something when I may have, but I have no recollection of seeing these and, you know, there were a number of documents, as I say, that weren't read but were talked about or the contents were talked about.<sup>443</sup>*

5.245 The following questions and answers occurred in Cullen's evidence:-

*MS STERN: Q. Ms Cullen, I know you gave evidence earlier that you didn't believe that you had seen assessment reports?*

*A. I don't recall seeing any.*

*Q. But you agree with me if there are assessment reports that were tabled at PSRG meetings at which you attended, that it's likely that you saw them?*

*A. Yes, ma'am.*

*Q. And equally, you gave evidence earlier, I believe, that you couldn't recall cases that had been substantiated by admission coming to your attention?*

*A. Correct.*

*Q. Do you agree with me that if the PSRG papers indicate that there was, before the PSRG at a meeting that you attended, records indicating a case had been substantiated by admission, that you, therefore, were in that way aware of that?*

*A. I can't - well, I can't say - I just don't know what I would have known or not known because I can't recall, that's all.*

*Q. But you agree that you read the papers that were before the PSRG meetings?*

*A. No, ma'am, not all of the papers, no, sorry.*

*Q. And equally, if there were documents that were before the PSRG that indicated that there was a complaint made about something which amounted to serious criminal conduct, you would agree that in that way you were then made aware of that?*

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<sup>442</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.474:39-41

<sup>443</sup> *ibid*, pp.480:31-481:3

A. Yes, ma'am.

Q. And you agree also that if there were statistics before the PSRG meetings that you attended and they gave, if you like, as with the last ones I took you to, an indication of the proportion of cases that involved, for example, child sex abuse, you were therefore aware of that?

A. Yes, ma'am.

Q. And if there were documents before the PSRG at meetings you attended that indicated that a particular practice was being adopted by the PSO, you were, therefore aware of that?

A. Yes, I suppose in a general sense, ma'am.<sup>444</sup>

## Cullen's contribution to the PSRG

5.246 During her evidence Cullen was asked about the extent of her contribution to discussions regarding the training of contact persons. She answered "*the only extent was to my expertise, which was that the encouragement or the emphasis that I wanted to have to make sure that victims were supported in making a complaint to police wherever possible*"<sup>445</sup>. Asked what she wanted to achieve in terms of the training of contact persons Cullen said "*I wanted to have victims reporting to police. That was my preference*".<sup>446</sup>

5.247 In her evidence Cullen agreed that she had understood her role, not to be one of exchanging information and intelligence but as a person who could assist the Group by providing her knowledge and expertise gained from her experience as a police officer.<sup>447</sup> Cullen agreed that she provided the PSRG with information about trends in paedophilia activity and grooming procedures.<sup>448</sup> Asked what other information Cullen provided to the PSRG to assist it in carrying out its functions, Cullen said:-

*It was primarily in relation to child sex offender modus operandi and the recognition of what might be termed low-level behaviour or misconduct perhaps of a sexual nature and how that may well be indicative of serial or serious sex offending behaviour.*<sup>449</sup>

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<sup>444</sup> ibid, pp.474:15-476:14

<sup>445</sup> ibid, p.499:17-34

<sup>446</sup> ibid, p.499:36-40

<sup>447</sup> ibid, p.503:35-41

<sup>448</sup> ibid, p.501:15-25

<sup>449</sup> ibid, p.501:30-34



5.248 In evidence given in a private hearing of the Commission Cullen said that, in relation to particular matters before the PSRG, she had “*various checks that I went through in my head to make sure that the appropriate process as far as the information transmission had occurred*”.<sup>450</sup> The following question and answer then occurred:-

Q. *Can you just explain those checks in your head?*

A. *The checks? Well, risk to children is number one, so if there was any indication that any of the alleged offenders currently had access to children. So I would need to be satisfied that where there were any allegations that gave concern to me that this person may be a child sex offender, I would have to be satisfied that the person didn't currently have access to children in any way that exposed the children to risk.*

*The other checks would be whether or not the dissemination - whether the victim wished to report the matter to police or whether or not the information has been reported to police; whether or not there was a police investigation running; whether or not the victim - so, yes. So in terms of the policing practice, those were the main issues for me.*<sup>451</sup>

#### Asking for further information

5.249 Cullen gave evidence that as a PSRG member she did not get much detail about matters being dealt with under *Towards Healing* and that she hoped that there “*would have been more detail going to police than I was getting at the meetings*”.<sup>452</sup> Cullen said that she could not recall ever asking in particular cases for further information about what information had been provided to the Police Force.<sup>453</sup>

5.250 Cullen agreed that as a PSRG member she was not given any identifying information about persons involved in cases and that in documentation the cases were identified by a number.<sup>454</sup>

5.251 Cullen gave evidence that on more than a couple of occasions she had asked for more information from Davoren and Salmon in relation to particular cases.

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<sup>450</sup> Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), p.31:33-35

<sup>451</sup> *ibid*, pp.31:37-32:6

<sup>452</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.427:36-43

<sup>453</sup> *ibid*, p.440:23-26

<sup>454</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.445:27-29 & p.452:14-23; see also Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), p.10:20-26 & p.15:10-28

However, Cullen said that this was more *“the exception than the rule”*.<sup>455</sup> Cullen said the reason she had sought this further information was *“to satisfy myself that all the actions that needed to be taken had been taken by the Professional Standards Office”*.<sup>456</sup>

5.252 Cullen gave evidence that she was aware that Davoren and Salmon had an attitude that they would cooperate with any requests from police for more information.<sup>457</sup> During her evidence the following question and answer occurred:-

*Q. And that was even if that included the provision of identifying information in relation to the victim?*

*A. Look, I didn't understand there to be any restrictions on the information that they would provide if police asked for it.*<sup>458</sup>

Cullen said she was not sure whether she was aware that no guarantee of confidentiality was given by the PSO to victims under the *Towards Healing* process.<sup>459</sup>

5.253 In her evidence Cullen said *“if I felt that information hadn't gone to police that should have gone to police...I would have provided that advice to Mr Davoren or Mr Salmon and my understanding is they would have done that”*.<sup>460</sup>

5.254 During Cullen's evidence the following questions and answers occurred:-

*MS STERN: Q. Ms Cullen, Mr Davoren gave evidence that in relation to the PSRG there was an expectation of confidentiality being kept by members of the Group. Were you aware of that expectation?*

*A. Yes, I believe I was aware of that.*

*Q. Did you understand, throughout your time on the PSRG, that you should not take details of what you learnt on the PSRG back to the NSW Police Force?*

*A. I didn't understand it to mean that, no, ma'am.*

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<sup>455</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, pp.438:19-439:13

<sup>456</sup> *ibid*, p.440:15-17

<sup>457</sup> *ibid*, p.430:15-47

<sup>458</sup> *ibid*, pp.430:46-431:3

<sup>459</sup> *ibid*, p.431:5-16

<sup>460</sup> *ibid*, p.453:32-36

Q. *What did you understand the expectation of confidentiality that you gave evidence about moments ago to mean?*

A. *In that in terms of the detailed workings of draft documents or policies or - it was not for general discussion or distribution, but the cases themselves were anonymised and would be of no value, but I did not feel that that conflicted with any of my police - if I was obliged to do something by law, I would have done it. I didn't feel constrained by that, if you understand what I'm saying.*

Q. *Okay. And so did you consider that you would have been free to take any of those details back to the NSW Police Force if you chose to do so?*

A. *But there were no details, ma'am.*

Q. *Did you feel that you could have asked Mr Davoren for identifying information in relation to any one of the cases that you considered through your role on the PSRG?*

A. *If I had considered that my role, I could have.*

Q. *You agree that you could have asked him for details of identifying information in relation to any one of them, one of those cases, I should say?*

A. *I could have, yes.*

Q. *You didn't do it, did you?*

A. *Not on every one of them, no, ma'am.*

Q. *And in order to make a report to the police that might have been useful in investigation, all you needed to do was to ask for the identifying information and then pass the material back to the police?*

A. *That's in the absence of any other system, ma'am.*

THE COMMISSIONER: Q. *Sorry?*

A. *In the absence of any other system for that information going.*

MS STERN: Q. *You agree if you had wanted to do that, that's all you needed to do?*

A. *It's not about wanting. That wasn't my role, ma'am.*

Q. *Just in terms of the material steps that would have had to be taken, you agree with me that's all that you needed to do?*

A. *To ask, yes, correct.*

Q. *You were confident through all the time that you were on the PSRG that if you had asked for any additional information from Mr Davoren or Mr Salmon, they would have given it to you?*

A. *I believe so, yes. I had no reason to think that they wouldn't, no.*<sup>461</sup>

## Cullen not reporting

5.255 During her evidence, Counsel Assisting asked Cullen the following questions about whether she had reported information obtained by her on the PSRG to the Police Force:-

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<sup>461</sup> ibid, pp.457:45-459:16

Q. And I'll go to some specific examples in due course. But now, did you ever take one of those case summaries and hand it to anyone else at the NSW Police Force?

A. No, ma'am, I didn't take them away from the meeting.

Q. Did you ever report any of the information from those case summaries to anyone at the NSW Police Force?

A. No, ma'am.

Q. Did you ever report any of the information about an individual case that you learnt on the PSRG to anyone else at the NSW Police Force?

A. No, I don't - well, I didn't, no, I didn't report that, no.

Q. And is it right that you did never yourself report anything that you learnt on the PSRG in relation to an individual case to the NSW Police Force?

A. That wasn't my role, no, ma'am.<sup>462</sup>

5.256 Cullen said she did not check whether any individual case she learnt about on the PSRG was subsequently the subject of a police investigation.<sup>463</sup>

#### Cullen not recording information

5.257 Cullen said that she did not record in her Police Force notebook any information learnt by her during a PSRG meeting or provided to her as a member of the PSRG.<sup>464</sup> Cullen said that it was not her understanding that this was something that she should have done.<sup>465</sup>

5.258 When Cullen was asked by Counsel Assisting why it was her view that she was not required to record in her Police Force notebook information about particular incidents of abuse that she became aware of during PSRG meetings, she gave the following explanation:-

*Because it wasn't my role to record a report in relation to those matters. That was occurring outside my involvement in the PSRG.*<sup>466</sup>

5.259 The following question and answer then occurred:-

Q. And do you not agree that if not in your police notebook formally, that you should have made some contemporaneous note of the matters that you

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<sup>462</sup> ibid, p.426:19-37

<sup>463</sup> ibid, p.461:43-47

<sup>464</sup> ibid, p.475:16-21

<sup>465</sup> ibid, p.475:23-26 & pp.497:27-498:4

<sup>466</sup> ibid, p.498:7-9

*learnt in relation to individual complaints of abuse on the PSRG so that you had an accurate contemporaneous record that you could go back to in the future, if necessary?*

*A. I don't believe that - even if I had thought that I'd make any record of what was discussed, that there was any detail that I'd be able to identify things from.*<sup>467</sup>

## Reporting by the PSO

5.260 During Cullen's examination by Counsel Assisting the following question and answer occurred:-

*Q...if at the time when you were being made aware of these matters you were confident there wasn't a parallel police investigation, surely you would have known that the matters that were reported to you about individual cases were probably not at the same time similarly being made known to the police?*

*A. My understanding was that the Professional Standards Office was notifying police about the matters that were notified to them...*<sup>468</sup>

5.261 Cullen said that the means by which she had understood the PSO were notifying police was blind reporting.<sup>469</sup> The following question and answer then occurred:-

*Q...if we put to one side the child currently at risk cases, do you agree that the only reporting that you were aware of by the PSO to the police was by way of these blind report forms?*

*A. No, I can't say that I was aware that that was the only reporting.*

*Q. What other reports did you believe were taking place?*

*A. I believe there was a liaison between local area commands and the Professional Standards Office occurring on individual investigations that were being conducted and I understand that those communications may - well, my understanding was that some of those communications involved the passing of information to local police for their - to support their investigations. But if there wasn't an inquiry, if you like, from police for material, if you're wishing me to address that component, then my understanding was that, yes, without any inquiry from police, that the material that was notified to the Professional Standards Office would be passed to the CPEA through the - well, by using or - or facilitated by that tool, which is being called the blind reporting tool.*<sup>470</sup>

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<sup>467</sup> *ibid*, p.498:11-19

<sup>468</sup> *ibid*, pp.427:45-428:6

<sup>469</sup> *ibid*, p.428:8-16

<sup>470</sup> *ibid*, pp.428:45-429:19

5.262 Cullen said that it was not her understanding of the practice that the blind report would be made to police, only once a complaint had been substantiated.<sup>471</sup> Cullen was also not aware that it was Salmon's practice that it would be a variable matter as to when a blind report would be made.<sup>472</sup> She was also not aware that, where a blind report was put in early in the *Towards Healing* process, there were occasions where information subsequently obtained in that process would not be communicated to the police.<sup>473</sup> She said that she could not recall discussing with either Davoren or Salmon at what point a report should be made.<sup>474</sup>

5.263 Cullen said that she did not see the blind reporting information which was being passed to police and so was not aware of "*how much or how little information was being provided*".<sup>475</sup> The following questions and answers then occurred:-

Q. *Do you agree with me that by reason of that, you weren't in a position to know whether or not all information collected through the Towards Healing process was reported to the NSW Police Force?*

A. *That's correct.*

Q. *And do you agree that in your role as a NSW Police Force officer, you should have taken steps to ensure that all information was appropriately reported to the NSW Police Force?*

A. *No, I don't agree with that.*

Q. *Why not?*

A. *It was my understanding that notifications were made to police on all relevant matters. Police made records of those relevant matters on the COPS system. Any officer wanting to have access to - this is before we had multimedia systems - wanting to have access to all the documentation, if you like, my understanding was that the COPS report would contain some reference to where that material may be obtained, so at any point in time when police wished to have all the relevant information, that they would then - that would be the starting point for obtaining whatever was available on that particular person held by, say, the Catholic Church, regardless of whether there was only, you know - whether that information had grown over time, if you like. So that was my understanding of the purpose of making that link to the person of interest, the accused person, that that would then enable the inquiry to be made to extract any of the material, whether it had come in at an early stage or a later stage or even after some investigation had been or some assessment had been concluded.<sup>476</sup>*

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<sup>471</sup> ibid, p.440:38-43

<sup>472</sup> ibid, p.441:3-8

<sup>473</sup> ibid, p.441:17-23

<sup>474</sup> ibid, p.440:45-441:1 & p.441:10-15

<sup>475</sup> ibid, p.441:29-36

<sup>476</sup> ibid, pp.441:38-442:23

## Cullen's perception of her role

5.264 During her evidence Counsel Assisting asked Cullen whether she should have sought to ensure that information, such as an admission by an accused person, which was held by the PSO and relevant to potentially serious criminal conduct was reported by the PSO to the police promptly and accurately.<sup>477</sup> Cullen answered: "*I didn't see that as my role on the PSRG, ma'am, no*"<sup>478</sup> The following exchange then occurred:-

*Q. Did it concern you that you were being given information about individual cases but you didn't know whether or not the particular information you were being given had been provided to the NSW Police Force through other channels?*

*A. I believe --*

*MR MADDEN: I object to that. She hasn't said that she didn't know. I mean, that suggests that she didn't know as a fact that the information was being given. She said she doesn't know, not that she didn't know.*

*MS STERN: The witness has said that she didn't know at what point in time the report was made and it would therefore follow that - sorry.*

*THE COMMISSIONER: Could we have the question again.*

*MS STERN: The question was:*

*Did it concern you that you were being given information about individual cases but you didn't know whether or not the particular information you were being given had been provided to the NSW Police Force through other channels?*

*THE COMMISSIONER: I think that's a proper question. I will allow that.*

*THE WITNESS: I don't know what information was being provided. Isn't that the - is that the question?*

*MS STERN: Q. Yes. The premise of the question is you didn't know what information was being provided?*

*A. Correct, yes.*

*Q. And as an officer of the NSW Police Force, didn't that concern you?*

*A. I had no reason to believe that all relevant information wasn't being passed.*

*Q. But you didn't check that that it was being passed, did you?*

*A. No, that's correct.*

*Q. Weren't you then in a position of conflict of interest --*

*A. No, ma'am.*

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<sup>477</sup> *ibid*, p.443:7-10

<sup>478</sup> *ibid*, p.443:11

Q. -- because you were being given information through the PSRG but you didn't know that that was being appropriately reported to the NSW Police Force?

A. My role on the PSRG was not to receive information for police. Is that what you're suggesting, ma'am?

Q. Well, I'm suggesting that there was a conflict of interest inherent in your role, in that you were receiving information that might be relevant to potential investigation of criminal conduct but you were not receiving it in a role in which you were passing that on to the police to ensure that that investigation was carried out?

A. My role was as an adviser, as a person with particular expertise. The system of passing information to or from police was entirely outside that role and that was not - and that was being managed by others who were not reporting to me. You have a certain - so I don't see that there was a conflict in my - that I understood the process to be working that I then had an obligation to check every piece of information. I don't - I didn't see that as my role. That wasn't expected of me, by police or Professional Standards Resource Group.<sup>479</sup>

5.265 Cullen said she believed her role on the PSRG was “subject to a letter which was the letter of invitation to [her] participation” and “approved” by her then Commander.<sup>480</sup> Documents produced by the police to the Commission did not contain a copy of this letter. Cullen gave the following evidence:-

...my role wasn't as the police liaison officer or the police conduit of information. That was entirely outside - and it was not appropriate for that information to be passed or to be waiting for me to have a meeting once a month. That information, you know, and sometimes I wasn't able to make meetings, so it wouldn't have been sensible for me to - for there to be any expectation that I was the receiver or passer of information to police, to and from police from Professional Standards Office. It was not a sensible option. So therefore, it wasn't expected that I would do so.<sup>481</sup>

5.266 During Cullen's evidence the following question and answer occurred:-

Q. Did you ever have a discussion with either Commander Heslop or Commander McKay whereby you said to them, "I'm becoming privy to this sort of information, namely, details of criminal conduct. Should I be bringing this back to you or not?"

A. I would disagree that I had details of criminal conduct. My recollection is of anonymised case discussions, ma'am.<sup>482</sup>

5.267 Cullen was asked whether she had ever had any conversation with Heslop or McGee where she told them about “the type of material” she was considering

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<sup>479</sup> ibid, pp.443:13-444:38

<sup>480</sup> ibid, p.445:2-5

<sup>481</sup> ibid, p.445:10-20

<sup>482</sup> ibid, p.445:22-29



on the PSRG by way of a case report or case summary and whether she had asked them whether she should be taking any steps to ensure that information was reported to the police.<sup>483</sup> Cullen said she did not think she had had such a conversation with Heslop, as she had begun working for the NSW Ombudsman at the time of her first meeting. Cullen said that she could recall a “*generic discussion*” with McGee which involved something like “*advice*”.<sup>484</sup> The following questions and answers occurred:-

*Q. And did you tell them that you were receiving details of individual cases, albeit usually in an anonymised form?*

*A. Again, details, I would have said that they're anonymised case discussions, but not - yes, that's probably about it.*

*Q. And did you ask them whether that sort of information should be in any way reported by you through NSW Police Force channels?*

*A. I didn't directly ask for that, no.*<sup>485</sup>

5.268 During her evidence Cullen was shown the minutes for a meeting of the PSRG of 19 April 2002.<sup>486</sup> Those minutes recorded Cullen as being present at that meeting.<sup>487</sup> The minutes recorded, in respect of a particular case being considered by the PSRG, that the complainant had made a complaint under *Towards Healing* and had then reported the matter to the police. The minutes continued:-

*The Professional Standards office due to the police investigation undertook no further action; complainant has not followed up with police complaint and has since forwarded another complaint to the Office with a confession from the accused that he had located...*<sup>488</sup>

The following questions and answers then occurred:-

*Q...a confession from an accused is important information which may be relevant to a prosecution of an offender for an offence of sexual abuse, isn't it?*

*A. If it was admissible in court, ma'am.*

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<sup>483</sup> *ibid*, p.445:31-36

<sup>484</sup> *ibid*, p.445:37-42

<sup>485</sup> *ibid*, pp.445:44-446:6

<sup>486</sup> *ibid*, pp.446:8-447:30

<sup>487</sup> Exhibit 110B, p.1

<sup>488</sup> Exhibit 110B, p.4

*Q...(Do) you agree that it is information that you should have taken steps to ensure was passed to the NSW Police Force?*

*A. But that wasn't my role on the committee, ma'am, no.*

*Q. So the reason why you don't agree that you should have checked or ensured that this was passed to the NSW Police Force is because of your understanding of your role on the PSRG?*

*A. And that information was being passed to NSW Police by the Professional Standards Office, outside my role.*<sup>489</sup>

5.269 During her evidence Cullen was shown a draft of a letter from Davoren to a complainant where the identity of the complainant had been anonymised. Cullen agreed that the anonymisation precluded her from making any inquiries within the Police Force about whether the police held further information in relation to that case. However, Cullen said that making such inquiries was not expected of her.<sup>490</sup> Cullen said that for the period in which she was employed by the Ombudsman she would not have had access to the COPS system.<sup>491</sup>

5.270 During her evidence Counsel Assisting examined Cullen on a number of documents which were before the PSRG. During this examination an objection was made by the legal representative for the Commissioner of Police in the following terms:-

*MR SAIDI: Commissioner, can I object to this line of questioning?*

*THE COMMISSIONER: Yes.*

*MR SAIDI: And can I do this hopefully in the spirit of being helpful to the Commission rather than obstructive. This witness has repeatedly in her evidence indicated what her view of her role was on the PSRG, the extent to which she was given information, the extent to which she relied on a practice as she understood it of reporting between the church and the police organisation. She did not see it as her role to be a reporter of information or to convey the information to the police in her capacity.*

*One has to ask knowing that as the general background, why it is that the witness is being taken to individual documentation in relation to what came before the Professional Standards Group and she's specifically being asked questions relating to - and I assume we're going to hear the repetitive type question of "Would you have considered that should have been reported?", or whatever. The Commission has got the general background.*<sup>492</sup>

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<sup>489</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.447:17-37

<sup>490</sup> *ibid*, p.452:14-34

<sup>491</sup> *ibid*, pp.452:45-453:4

<sup>492</sup> *ibid*, p.472:7-29

5.271 The legal representative for Cullen joined the objection. This occurred in the following exchange:-

*MR MADDEN: I join the objection too, Commissioner. I mean, my client has said over and over again what she thought her role was. If she has said it once, she has said it 20 times, over and over again and this taking her to documents and reading the documents, "Why didn't you do this?". Well, she's not going to say - well, I won't say what she's going to say but this isn't achieving anything. All it is doing is just keeping my client in the witness box longer than is necessary and we're going to run out of time.*

*THE COMMISSIONER: Do you agree with the general propositions about the witness's evidence that Mr Saidi has just stated, Mr Madden?*

*MR MADDEN: I agree that my client's evidence has been that she saw her role not - or did not see her role as reporting things back to the NSW Police Force.*

*THE COMMISSIONER: Yes. She had a conception of her role that did not include reporting matters to the NSW Police Force.*

*MR MADDEN: That's right. She was not there as an investigator or a conduit for information to go back to the NSW Police Force.*

*THE COMMISSIONER: Yes.*

*MR MADDEN: That was also the evidence, as I understand it, of former Chief Superintendent McKay --*

*THE COMMISSIONER: Yes.*

*MR MADDEN: -- and Mr Armstrong I think also gave that evidence.*<sup>493</sup>

5.272 Counsel Assisting, having regard to the submissions of the legal representative for the Commissioner of the Police Force and the legal representative for Cullen, did not again take Cullen to particular documents which were recorded in PSRG agendas as having been before the committee. Instead, Counsel Assisting put to Cullen, and Cullen accepted, that if documents had been tabled at a PSRG meeting which she had attended it was likely that she would have been aware, at least in a general sense, of those documents and of information contained within them.<sup>494</sup>

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<sup>493</sup> *ibid*, pp.472:33-473:21

<sup>494</sup> *ibid*, pp.473:23-475:14

## Blind reporting

5.273 Cullen gave evidence to the Commission that she was involved in the establishment of the practice of blind reporting and assisted in the drafting of a pro forma document used by Davoren and Salmon to report matters to the police.<sup>495</sup> However, Cullen said the version of the document she was involved in creating did not contain the pre-filled answer “No” after the questions “*Is the informant willing to speak to the police?*”<sup>496</sup> Similarly, Cullen said that the pre-filled answer “*Not at this stage*” after the question “*Is the victim willing to report to police?*” was not in the form she had been involved in drafting.<sup>497</sup> Cullen said that in the version of the standard form she was involved in preparing the answers to both those questions had been left blank.<sup>498</sup>

5.274 The following questions and answers then occurred:-

*Q. And so would you agree that, partly through your work, there was an arrangement between the PSO and the CPEA that where an individual complainant indicated that they didn't themselves want to make a report to the police, the only reporting would be by way of completion of this form but with the victim's identifying details omitted?*

*A. I didn't agree to that, no, ma'am.*

*Q. You don't agree that that was an arrangement that you put in place?*

*A. No, ma'am.*

*Q. But you drafted this form?*

*A. Yes, ma'am.*

*Q. And you suggested to the PSO that this is a form that should be used where an individual complainant indicated that they didn't want themselves to make a complaint to the police?*

*A. No, ma'am, otherwise I wouldn't have included victim details (a box in the form for details of the victim).<sup>499</sup>*

5.275 Cullen said that there was a practice that, if complainants were unwilling to report matters to the police, then the PSO would not give identifying details of complainants to the police.<sup>500</sup>

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<sup>495</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.448:32-35; Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), p.57:17-19 & p.61:25-40

<sup>496</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.449:9-12

<sup>497</sup> *ibid*, p.449:22-33

<sup>498</sup> *ibid*, p.449:19-20 & p.449:30-33

<sup>499</sup> *ibid*, pp.449:35-450:8

5.276 In her evidence Cullen was asked by Counsel Assisting what in her view was the purpose of the blind reporting form. Cullen said that it was to assist police and to help the PSO *“in providing details that police could use to complete relevant reports and COPS on matters that had come before the PSO”*<sup>501</sup>

5.277 In a private hearing of the Commission Cullen agreed that blind reporting forms were provided to police for intelligence purposes.<sup>502</sup> She said that the intention of the blind reporting system was to alert police officers to the fact that the PSO held information in relation to a particular matter and that those officers could make a request for such information if they needed it.<sup>503</sup> Cullen said:-

*...should another victim have gone to a police station to report their matter, and when the police officer looked up what was known about that particular person who was named or alleged to have committed the offence and would see that there's some information that has come to police about this particular perpetrator, that would allow them - that would kick off the inquiry for the records relating to that particular person as part of their investigation. That was my understanding of how the system worked.*<sup>504</sup>

5.278 Cullen said that it followed that, where such inquiries were not made by any police officer, and the victim did not themselves later approach police, then any information obtained by the Church over and above what was contained in the blind report would not be provided to the police.<sup>505</sup>

5.279 Cullen said she did not see any completed blind reporting forms.<sup>506</sup> She said that she only became aware during the Operation Protea investigation that the vast majority of blind reporting forms were submitted without identifying details included.<sup>507</sup> However, she said that she *“was aware that that was one of the potential uses of the form”*.<sup>508</sup> Cullen gave evidence that she could not recall

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<sup>500</sup> *ibid*, p.466:3-10

<sup>501</sup> *ibid*, p.450:12-15; see also p.451:17-19

<sup>502</sup> Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), p.41:36-38

<sup>503</sup> *ibid*, p.28:41-46

<sup>504</sup> *ibid*, p.42:21-30

<sup>505</sup> *ibid*, p.62:22-46

<sup>506</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.450:17-20 & p.451:15

<sup>507</sup> *ibid*, p.450:22-26

<sup>508</sup> *ibid*, p.451:3-4

ever asking to see a blind report form submitted by the PSO to the Police Force.<sup>509</sup>

5.280 Cullen gave evidence that she could not recall advising Davoren to include the victim's details on a blind report form, when the victim did not want to go to the police.<sup>510</sup> She could not recall any discussions with Davoren about the way in which he was to complete the form.<sup>511</sup> Cullen agreed she took no steps to ensure that the identifying details of a victim were included in a form completed by Davoren.<sup>512</sup> Cullen said she did not agree it was her role as either a PSRG member or as a police officer on the PSRG to advise Davoren to include identifying information on the blind report forms.<sup>513</sup>

5.281 In a private hearing Cullen was asked why she did not seek to change the blind reporting system after becoming aware of internal Police Force legal advice that blind reporting contravened s 316 of the Crimes Act. Cullen said that she had disagreed with the advice, as it appeared to be saying that victims should be prosecuted for concealing a serious offence, by not providing their details to the Police.<sup>514</sup> Cullen said she had advised her Commander of her views.<sup>515</sup>

5.282 During her evidence in the private hearing the following questions and answers occurred:-

*MS STERN: Q. Did you inform your senior officers that you intended to continue that system unabated, notwithstanding the legal advice that had been provided?*

*A. Look, I understand that that discussion - I can't recall the exact discussion, but that - because I'm trying to recall at which point I've had the discussion with Kim McKay about my disagreement with the legal advice and that it, by inference, meant that victims would be prosecuted under section 316 and that, therefore, we would not get the information. Without the blind reporting, we would not have the information that we did have. So it would be a backwards step if we stopped the blind reporting protocol.*

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<sup>509</sup> *ibid*, p.440:28-31

<sup>510</sup> *ibid*, p.450:28-32

<sup>511</sup> *ibid*, p.450:34-42

<sup>512</sup> *ibid*, p.451:6-9

<sup>513</sup> *ibid*, pp.451:21-452:9

<sup>514</sup> Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), pp.72:36-73:6

<sup>515</sup> *ibid*, p.73:8-13

*And I do recall that I had that discussion, but I know that there was - they were very - Mr Morgan was the commander of State Crime Command at that point, and he was very - he is a qualified lawyer, so he's very cautious, and that's why there was no enactment, if you like, of that MOU, because they erred on the side of caution to make sure that that wasn't in writing, if you like. But there was - as far as I was aware, they were - the commander or the command was satisfied that what was working was working to a satisfactory degree, better - it might not be a perfect system, but it was something better than what we had.*

*Q. So is it your evidence that you were authorised to continue the system which was reflected in paragraph 6 of the MOU that I took you to, but just that it should not be written down?*

*A. Authorised in that the command was aware that that was in place, yes, and that wasn't stopped, ma'am.*<sup>516</sup>

5.283 Cullen said she understood that the blind reporting system was being used while she was on the PSRG.<sup>517</sup> In the private hearing Cullen said she “*believed*” that she had explained the system to her superior officers and sought their approval.<sup>518</sup>

5.284 Cullen was shown a copy of the standard statement of complaint form used by the PSO. Cullen agreed that, although the form indicated that the victim had been asked whether they had notified police, or intended to notify police, it did not explicitly record an intention on the part of the victim that their identifying details be withheld from police. The form also did not say that the victim had been encouraged to go to the police.<sup>519</sup>

5.285 During her evidence Cullen was asked whether it was her understanding that a statement in a complaint form that a person had not and did not intend to notify police, formed the basis for the understanding of the PSO that a complainant did not want to make a complaint to police.<sup>520</sup> Cullen said this was not her understanding.<sup>521</sup> The following questions and answers then occurred:-

*Q. What was your understanding?*

*A. My understanding was that that was the complainant's wishes, that wasn't what was written on the form - I hadn't made connections between forms.*

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<sup>516</sup> Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), pp.73:35-74:19

<sup>517</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.428:1-16; Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), p.61:13-23

<sup>518</sup> Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), pp.61:46-62:2

<sup>519</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.477:7-23

<sup>520</sup> *ibid*, p.481:23-32

<sup>521</sup> *ibid*, p.481:33

*Q. But did you not understand that the way that the wishes were communicated to the contact person was through the form and in the process of completing the form?*

*A. I had understood that it wasn't just what was on the form, it's what they said.*<sup>522</sup>

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<sup>522</sup> *ibid*, p.481:35-44



## 6. SUMMARY OF THE EVIDENCE RELATING TO THE SECOND LIMB

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6.1 As the Commission has previously observed, some of the evidence summarised by the Commission as being relevant to the first limb of the investigation may also have relevance to the second limb of the investigation.

6.2 In Chapter 11 in Volume 5 of its Report, which dealt with “*the Churches*”, the RCPS noted that it had uncovered very early in its inquiries a number of cases where it appeared that:-

*...there was a serious absence of protocols, guidelines, accepted practices or established lines of communication with the Police Service, concerning the way that allegations of this kind should be managed.*<sup>523</sup>

6.3 In paragraph 11.90 of Chapter 11 in Volume 5 of its report the RCPS said:-

*One of the main functions (of the PSO) is to ensure open liaison with police and other relevant authorities. For this purpose liaison arrangements have been made and a memorandum of understanding between the PSRG and the Police Service is in preparation, which will deal with the procedures for communications between the two bodies.*<sup>524</sup>

6.4 On 3 May 1996 Superintendent N S Gould, the Acting Commander of the CPEA (“Gould”), wrote a letter to Father Brian Lucas (“Lucas”), who was the Archdiocesan Secretary of the Archdiocese of Sydney, Catholic Church of Australia.<sup>525</sup> After referring to the establishment of the CPEA the letter continued:-

*This area of policing relies heavily on the cooperation with a number of organisations, and I believe your organisation might be placed to assist in this highly sensitive area.*

*I expect that any areas of mutual interest and co-operation can be clarified in the near future and I now seek your assistance in the nomination of a suitable contact officer to facilitate a liaison with this Agency in this regard.*

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<sup>523</sup> New South Wales, Royal Commission into the New South Wales Police Service, *Final Report – Volume V: The Paedophile Inquiry* (August 1997), p.991 ([11.1])

<sup>524</sup> *ibid*, p.1007 ([11.90])

<sup>525</sup> Exhibit 17

*If you require further information or clarification, please do not hesitate to contact me on telephone number (02) XX XXXXX, or my staff officer, Inspector John Heslop, on (02) XX XXXXX.*<sup>526</sup>

6.5 In his evidence Heslop said that he did not recall seeing the letter but said that the letter was “one of a number of letters that I remember Mr Gould sending out”.<sup>527</sup> The following questions and answers occurred in Heslop’s evidence:-

Q. *Do you recall that from an early stage in the operations of the CPEA, one of the aims was to establish cooperation between the CPEA and the Catholic Church?*

A. Yes.

Q. *And was that because it was identified that the Catholic Church could provide valuable information which would assist the CPEA in carrying out its operations?*

A. Yes.

Q. *And that that might include intelligence information?*

A. It could include that, yes.

Q. *But it might also include information that was relevant to the investigation of criminal behaviour?*

A. Yes, ma’am.

Q. *And it could also include disclosures of criminal behaviour which could then be investigated by the NSW Police Force?*

A. Yes.

Q. *Is it right that from this early stage, you were anxious or you were seeking, I should say, to establish an arrangement which would provide for the disclosure of information from the Catholic Church to the CPEA?*

A. An arrangement or process, yes, very much.

Q. *You were seeking to establish that arrangement or process by cooperation with the Catholic Church?*

A. Yes.

Q. *So you were therefore seeking to reach some form of agreement with the Catholic Church as to the provision by the church of information to the CPEA?*

A. Yes.<sup>528</sup>

6.6 In a letter from the Catholic Archbishop of Sydney to Gould of 22 May 1996 Father Brian Lucas was nominated as a contact officer.<sup>529</sup>

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<sup>526</sup> ibid

<sup>527</sup> PIC Transcript, John Heslop, 15 October 2014, p.238:6-9

<sup>528</sup> ibid, p.238:11-46

- 6.7 On 12 June 1997 Father Lucas sent a memorandum to Davoren to which a draft Memorandum of Understanding (“MOU”) was attached.<sup>530</sup> In the first paragraph of the memorandum Father Lucas said:-

*As requested here is a copy of the draft memorandum of understanding which has been submitted by the Child Protection Enforcement Agency.*<sup>531</sup>

In the memorandum Father Lucas enquired whether Davoren would like to have a meeting.

- 6.8 The draft MOU was expressed to be between the NSW Police Service and the Catholic Church in NSW. The draft MOU contained, *inter alia*, the following provisions.

- 6.9 Page one of the draft MOU stated next to the word “Mission” the following: “*The NSW Police Service and the Catholic Church working together to protect children*”.<sup>532</sup> Next to the word “Objective” the following was stated:-

*To establish an effective liaison and intelligence flow between the NSW Police Service and the Catholic Church in NSW, specifically in relation to allegations of child sexual abuse by personnel of the Catholic Church.*

*The Catholic Church and the Police Service recognise the necessity for a continuing liaison to be established. This document is a basis for ideas and proposals for consideration, leading to the establishment of a memorandum of understanding acceptable to the two organisations, and further, to ensure information and intelligence is exchanged in the pursuit of continuing protection for children.*<sup>533</sup>

- 6.10 On the second page of the document the following was stated:-

**PROPOSAL:** *Create a point of contact for the exchange of information and intelligence between the Catholic Church and the NSW Police Service.*

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<sup>529</sup> Exhibit 18

<sup>530</sup> Exhibit 310

<sup>531</sup> *ibid*

<sup>532</sup> *ibid*, b/c 8128052

<sup>533</sup> *ibid*, b/c 8128052

**OUTCOME:** *Information between the Catholic Church and the Child Protection Enforcement Agency will be exchanged freely through these contact points. The Catholic Church will, through the CPEA, seek advice and referral to appropriate police services, in relation to matters of child protection. Similarly, where the Police Service conducts an investigation involving Church personnel, the Catholic Church will provide information to the Police Service.*<sup>534</sup>

6.11 The following was stated on the fourth page of the document:-

**PROPOSAL:** *Provide an avenue for the report to the Police Service of intelligence obtained by the Catholic Church personnel.*

**STRATEGY:** *Where a person may be suspected of committing an offence against a child but a complaint has not been made, the Church will be able to report the matter to the CPEA for intelligence purposes only. In this regard, if a complaint is made from another source, the intelligence can be married together.*

<sup>535</sup>  
...

6.12 The following was stated on the sixth page of the document:-

**PROPOSAL:** *Ensure the rights of the victim are paramount and the Police Service and Catholic Church policy of victim care is strictly adhered to*

**STRATEGY:** *Where a person reports to a contact person a historical assault and wants the matter to be kept confidential, The contact person should report the matter through the normal channels to the Police, including victim and offender details. The Police Service will reserve the right to interview the victim for the purpose of obtaining further intelligence to ensure that the offender is still not a risk to other children, and to accurately record the allegation. **THE POLICE SERVICE WILL NOT INSTITUTE PROCEEDINGS AGAINST AN ALLEGED OFFENDER WHERE THE VICTIM DOES NOT WANT THIS TO OCCUR. IF THE VICTIM DOES NOT WANT TO MAKE A STATEMENT TO POLICE, THEY ARE NOT OBLIGED TO. THE NSW POLICE SERVICE***

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<sup>534</sup> *ibid*, b/c 8125053

<sup>535</sup> *ibid*, b/c 8125055

**RESPECTS THE RIGHTS OF THE VICTIM, HOWEVER ALSO HAS A DUTY OF CARE TO INVESTIGATE A CRIME AND TO TAKE ALL STEPS TO ENSURE THAT THE ALLEGED OFFENDER IS NO LONGER IN A POSITION TO OFFEND.**

**OUTCOME:** *The victims rights are protected. The Police Service ensures that the alleged offender is not a threat to the community, be that Catholic or general. Valuable intelligence is obtained regarding that particular alleged offender who may have offended against others.*<sup>536</sup>

6.13 In his evidence Davoren said that he had no recollection of receiving the memorandum.<sup>537</sup> Davoren said that what was set out in the first and third sentences of the “*Strategy*” on the sixth page of the draft MOU were not practices that had been put in place while Davoren was the Director of the PSO.<sup>538</sup>

6.14 With regard to the first paragraph of the memorandum which asserted that the draft MOU had been submitted by the CPEA, Heslop said that he had no recollection of having submitted a draft MOU.<sup>539</sup>

6.15 Heslop said that the only meeting with anyone from the Catholic Church which he could recall was a single meeting with Father Lucas.<sup>540</sup>

6.16 Heslop did not recall that he had believed that it would be important to establish a MOU between the CPEA and the Church in relation to the conveying of information from the Church to the police.<sup>541</sup> However, he was “*keen to forge a link with the Catholic Church*” and keen that the CPEA should become the established contact point within the police service.<sup>542</sup> He did not recall the PSO being an established contact point for the exchange of information.<sup>543</sup>

6.17 Heslop said that it was his intention that there be “*a free communication of information from the Catholic Church to the CPEA in relation to matters relevant*”

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<sup>536</sup> *ibid*, b/c 8125057 (emphasis in original)

<sup>537</sup> PIC Transcript, John Davoren, 13 October 2014, p.78:16-22

<sup>538</sup> *ibid*, pp.78:24-79:24

<sup>539</sup> PIC Transcript, John Heslop, 15 October 2014, p.241:13-17

<sup>540</sup> *ibid*, p.239:41-44 & p.242:10-12

<sup>541</sup> *ibid*, p.242:14-22

<sup>542</sup> *ibid*, p.243:6-13

<sup>543</sup> *ibid*, p.243:45-47

to child protection".<sup>544</sup> Heslop said that there should be as much information communicated by the Catholic Church to the CPEA as was possible.<sup>545</sup> Heslop said that it was his aim to ensure that intelligence reporting, that is reporting of suspected offending even where there had been no actual complaint, should be freely communicated.<sup>546</sup>

6.18 With reference to the part of the draft marked as "Strategy" on the sixth page the following question and answer occurred:-

*Q... where a victim wishes to keep that matter confidential, is that something that is relevant to the question of whether or not the NSW Police Force or the CPEA would investigate the matter at all?*

*A. Could still investigate the matter - it wasn't unusual for that to be a scenario, that in historical abuse cases, with the passage of time, a person might well have worked through the abuse or shut the abuse out and didn't want to have anything more to do with it.*

*Q. But did you, as the commander of the CPEA, regard a victim's desire for confidentiality to be a valid reason for the police not investigating a complaint of an assault?*

*A. No. No, it's - the fact that a victim didn't want to go ahead with making a statement, the information we had might assist us in another investigation involving the same offender.*<sup>547</sup>

6.19 In his evidence Heslop agreed that, in the case of a report of an assault where the victim wished to maintain confidentiality, the CPEA sought to ensure that victim and offender details were reported to police. This report was made through the COPS system by way of an event report.<sup>548</sup>

6.20 In his evidence Heslop said that it was often the case that police would approach a victim and seek an interview even where that victim had expressed a desire for confidentiality.<sup>549</sup>

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<sup>544</sup> *ibid*, p.244:10-14

<sup>545</sup> *ibid*, p.244:25-30

<sup>546</sup> *ibid*, p.245:4-28

<sup>547</sup> *ibid*, pp.246:38-247:7

<sup>548</sup> *ibid*, p.248:10-27

<sup>549</sup> *ibid*, pp.248:45-249:4

- 6.21 Heslop gave evidence that it was “*often the case*” that police would seek to approach and interview a victim who had expressed a desire that their identity be kept confidential from the police.<sup>550</sup> This was done through a variety of mechanisms such as by counsellor, a person whom the victim trusted or the person who had first received the complaint.<sup>551</sup> Heslop agreed this was done because it was important to investigate as fully as possible matters which might represent serious criminal conduct.<sup>552</sup>
- 6.22 As to the first sentence in upper case in the part of the draft MOU next to the word “*Strategy*” on the sixth page of the draft MOU Heslop said: “*I can't speak for every investigation...I don't believe it was a policy or a practice; it would depend on the merits of a case*”.<sup>553</sup> He agreed that there would be cases which could be described as strong on the basis, for example, of an admission, without any statement from the victim.<sup>554</sup>
- 6.23 At a meeting of the PSRG on 20 June 1997 Davoren tabled copies of a “*Draft MOU between the Church and the Police*” and it was agreed that the MOU “*be placed on the agenda as soon as possible*”.<sup>555</sup> It would appear likely that the draft MOU tabled was the draft MOU attached to Lucas’s memorandum.
- 6.24 The following passage appeared in the minutes of a meeting of the PSRG on 22 October 1999, which was attended by Cullen:-

*It was noted that it is the current practice that:*

*a) Any abuse of a child is reported to police. If the complainant does not wish to complain to police, the information is passed to police without identifying the complainant. This communication is for police intelligence purposes, and is seen to meet the requirements of s316 of the NSW Crimes Act.*

*b) In these circumstances when the police have no identified witness and cannot investigate, the appointment of an independent assessor is recommended to the Church authority.*

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<sup>550</sup> *ibid*, p.249:19-24

<sup>551</sup> *ibid*, p.249:6-17

<sup>552</sup> *ibid*, p.249:26-30

<sup>553</sup> *ibid*, p.249:32-45

<sup>554</sup> *ibid*, pp.249:47-250:5

<sup>555</sup> Exhibit 62B

c) *In case of adult abuse/rape then PSRG advises the complainant to lodge the complaint with Police.*

d) *If complainant does not wish to complain to police then PSRG recommends an independent assessment with a view to a pastoral response.*<sup>556</sup>

6.25 Davoren gave evidence that paragraph (a) accurately described the practice of the PSO through the time that he was director of the PSO.<sup>557</sup> Davoren confirmed that the PSO made a report to the police at the time a complaint of sexual abuse was found in the Church's process to be substantiated but that, if a complaint was not substantiated, no report was made to the police.<sup>558</sup> Davoren said that he would have received advice that the practice set out in paragraph (a) of the minutes met the requirements of s 316 of the Crimes Act.<sup>559</sup> He assumed that the practice was accepted as appropriate by the Police Force.<sup>560</sup>

6.26 In his evidence Davoren said that he had received advice from the police that, if the PSO did not provide the police with information identifying the complainant, then the police would be unable to investigate the complaint.<sup>561</sup> Davoren said that paragraph (b) accurately described the practice of the PSO.<sup>562</sup> However, later in his evidence Davoren said that paragraph (b) seemed to him to be "*rather muddled*"<sup>563</sup>

6.27 On 10 November 1999 a Professor Patrick Parkinson ("Parkinson") wrote to the then Minister for Police. In that letter Parkinson said he was "*currently assisting the Catholic Church in revisiting its procedures on complaints of sexual abuse against priests, religious and other church personnel*".<sup>564</sup> The letter noted that these procedures had been set out in the *Towards Healing* protocol of 1996. The letter continued:-

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<sup>556</sup> Exhibit 88B

<sup>557</sup> PIC Transcript, John Davoren, 14 October 2014, pp.102:42-103:11

<sup>558</sup> *ibid*, p.103:13-24

<sup>559</sup> *ibid*, p.103:35-38

<sup>560</sup> *ibid*, p.104:1-5

<sup>561</sup> *ibid*, p.106:20-24

<sup>562</sup> *ibid*, p.104:36-46

<sup>563</sup> *ibid*, p.106:6-18

<sup>564</sup> Exhibit 22



*Almost all the complaints made under Towards Healing have come from adults who were abused many years ago. Some victims have gone to the police and convictions have resulted. In other cases, victims have indicated in writing that they are unwilling to go to the police but still want the Church to address their needs and deal with the priest or religious appropriately. In still other cases, police have investigated but there has been insufficient corroborative evidence to bring charges, or charges have been dropped.*

*The need for a protocol arises in these cases where the victim is unwilling to go to the police or the police do not lay charges. The Church wishes to cooperate fully with the civil authorities. It does not want to conduct its own investigation where it is possible to involve the police. Nonetheless, if it is not possible to involve the police because a victim is unwilling to testify in court, then the Church needs to take action of its own. If the complainant's account is true, then the priest must be removed from ministry. Other children are likely to be at risk. Towards Healing establishes a procedure for dealing with this. Assessors are appointed to investigate the case and these are often ex-police officers or other experienced investigators.*<sup>565</sup>

- 6.28 Parkinson's letter sought the Minister's assistance in "developing a written protocol which will set out a mutual understanding between the Police Service and Church authorities on how to deal with cases where victims will not cooperate with the police." The letter noted that there was a lack of clarity in dealing with matters where victims refused to cooperate with Police. The letter continued:-

*In NSW, the main elements of that understanding are already in place. There is a good working relationship between Commander John Heslop and The Professional Standards Office of the Church in NSW. Where a victim is unwilling to go to the police, then he or she must sign a written statement to that effect. The Professional Standards Office notifies the Child Protection Enforcement Agency of the complaint and the name of the accused, but not the name of the victim. The Church has committed its personnel to comply with all mandatory reporting laws. Commander Heslop has indicated to me that he would be pleased to assist in the development of a written protocol.*<sup>566</sup>

- 6.29 The agenda of a PSRG meeting for 21 February 2000 included the following item:-

## **8. MOU WITH THE NSW POLICE SERVICE**

*Preliminary discussion with the Commander of CPEA, Supt Heslop took place in December. Subsequently Patrick Parkinson in association with the review of Towards Healing wrote to the Police Minister with a proposal that NSW might provide a model for the rest of the country in this regard. A meeting at the Minister's request was held on 2 February with Mr Heslop,*

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<sup>565</sup> ibid

<sup>566</sup> ibid

*Bishop Robinson, Professor Parkinson and John Davoren. It was proposed that Parkinson review the draft MOU and come back with recommendations to the interested parties with a view to a formal agreement between Church and Police Service that might also serve as a model for the other States and Territories.*<sup>567</sup>

6.30 When Davoren was giving evidence he was asked about this item in the agenda:-

*Q...Do you recall this occasion when you had discussions about entering into a memorandum of understanding with the NSW Police Force?*

*A. I do not recall the meeting but the note would indicate that I was present. I did not take the initiative in this matter.*

*Q. But did you consider yourself that it would be a positive development?*

*A. Not particularly, no.*

*Q. Why not?*

*A. I felt that we were getting on quite well as it was and didn't think that we needed to come up with an agreement and possibly could be interpreted as some sort of manipulation. We didn't need that. We didn't need to tie the police down in any way and that appeared to be one of the purposes.*

*Q. And when you say you thought you were getting on quite well as it is, was that because you felt that the practice that you had adopted through the PSO in relation to interactions with the police was working well?*

*A. Yes.*

*Q. And did you feel that there was agreement or an understanding by the police that that practice could, in the generality of cases, continue?*

*A. The officers I was dealing with didn't always agree with where I stood but we seemed to get on very well and achieve good results.*<sup>568</sup>

6.31 In evidence before the Commission was a draft version of a MOU dated March 2000. The document was headed:-

CONFIDENTIAL DRAFT

*MEMORANDUM OF UNDERSTANDING ON CO-OPERATION BETWEEN THE  
CATHOLIC CHURCH AND THE NEW SOUTH WALES POLICE SERVICE*<sup>569</sup>

6.32 At the hearing witnesses were asked about parts of Part IV of the draft MOU headed "*Protocol on liaison between Catholic Church and New South Wales Police Service*". Part IV was itself divided into parts. Part A was headed: "*Where*

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<sup>567</sup> Exhibit 162B

<sup>568</sup> PIC Transcript, John Davoren, 14 October 2014, pp.119:18-120:1

<sup>569</sup> Exhibit 25, b/c 7966948

a complainant does not wish to make a report to the Police". Clause 6 in Part A of Part IV was in the following terms:-

*Where a criminal offence is alleged, and the complainant does not wish to make a report to the police, the Convenor of the NSW Professional Standards Resource Group will report the name of the alleged offender to the police, but not the name of the complainant, and will provide such information concerning the alleged offence as is possible without disclosing the identity of the complainant.*<sup>570</sup>

6.33 Part D of Part IV was headed: "*Where the Police are conducting an investigation which follows a Church assessment*". Part D included the following clauses:-

*14. Where a complainant has indicated in writing to the Church that he or she does not wish to make a complaint to the Police, and the complainant subsequently makes a report to the Police, the Catholic Church will provide to the Police, such information concerning the process and outcomes of its investigation as is possible without breaching an obligation of confidentiality to any person.*

...

*17. Where the Police request to see the statement of complaint, and other documents relating to the complainant's account of the alleged offence, the Police shall first seek the complainant's permission for these documents to be made available.*

*18. Where the Police request to see documents relating to the accounts of other persons who provided information to assist in the Church assessment, the Police shall first seek the permission of those persons for these documents to be made available*

*19. Church authorities shall make available the report of an assessment and any other matter relevant to the accused's account of 'events only if required to do so by court order.*<sup>571</sup>

6.34 All the witnesses who gave evidence at the hearing, except for McDonald, gave evidence about this draft MOU.

6.35 Davoren did not recall having seen the document. In different parts of his evidence he said that clause 6 reflected the practice of the PSO while Davoren was the Director of the PSO or that clause 6 described "*what tended to happen in a number of cases*".<sup>572</sup> Davoren gave evidence that "*I would think that I did discuss it (the practice described in clause 6) with the Child Protection*

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<sup>570</sup> ibid, b/c 7966950

<sup>571</sup> ibid, b/c 7996951-952

<sup>572</sup> PIC Transcript, John Davoren, 14 October 2014, p.114:19-42

Enforcement Agency".<sup>573</sup> He could not recall which officer of the CPEA he had had the discussion with.<sup>574</sup> The following question and answer occurred in Davoren's evidence:-

*Q. And were you under the understanding that it was a practice that they were content for you to adopt?*

*A. No, I don't think they were happy about the fact that we weren't able to give them the complainant's name and certainly at times if they insisted, then we would indicate to the complainant that we were going to give their name.*<sup>575</sup>

6.36 Davoren gave evidence that what was described in clause 14 of the document reflected the practice of the PSO.<sup>576</sup>

6.37 The following questions and answers occurred in Davoren's evidence:-

*Q. But was it your understanding that the police were content for you to adopt the practice, namely, that you wouldn't provide information that might breach an obligation of confidentiality to, for example, a victim who had indicated a wish for confidentiality?*

*A. No. The police weren't happy with that.*

*Q. Did they seek to persuade you to change that practice?*

*A. I'm sure it was suggested that we do so but had we - the problem we were faced with then was that we would have to say this to the people right at the beginning, "we will not accept any obligation of confidentiality and we reserve the right to hand all of this over to the police", in which case a number of the would-be complainants would stand up and walk out, which means that the whole system then no longer has any meaning.*

*Q. Do you recall any specific member of the NSW Police Force advising you that you should alter that practice as a general practice?*

*A. I'm sure we had discussions about it, but I indicated my problem was that we might as well close down.*

*Q. Is it your recollection during those discussions that the police officer accepted that and agreed that the practice could continue?*

*A. No, I don't think that's what they would have said. They would just say, "we regret that you insist on doing it."*<sup>577</sup>

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<sup>573</sup> *ibid*, p.114:46-47

<sup>574</sup> *ibid*, p.115:2-4

<sup>575</sup> *ibid*, p.115:6-11

<sup>576</sup> *ibid*, p.115:13-33

<sup>577</sup> *ibid*, pp.116:33-117:14

6.38 Salmon said that he believed that clause 6 in Part IV of the draft MOU accurately reflected an arrangement between the PSO and the NSWPF in relation to blind reporting.<sup>578</sup>

6.39 During his evidence Salmon's attention was drawn towards clause 14 of the draft MOU. The following questions and answers occurred:-

*Q. Now, does that accurately reflect the terms of the arrangement that you've been discussing earlier in your evidence?*

*A. No, it doesn't, because I think I've already said in my evidence that it wasn't normal practice to provide those other, you know, copies of assessments and whatever. There was the blind report that went out in the first instance and that was the arrangement in place when I came into the job and it was the arrangement that continued.*

*Q. And is there not another difference, namely, that you did not automatically provide information to the police but you waited for a written request from the police for the additional information before you would provide it?*

*A. Yes. If the police were seeking further information then we - as I said, very early on in my term the policy was that we would provide to the police what they were seeking and all we requested was a written report identifying what they wanted and that could be by email.<sup>579</sup>*

6.40 Salmon gave evidence that clauses 17, 18 and 19 did not reflect "the longstanding practice at the PSO".<sup>580</sup>

6.41 Davoren said that clause 19 of the draft agreement "definitely" did not reflect the practice of the PSO.<sup>581</sup> The following questions and answers occurred:-

*Q. What was the PSO's practice in relation to disclosure of matters relevant to an accused's version of events or account of events if that was requested by the NSW Police Force?*

*A. Any information which was given directly to us would be handed on to the police.*

*Q. And would you first seek the permission of the accused to do so?*

*A. No.<sup>582</sup>*

6.42 Heslop gave evidence that he did not recall having been consulted as to the terms of a draft MOU.<sup>583</sup>

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<sup>578</sup> PIC Transcript, Michael Salmon, 14 October 2014, pp.175:41-176:18

<sup>579</sup> *ibid*, p.177:5-23

<sup>580</sup> *ibid*, p.179:3-13

<sup>581</sup> PIC Transcript, John Davoren, 14 October 2014, p.117:35-38

<sup>582</sup> *ibid*, pp.118:16-119:7

- 6.43 Heslop gave evidence that he was not aware that it had been the practice of the PSO while Heslop was the commander of the CPEA to make reports to Police Force in accordance with clause 6 in Part IV of the draft MOU.<sup>584</sup> Heslop had no recollection as to whether clause 14 in Part IV of the draft MOU reflected a practice that had been the subject of agreement between the Catholic Church and the Police Force.<sup>585</sup>
- 6.44 When McGee gave evidence she said that she had a recollection of having seen the draft memorandum of understanding before.<sup>586</sup> In relation to clause 6 in Part IV of the draft MOU she said that she was aware that a system of blind reporting “*was in place*” but did not know if that was what Davoren and Salmon had been doing by way of reporting.<sup>587</sup> As to clause 14 in Part IV of the draft MOU she was not sure of what the practice of the PSO had been while she was Commander of the CPEA.<sup>588</sup>
- 6.45 McGee agreed that there was an arrangement between the CPEA and the PSO relating to Cullen. The arrangement was merely that Cullen should attend meetings of the PSRG.<sup>589</sup>
- 6.46 In her evidence Cullen agreed that clause 6 in Part IV of the draft MOU reflected the practice of the PSO during the time that Cullen was a member of the PSRG.<sup>590</sup> Cullen gave evidence that clauses 14, 18 and 19 did not reflect the practice of the PSO or the PSRG while she was a member of the PSRG.<sup>591</sup> Cullen gave evidence that she was not involved in drafting the MOU and had not been consulted about the MOU.<sup>592</sup>

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<sup>583</sup> PIC Transcript, John Heslop, 15 October 2014, p.250:26-28

<sup>584</sup> *ibid*, p.251:4-15

<sup>585</sup> *ibid*, p.252:24-253:1

<sup>586</sup> PIC Transcript, Kim McGee, 16 October 2014, p.320:20-30

<sup>587</sup> *ibid*, p.322:9-30

<sup>588</sup> *ibid*, pp.323:42-324:15

<sup>589</sup> *ibid*, pp.331:23-332:2

<sup>590</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, pp.490:46-491:22

<sup>591</sup> *ibid*, pp.491:24-492:8

<sup>592</sup> *ibid*, p.492:10-15

6.47 On 28 June 2000 Professor Parkinson wrote a letter to Heslop, addressing Heslop as “*Dear John*”. The letter was headed “*Re Protocol with Catholic Church*”. In the letter Parkinson thanked Heslop for his “*comments on the draft protocol*”. The penultimate paragraph of the letter stated:-

*I enclose a second draft. I don't think it is necessary at this stage for you to seek further legal advice on it, given that you had no problems with the first draft. You may wish to get further advice on the final draft, prior to our meeting. I would be grateful in the meantime if you could let me know with whom the Church should liaise when a complaint of a criminal offence is made against an adult. I assume it would not be appropriate for such matters to be reported to the Child Protection Enforcement Agency.*<sup>593</sup>

It would seem that the previous draft referred to was the draft MOU of March 2000 or not substantially different from that draft MOU.

6.48 In his evidence Heslop, having read the letter of 28 June 2000, accepted that he had commented on the first draft and had accepted it as being appropriate.<sup>594</sup>

6.49 After being shown the transcript of an interview of Professor Parkinson by Commission investigators Heslop accepted that it was likely that he had commented on the first draft MOU and had expressed the view that he was “*comfortable*” with it.<sup>595</sup> He agreed that he would not have expressed the opinion that he was comfortable with the draft, unless he felt that the draft reflected the practice that was in place between the Church and the Police Force.<sup>596</sup> Heslop further accepted that it was likely that he had been closely involved in the drafting of the first draft MOU.<sup>597</sup>

6.50 A document tabled at a meeting of the PSRG on 23 February 2001 was a report of the PSRG for the period from 1997 to 2000.<sup>598</sup> On page 6 of the report under the heading “*Assessment of complaints*” it was stated:-

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<sup>593</sup> Exhibit 318

<sup>594</sup> PIC Transcript, John Heslop, 15 October 2014, p.263:33-41

<sup>595</sup> *ibid*, p.265:5-18

<sup>596</sup> *ibid*, p.265:20-25

<sup>597</sup> *ibid*, p.265:27-42

<sup>598</sup> Exhibit 191

### **The Police**

*If the complaint concerns a matter that is possibly criminal the complainant is advised of his or her right to take the matter to the police and that, if requested, assistance will be provided in approaching the police.*

*If the complainant is unwilling to report a criminal matter to the police, the Professional Standards Office, on behalf of the Church authority, advises the NSW Police Service only that a complaint has been received, but does not indicate the source of the information. The complainants are advised before this action is taken, with the understanding that the police will not contact them unless they are willing to be contacted.<sup>599</sup>*

6.51 Cullen gave evidence that her understanding of the practice was that complainants were encouraged to take their matters to the Police Force and not merely advised of their right to take matters to the police.<sup>600</sup>

6.52 At a meeting of the PSRG on 22 June 2001 an individual case designated as case 1041 was considered. The documents at the meeting included a draft of a letter to be written by Davoren to the complainant, who had complained of sexual abuse by a priest. Parts of the draft letter were as follows:-

*(The priest) is no longer acting as a priest, and is never likely to be allowed to return. However, we would like to notify the police that we have received this complaint about him. We have a long-standing agreement with the police and they do not try to track down the people who have given us information of this kind. They may get back to us if they have anything else they wish to pursue with (the priest), and to ask us to let you know that they would like to hear from you, but no pressure will be put on you to get you to talk to them. Of course we can include your name and address if you want us to do this but to make sure there was no misunderstanding, I would have to have your advice in writing before I took action. I enclose a copy of the form to police. I stress that this has not gone to the police at this stage.<sup>601</sup>*

6.53 Cullen was the only witness who was questioned about this document. Her evidence would not appear to be relevant to the second limb of the Commission's investigation.

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<sup>599</sup> *ibid*, p.6

<sup>600</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.464:6-7

<sup>601</sup> Exhibit 202B



6.54 In a report of the PSRG for the period 1 June to 12 October 2001 it was asserted that the PSRG continued to have “good working relations” with the CPEA.<sup>602</sup> The following passage occurred in the report:-

*If a complaint is about criminal matters, the Professional Standards Office, on behalf of the Church authority, advises the NSW Police Service that a complaint has been received, without indicating the source of the information. The police have agreed and kept to their agreement that they will not attempt to identify the complainants in these situations, or seek to put any pressure on them unless the Office advises that the complainants are willing to be contacted. They are advised that the police are about to be informed and of the conditions under which any information is given to the police.*<sup>603</sup>

6.55 Davoren gave evidence that he did not recall reaching such an arrangement with the police.<sup>604</sup> Davoren said:-

*I have no memory of an agreement and I would have thought that I would have remembered it, so I don't understand why I put that in the report, which presumably was my report.*<sup>605</sup>

6.56 In her evidence Cullen said that she was not aware of an agreement by the Police Force that police officers would not attempt to identify complainants.<sup>606</sup> However she did agree that, although there was not an agreement, there was a practice that police would not attempt to identify complainants in these situations.<sup>607</sup> She agreed that she never sought to change this practice.<sup>608</sup>

6.57 On 23 October 2001 Peter Kristofferson a solicitor/co-ordinator of the Commercial Law Section Court and Legal Services within the police service sent a memorandum to Chief Inspector Trichter Senior Manager/Senior Solicitor, Operational and Special Advice Unit, Court and Legal Services. The heading of the memorandum was “*PROPOSED PROTOCOL AND MEMORANDUM OF UNDERSTANDING WITH CATHOLIC CHURCH*”. Kristofferson attached to the

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<sup>602</sup> Exhibit 187, p.2

<sup>603</sup> *ibid*

<sup>604</sup> PIC Transcript, John Davoren, 13 October 2014, p.109:12-31

<sup>605</sup> *ibid*, p.109:23-26

<sup>606</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.462:15-19

<sup>607</sup> *ibid*, p.462:40-46

<sup>608</sup> *ibid*, p.463:1-6

memorandum a copy of the draft MOU of March 2000.<sup>609</sup> In the memorandum Kristofferson said, *inter alia*:-

*I receive instructions in relation to the above matter from Detective Inspector Robert Sullivan, Chief of Staff, Child Protection Enforcement Agency.*

*I am instructed that the attached draft Memorandum of Understanding (MOU) has been prepared by Professor Patrick Parkinson, University of Sydney and has received final approval from the Catholic Church.*

*I have perused the draft MOU and am of the initial view that the Catholic Church is seeking preferential treatment. In this regard, I note section 316 of the Crimes Act 1900 (NSW) and that the regime that the Catholic Church suggests may be contrary to that explicit legislative requirement.*

*Further, I suggest that, if the Police Service is prepared to enter into such a protocol with the Catholic Church, it would constitute a preferential treatment of one religious group over another and as such, the Police Service should be prepared to also enter into protocols with other religious groups.*

*I would appreciate your advice concerning whether or not you believe the protocols in draft MOU meets with both legislative and our operational/procedural requirements.<sup>610</sup>*

6.58 In his evidence Heslop said “*I don’t remember this document and I don’t remember the issue coming before me*”.<sup>611</sup>

6.59 Cullen gave evidence that she did not recall ever being shown Kristofferson’s memorandum and was not aware at the time in October 2001 that Kristofferson had expressed an opinion that the draft MOU might be contrary to s 316 of the Crimes Act.<sup>612</sup>

6.60 Kristofferson’s memorandum was referred by Chief Inspector Trichter to Acting Sergeant Treadwell (“Treadwell”).<sup>613</sup>

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<sup>609</sup> Exhibit 5

<sup>610</sup> *ibid*

<sup>611</sup> PIC Transcript, John Heslop, 15 October 2014, p.255:27-28

<sup>612</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.493:16-28

<sup>613</sup> Exhibit 5

6.61 Treadwell gave a written advice dated 11 December 2001. Because of the significance of the advice to the issues examined in this report, the Commission will set out Treadwell's advice in full:-

ISSUE:

*Proposed Protocol and Memorandum of Understanding with Catholic Church.*

BACKGROUND:

*Professor Patrick Parkinson of the University of Sydney has prepared a Draft Memorandum of Understanding (MOU), between the Catholic Church and the NSW Police Service. The MOU is designed to govern how both the NSW Police Service and the Catholic Church in co-operation will deal with complaints of physical and sexual assault when they involve Catholic Church personnel, most specifically, the MOU deals with the exchange of information between the two entities and attempts to protect those who would make complaints by affording them anonymity.*

COMMENT:

*After reading the draft MOU, I am of the view that its objectives are admirable and that the suggested protocols are supportive of the objectives. I do not believe that there are grounds for asserting a purposeful attempt by the Catholic Church to gain preferential treatment, however, there may be some incongruence between the draft MOU and existing legislation.*

*The part of the draft MOU that may be incongruent with current legislation is point 6, paragraph IV, which states:*

*"Where a criminal offence is alleged, and the complainant does not wish to make a report to the police, the Convenor of the NSW Professional Standards Recourse Group will report the name of the alleged offender to the police, but not the name of the complainant, and will provide such information concerning the alleged offence as is possible without disclosing the identity of the complainant."*

*I take this to mean that the Catholic Church will, if the draft MOU is settled be selective about the information it discloses to the NSW Police Service when there is a criminal offence reported to them. They intend it seems, to withhold any information in circumstances where it will reveal the name of a complainant and where that person has expressed a desire to remain anonymous.*

*The current legislation with which this may be incongruent is section 316(1) of the Crimes Act 40/1900. This section requires disclosure of 'all' information that might be of material assistance in the investigation of a serious indictable offence' and provides a sanction in the event of a failure to disclose it. Of course, the name of the person against whom it is said a serious indictable offence has been committed is almost certainly going to be of material assistance in any investigation.*

*Section 316(1) states:*

If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

*Interestingly, subsection 4 of the same section provides:*

A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.

*Clause 6 of the Crimes (General) Regulation 2000 prescribes the following professions, callings and vocations for the purposes of s 316(4):*

- (a) a legal practitioner,
- (b) a medical practitioner,
- (c) a psychologist,
- (d) a nurse,
- (e) a social worker, including:
  - (i) a support worker for victims of crime, and
  - (ii) a counsellor who treats persons for emotional or psychological conditions suffered by them,
- (f) a member of the clergy of any church or religious denomination,
- (g) a researcher for professional or academic purposes.

*If the draft MOU is settled, there would prima facie be a conflict between the requirements of the MOU and the law in circumstances where a serious indictable offence is reported to Catholic Church personnel and where there is a desire expressed by the complainant to remain anonymous.*

*I suggest that it would be nonsensical and undesirable for the NSW Police Service to enter into private agreements inconsistent with public law. The courts would not recognise any such agreement and as a matter of public policy, it would be expected that police generally would carry out their primary function of law enforcement notwithstanding the existence of such an agreement. The question therefore is whether Catholic Church personnel in the afore stated circumstances are exempt from the law, for only then could it be said that the MOU is in harmony with existing law.*

*It is clear from the above that there is a distinction to be drawn between members of the clergy and ordinary citizens in that the approval of the Attorney General is required before a prosecution may be commenced against a member of the clergy for an offence under section 316(1). Notwithstanding this the legislation clearly makes it an offence for Catholic Church personnel, be they clergy or otherwise, to fail to disclose everything within their knowledge to the*

*police if it will aid in the investigation of a serious indictable offence. This is so unless they have a reasonable excuse.*

*The fact that disclosure of information to the police by Catholic Church personnel in circumstances where the complainant wishes to remain anonymous may be a breach of confidence, is unlikely to be viewed by a court as a reasonable excuse. This is because the concept of reasonableness is to be viewed in terms of the mischief that the legislation is designed to prevent. The meaning attributed to 'reasonable excuse' in the circumstances will be that which gives effect to the legislation. In my view the mischief contemplated by section 316(1) is the frustration of the investigation of serious crime. The maintaining of confidence is the very thing that will frustrate it and the legislation itself already takes into account that special relationships exist between clergy and parishioners amongst others.*

*In other words, because the legislation itself takes into account that disclosure of information to the police by members of the clergy deserves special consideration (subsection 4 of section 316), it is unlikely that in addition to this it will amount to a reasonable excuse for failing to disclose.*

*Further, the seriousness of the offences to which section 316(1) applies is likely to effect the consideration of what is reasonable. This concept was given judicial consideration in Taikato where it was considered that one might find excuses for the possession of a prohibited article more reasonable depending on the nature of the article possessed. Justice Kirby in that case states:*

*"...the word reasonable will take into account the need for a much more substantial excuse for being in possession in a public place of a loaded firearm than it would, say, for being in possession in a public place of a small canister capable of emitting an irritant liquid. Similarly what would be a reasonable excuse for being in possession of such a canister would not necessarily be sufficient to excuse possession of a canister of tear gas, still less an explosive fuse or detonator,"*

*Based on the rationale of this statement, I view it as unlikely that the desire for maintaining confidence will outweigh the need for disclosure in circumstances where a serious indictable offence has been committed. The excuse is simply not substantial enough to amount to a reasonable one.*

*There are reasons, other than it being a breach of confidence, imaginable for failing to disclose information to police: It may well be that the reason is so compelling it will at law amount to a reasonable excuse, or at least it may be something that motivates the Attorney General not to approve a prosecution. However, the draft MOU fails to specify any of these potentialities, As such, we are left with a blanket proposal which, as demonstrated above, is incongruent with existing legislation at least in circumstances where maintaining confidence is relied upon as a reason for failure to disclose.*

*In all the circumstances, I view the draft MOU as substantially acceptable, however, I view point 6 in part IV as incongruent with existing legislation. I do not believe that it could be successfully argued before any court that personnel of the Catholic Church by virtue of their position alone are afforded a reasonable excuse for a failure to disclose information to the police in circumstances where a serious indictable offence has been reported to them. In line with the*

*logic of the arguments presented above, I do not believe that settlement of the draft MOU in its current terms would affect this, as the law simply would not recognise the inconsistent part.*

*As a matter of public policy, I view it as undesirable for private agreements to be struck between the NSW Police Service and other entities, which are in conflict with existing public law. It is nonsense for an agreement to be entered into regarding how the law will be enforced which in law will not be recognised. Further, I do not think it desirable that there be potential for the frustration of the investigation of serious indictable offences by the existence of such a private agreement.*

RECOMMENDATION:

*I recommend that the draft MOU be amended to remove the part that is inconsistent with existing, law (point 6, paragraph IV) before any consideration is given to settling it.*<sup>614</sup>

6.62 All witnesses who gave evidence at the hearing, except McDonald, were asked questions about the Treadwell advice.

6.63 It was not suggested to Davoren that he had ever seen the document. Mr Davoren agreed that “*Point 6 paragraph (iv)*” which is quoted on page 1 of the advice reflected the general system Davoren had in place.<sup>615</sup> Davoren did not recall ever being told that that system was “*incongruent*” with any provision of the Crimes Act.<sup>616</sup> Davoren did not recall ever being told by a member of Police Force that a desire to maintain a complainant’s confidentiality would be unlikely to be viewed by a Court as a reasonable excuse within s 316 of the Crimes Act.<sup>617</sup>

6.64 It was not suggested to Salmon that he had ever seen the document. Salmon agreed that the sentence in the advice “*they (the Catholic Church) intend it seems to withhold any information in circumstances where it will reveal the name of a complainant and where that person has expressed a desire to remain anonymous*” was the practice he had adopted, except that he described it as applying to persons who did not intend to make a complaint to the police

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<sup>614</sup> Exhibit 6 (footnotes omitted)

<sup>615</sup> PIC Transcript, John Davoren, 13 October 2014, pp.65:17-66:6

<sup>616</sup> *ibid*, p.66:8-11

<sup>617</sup> *ibid*, pp.66:45-67:2

themselves, rather than persons who expressed a desire to remain anonymous.<sup>618</sup>

6.65 Salmon did not recall anyone telling him that the arrangement he was acting under might be inconsistent with s 316 of the Crimes Act.<sup>619</sup>

6.66 Heslop did not recall being informed of Treadwell's advice.<sup>620</sup> He did not recall whether there had been an arrangement between the Police Force and the Catholic Church about the manner in which the Catholic Church was to report instances of child sexual abuse.<sup>621</sup>

6.67 McGee attached a copy of the Treadwell advice to a memorandum she subsequently sent seeking further advice. She was asked about the part of the advice "*I take this to mean that the Catholic Church will, if the draft MOU is settled be selective about the information it discloses to the NSW Police Service when there is a criminal offence reported to them.*" She accepted that blind reporting "*amounted to selectivity about the information that was disclosed by the Church to the police service*".<sup>622</sup> She said that she had not done anything to change the practice about the manner of reporting.<sup>623</sup>

6.68 Armstrong's evidence about the Treadwell advice will be referred to later in this report.

6.69 Treadwell gave a further advice dated 7 May 2002. In this further advice he referred to the draft MOU and to his previous advice of 11 December 2001. He noted that:-

*After consideration by the Commercial Law Section of the New South Wales Police Service, it is proposed that the MOU not be entered into for reasons outlined in the attached report under the hand of Peter Kristofferson and Rod Blume.*<sup>624</sup>

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<sup>618</sup> PIC Transcript, Michael Salmon, 14 October 2014, pp.179:30-180:22

<sup>619</sup> *ibid*, pp.180:41-182:13

<sup>620</sup> PIC Transcript, John Heslop, 15 October 2014, p.256:5-23

<sup>621</sup> *ibid*, p.256:25-31

<sup>622</sup> PIC Transcript, Kim McGee, 16 October 2014, pp.347:31-348:10

<sup>623</sup> *ibid*, p.348:24-31

<sup>624</sup> Exhibit 7

6.70 In this advice Treadwell made the following recommendation:-

*I recommend that the draft MOU be amended to remove the part that is inconsistent with existing law (point 6, paragraph IV) and altered to reflect the legal responsibility the Catholic Church has to provide the police with information regarding serious indictable offences (for example paragraph 14, 17, 18 and 19 would have to be altered) before any consideration is given to settling it. I further recommend that any operational reasons in favour of settling the MOU be raised by an officer with operational investigative responsibility.*<sup>625</sup>

6.71 On 26 June 2002 Mr RJW D'Apice ("D'Apice"), a solicitor acting for church authorities, wrote a letter to Davoren enclosing a copy of "*the most recent draft of the Memorandum of Understanding on Co-operation between the Catholic Church and the New South Wales Police Service*". The draft MOU enclosed with D'Apice's letter appears to be the same as, or substantially similar to, the draft MOU of March 2000. It contains clauses 6, 14, 18 and 19 in the same terms as the draft MOU of March 2000.<sup>626</sup>

6.72 In the final paragraph of the letter D'Apice wrote:-

*His Grace has asked me to confirm with you that your policies and procedures and those set out in the enclosed protocol conform with each other in respect of police reporting.*<sup>627</sup>

6.73 On 1 July 2002 Davoren responded to D'Apice's letter. In his letter Davoren said:-

*1. In general the policies and procedures set down in this draft protocol do conform with the policies and procedures in Towards Healing. This congruence was requested by the National Committee and implemented by Patrick Parkinson working with the NSW Police. The completed and signed document was intended to provide a model for the other States.*

...

*3. The document has not been finalised and it appears that the police might prefer that it not be finalised.*

*4. Relationships with the police are currently very good, or at least they are between this office and the police specialist unit, the Child Protection Agency with which I have almost daily dealings.*

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<sup>625</sup> *ibid*

<sup>626</sup> Exhibit 228

<sup>627</sup> *ibid*



5. *I believe that informal discussions could be useful in bringing the incomplete negotiations to a conclusion with either a properly signed off MOU or a less formal agreement on how to proceed if and when difficulties arise between the Police and any agency of the Church.*<sup>628</sup>

6.74 Davoren gave evidence that it was his understanding that the document was never completed and signed and “*I was not particularly interested in it anyway*”<sup>629</sup>. He gave further evidence as follows:-

*D'Apice was working with the Archbishop. I wasn't answerable to the Archbishop, he was running his own show. Parkinson was running another show. I was not terribly interested in what they were doing.*<sup>630</sup>

6.75 Davoren said that he did not think that clause 19 of the draft reflected any practice he had put in place.<sup>631</sup> He had not been consulted to ensure that the draft document accurately reflected his practices.<sup>632</sup>

6.76 The draft MOU attached to D'Apice's letter and the two letters of 26 June 2002 and 1 July 2002 were discussed at a meeting of the PSRG on 16 August 2002. The relevant part of the minutes of the meeting record “*that PSO had a good working relationship with CPEA and this has been in place for some 5 years and that an MOU was not seen as crucial*”.<sup>633</sup>

6.77 Davoren gave evidence that this part of the minutes reflected his thinking.<sup>634</sup> Davoren did not agree that the reason why a MOU was not seen as crucial was that the draft MOU just reflected existing practices that were used successfully. Davoren said that the draft MOU was irrelevant to “*our discussions*” and that the Archbishop and Professor Parkinson were “*proceeding on in their own way*”.<sup>635</sup>

6.78 On 18 June 2003 McDonald as Executive Director of the CCER wrote a letter to McGee (then McKay) as commander of the Child Protection Squad. The letter contained the following passages:-

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<sup>628</sup> Exhibit 229

<sup>629</sup> PIC Transcript, John Davoren, 14 October 2014, p.123:1-2

<sup>630</sup> *ibid*, p.123:21-24

<sup>631</sup> *ibid*, p.123:26-29

<sup>632</sup> *ibid*, p.123:39-41

<sup>633</sup> Exhibit 113B

<sup>634</sup> PIC Transcript, John Davoren, 14 October 2014, p.124:32-42

<sup>635</sup> *ibid*, p.125:1-7

*In recent times, issues relating to investigation and charging of personnel including clergy have required me to write seeking clarification with you...*

...

*I, therefore, seek your confirmation that the unsigned Memorandum of Understanding with the police remains in place and that our contact point with the police is the Executive Officer of the Professional Standards Office, at this time Mr Michael Salmon.*<sup>636</sup>

6.79 McDonald attached to his letter a copy of a draft MOU which was in the same terms, or substantially in the same terms, as the draft MOU of March 2000.

6.80 McDonald said in his evidence that he wrote the letter, not because of any concern about clause 6 in Part IV of the draft MOU, but as a person responsible for reporting under Part 3A of the *Ombudsmans Act* and a person who was responsible for managing employment relations in Catholic bodies.<sup>637</sup>

6.81 When McDonald was asked about the part of the letter in which he sought confirmation that the “*unsigned Memorandum of Understanding with the police remains in place*”, he denied that he meant that an arrangement between the Police Force and the Catholic Church had been reached and was “*in place*” at the date of his letter.<sup>638</sup> McDonald’s evidence continued:-

*This document is not a document that, through my experience in the PSO, was a document that had any headline issue. I wasn't sure whether it had any credibility or not. That's why I was writing on behalf of Catholic employers, and I made the assumption it must have some reality.*<sup>639</sup>

6.82 McDonald said that he could not say that in writing the letter “*I believed that it (the draft MOU) was in place in the sense of other than existing, I don't believe I meant it was actually fully in place*”.<sup>640</sup>

6.83 After receiving McDonald’s letter McGee sought legal advice from within the Police Force “*as to the appropriateness of this MOU and whether I should enter*

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<sup>636</sup> Exhibit 8

<sup>637</sup> PIC Transcript, Michael McDonald, 15 October 2014, p.223:26-32

<sup>638</sup> *ibid*, pp.224:46-225:14

<sup>639</sup> *ibid*, p.225:16-21

<sup>640</sup> *ibid*, p.225:22-24

into it". McGee attached to this request for advice a copy of the MOU and copies of Treadwell's two advices.<sup>641</sup>

6.84 On 3 August 2003 Ms Angela Friedrich ("Friedrich") a solicitor in the Commercial Law Section of the Police Force provided written legal advice to McGee. In her advice Friedrich said:-

*I have been asked to advise as to the appropriateness of the MOU submitted by the Catholic Commission for Employment Relations.*

*I confirm that the MOU has not been approved by the NSW Police, and the MOU should not currently direct the working relationship between the church and police as suggested by Mr McDonald, Executive Director, Catholic Commission for Employment Relations.*

*I have perused the draft MOU, and I do not consider it is in the interests of the Commissioner of Police ('NSW Police') to enter into the proposed draft MOU. In my opinion, the arrangements proposed by the draft MOU are inappropriate insofar as they are inconsistent with the law, and would be void on the basis of public policy.*

*In addition, please note that all MOU's on behalf of the NSW Police must be signed by the Commissioner or his authorised delegate, Mr Holmes, Director, Legal Services.*

*I enclose a draft letter to Mr McDonald, Executive Director, Catholic Commission for Employment Relations for your consideration.*<sup>642</sup>

6.85 In her evidence McGee agreed that Treadwell and Friedrich were "saying the same thing", that is, giving the same advice.<sup>643</sup>

6.86 Armstrong gave evidence that he had read Friedrich's advice and had in fact quoted it in some documents prepared by himself.<sup>644</sup> He did not specify when he had first read the advice.

6.87 McGee wrote a letter to McDonald dated 20 August 2003 (apparently in accordance with Friedrich's draft). In her letter McGee said:-

*Re: Memorandum of Understanding on Co Operation between the Catholic Church and the NSW Police Service.*

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<sup>641</sup> Exhibit 9; PIC Transcript, Kim McGee, 16 October 2014, p.346:1-31

<sup>642</sup> Exhibit 10

<sup>643</sup> PIC Transcript, Kim McGee, 16 October 2014, pp.348:33-349:11

<sup>644</sup> PIC Transcript, Inspector Wayne Armstrong, 16 October 2014, p.396:15-35

*I refer to your letter dated 18 June 2003 and the above draft Memorandum of Understanding (MOU).*

*Please note that this draft unsigned MOU has not been approved by the NSW Police Service, and the arrangements proposed by the MOU are not currently in place.*

*The arrangements proposed by the draft MOU appear to be in direct conflict with the explicit legislative requirement of section 316 of the Crime Act 1900. In addition, I note clause 6 of the Crime (General) Regulation 2000.*

*In these circumstances the NSW Police Service cannot enter into arrangements as proposed by the draft MOU insofar as these arrangements are inconsistent with the law.*<sup>645</sup>

6.88 Salmon gave evidence that the letter from McGee to McDonald had been tabled at a meeting of the PSRG on 19 September 2003.<sup>646</sup>

6.89 Salmon gave the following further evidence:-

*I have no knowledge as to where it went from there. It seemed to go off the radar. It wasn't before the resource group as an ongoing issue and the arrangement in terms of the blind reporting was continued on and there was no other information from the police that it was less than acceptable to them or not an operational arrangement going forward.*<sup>647</sup>

6.90 Salmon gave evidence that he did not enter into any discussions with the Police Force in relation to the matters set out in McGee's letter to McDonald.<sup>648</sup>

6.91 McDonald gave evidence that he would have received McGee's letter and would have provided it to the PSO.<sup>649</sup> He provided the letter to the PSO "*because it was relevant to an agenda which spasmodically was part of the discussions at the PSRG or relevant to the work of the PSRG*".<sup>650</sup>

6.92 McDonald could not recall any discussion about his letter or the reply from McGee at the PSRG meeting at which both documents were tabled.<sup>651</sup> He could

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<sup>645</sup> Exhibit 11

<sup>646</sup> PIC Transcript, Michael Salmon, 14 October 2014, p.181:15-36

<sup>647</sup> *ibid*, pp.182:43-183:2

<sup>648</sup> *ibid*, p.182:24-28

<sup>649</sup> PIC Transcript, Michael McDonald, 15 October 2014, p.227:14-15

<sup>650</sup> *ibid*, p.228:8-10

<sup>651</sup> *ibid*, p.228:12-14

not remember any discussions about whether the PSO's reporting practices should change as a result of the receipt of McGee's letter.<sup>652</sup>

6.93 During McGee's evidence her attention was drawn to the paragraph of her letter where she had advised McDonald that:-

*The arrangements proposed by the draft MOU appear to be in direct conflict with the explicit legislative requirement of section 316 of the Crime Act 1900. In addition, I note clause 6 of the Crime (General) Regulation 2000*

The following questions and answers then occurred:-

*Q. And that reflects your view, reached on the basis of the legal advice, as at August 2003 that the arrangements proposed by the MOU appeared to conflict with section 316; do you agree?*

*A. Yes.*

*Q. And would it follow that it was also your view that the process of blind reporting appeared to conflict with section 316 of the Crimes Act 1900?*

*A. No*

*Q. Why do you say "no"?*

*A. Because they've reported it.*

*Q. But they have been selective about what information was reported, haven't they?*

*A. On the wishes of the victim.*

*Q. But was it not in this letter precisely that selectivity in reporting that you were identifying as being in direct conflict with the requirement of section 316?*

*A. Exactly.*

*Q. So it follows that it was your view that that selectivity of reporting conflicted with the requirements of the Crimes Act?*

*A. It does.*

*Q. Do you not agree that in the light of that, you should have taken steps to change that practice of blind reporting to the extent that it was being adopted by the Catholic Church as regards reports to the CPEA?*

*A. No.*

*Q. Why not?*

*A. Because it's something that had been a problem for a number of years in terms of collecting information about victims of sexual assault, and in some regard it kept conversations open between the church and the police, which may have closed down completely. It kept the ability for the future for victims to understand that police were generally around. It opened up a lot of things that the law made very problematic in this area.*

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<sup>652</sup> *ibid*, p.228:12-28

Q. Should you not, at the very least, have investigated with the PSO whether they were prepared to provide you with identifying information in relation to victims?

A. No, it never crossed my mind to do that.<sup>653</sup>

6.94 On 30 July 2004 Armstrong sent a memorandum to McGee on the subject of “MOU with Catholic Church”. On the first page of the memorandum he summarised his views as follows:-

*1. I believe the legal advice provided in May 2002 and August 2003 remains valid. Regardless of the attitude of this Command to the objectives of the MOU, the advice is that the draft MOU, if signed, "would be void on the basis of public policy".*

*2. I have not been able to identify any direct benefits for NSW in having an MOU with the Catholic Church. (Assuming a legally valid MOU could be negotiated.) There may be a secondary benefit to fulfilment of our child protection responsibilities if Church personnel felt more willing to facilitate the reporting of offences within the framework of an MOU.*

*3. I recommend the pursuit of the recommendations of the Child Protection SOG Exchange of Information Working Party in preference to establishing separate MOUs with each agency.*<sup>654</sup>

6.95 In the body of the memorandum Armstrong set out issues against the establishment of a MOU with the Catholic Church and issues in favour of an MOU with the Catholic Church.

6.96 The first issue against the establishment of a MOU which he identified was that previously obtained legal advice had been that there was a conflict between the draft MOU and s 316 of the Crimes Act. Armstrong observed that the provisions of s 316 were largely unchanged since the advice was given and “*to that extent the legal advice supplied is still valid*”. In fact, s 316 had not been amended since the advice was given. Armstrong also considered that, if a MOU was entered into with the Catholic Church, the Police Force might have to enter into a proliferation of agreements with other organisations. Armstrong also said that a memorandum of understanding might facilitate the making of false allegations against Church

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<sup>653</sup> PIC Transcript, Kim McGee, 16 October 2014, pp.349:37-350:37

<sup>654</sup> Exhibit 13, b/c 7993395

personnel and that there would be difficulties in ensuring compliance with the MOU by the large number of police officers in the state.<sup>655</sup>

6.97 The only issue identified by Armstrong as favouring the establishment of a MOU with the Catholic Church was that a MOU had been entered into by the Police Force with the NSW Department of Education and Training. Armstrong pointed to a distinction in the legislation between school teachers and Catholic Church personnel.<sup>656</sup>

6.98 Armstrong gave evidence that he was asked to work on the 2004 MOU by McGee.<sup>657</sup> However, he said that he “*wasn’t given the objective of seeing that such a document was created and adopted*”, rather he was “*exploring whether it was possible to have such a document*”, that is, whether one could be found which was “*agreeable*”.<sup>658</sup> For this purpose, he was given a copy of the Treadwell advice of 11 December 2001.<sup>659</sup>

6.99 In his evidence before the Commission Armstrong said that he was aware of the internal legal advices.<sup>660</sup> Counsel Assisting referred to the internal legal advices and asked Armstrong whether it was correct that at no point during his time at the CP&SCS was he given advice which supported the practice of blind reporting. Armstrong answered:-

*I didn't consider any of this advice being in support of blind reporting or commenting specifically on blind reporting. It was advice about the presence of a concern about section 316 of the Crimes Act and how it related to some of those situations.*<sup>661</sup>

6.100 Armstrong gave evidence that the Treadwell advice, that there was an “*incongruity*” between the practice of blind reporting and s 316 of the Crimes Act, “*identifies a problem for various employees of that organisation (by which he*

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<sup>655</sup> *ibid*, b/c 7993396

<sup>656</sup> *ibid*, b/c 7993397

<sup>657</sup> PIC Transcript, Inspector Wayne Armstrong, 16 October 2014, p.402:34-39

<sup>658</sup> *ibid*, p.402:20-32; see also p.390:39-43, & pp.402:41-403:2

<sup>659</sup> *ibid*, pp.390:45-391:10

<sup>660</sup> *ibid*, pp.390:45-391:2

<sup>661</sup> *ibid*, p.397:12-16

*appears to have meant the Catholic Church) not necessarily for me in the role I was conducting”.*<sup>662</sup>

6.101 Armstrong was asked whether he saw the internal legal advice as suggesting that he should seek to ensure that s 316 of the Crimes Act was complied with and that he should be ensuring that the Church was not selectively reporting to him. Armstrong said the “*selectivity*” did not “*degrade*” his use of the information and the blind reports provided “*adequate information*” for the use to which Armstrong was putting it.<sup>663</sup>

6.102 Armstrong gave further evidence that he wished to continue to receive information of the sort that was being provided. The following questions and answers occurred:-

*Q. (Did you see the legal advice) as suggesting to you that to ensure that the Crimes Act was complied with, and in particular section 316, you yourself should be seeking to ensure that the church was not selectively reporting information to you?*

*A. Well, I mentioned before that I saw the significance, the strategic significance of this situation and my response to it as being one of wishing to maintain the access to this sort of information, to continue to receive it if it was possible. I thought at some point I would have developed a view that I could take action which could be damaging to that flow of information, both from this organisation and from others who would inevitably learn of that. I certainly wouldn't have taken that action on my own, and I think I had an understanding, even in 2004 and 2005, about the principles under which the squad operated, which included the principle that we wanted greater engagement and to show greater encouragement towards the advice victims to report sexual assault to the police and that section 316, in every respect, was likely to be damaging to that.*

*Q. Nonetheless, you took no steps to communicate this advice to the PSO or anyone within the Catholic Church?*

*A. I can't recall whether I did in 2004. I think there may have been a copy of some document that was made available to them in a process I conducted in 2005, although I'm not a hundred per cent certain of that. I think they were well aware of that before 2005 and I think they were well aware of - well, I'm sure they were well aware of the issue of section 316 before I was engaged on this task.*

*Q. Did you consider that there was an arrangement between the CPEA and the Professional Standards Office of the Catholic Church pursuant to which the CPEA was, in essence, agreeing that in the vast majority of*

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<sup>662</sup> *ibid*, p.392:45-47

<sup>663</sup> *ibid*, p.393:17-25



cases, the only information that had to be reported by the PSO was the information reported in the blind report form?

A. As to what information had to be reported, there are other categories of information that individuals – and I think agencies - have to report, and they are not reports made to police necessarily, and they are not - these blind reports do not fit into those categories. Regarding what arrangement, if there was ever an arrangement, existed when the CPEA existed, I can't comment. I only belonged to the Child Protection and Sex Crimes Squad. In the era when I was involved, I didn't consider the receipt of blind reports to be part of an arrangement.<sup>664</sup>

6.103 In his evidence before the Commission Armstrong was asked about the part of his memorandum where he had identified an inconsistency between the practice of blind reporting and s 316 of the Crimes Act. He said:-

*I took it to be that there was a serious problem with section 316 in certain scenarios that we were faced with in our acquisition of information. There was clear legal advice that the problematic segment in the draft MOU that was presented to the police wouldn't stand in any MOU that was accepted by our legal services. I later received advice to the extent, or to the point that it wasn't actually a major flaw in a document such as this that there was such an apparent conflict, that legislation would always trump policy, policy would trump an MOU, and there would be no - we couldn't be held in any sense to what such a flawed clause in a document, if it ever were agreed, might have said.*<sup>665</sup>

6.104 A further MOU draft dated 21 August 2004 was produced, which was different to previous versions.

6.105 The draft document was said to be between the following parties:-

*THE COMMISSIONER OF POLICE for the NSW Police, of care of the Director, Legal Services, NSW Police, Level 11, The Ferguson Centre, 130 George Street, Parramatta, NSW, 2150 ("NSW Police"), of the first part,*

*AND*

*BISHOPS AND LEADERS OF RELIGIOUS INSTITUTES of the Catholic Church in NSW, represented by the Executive Director of the Catholic Commission for Employment Relations ("Catholic Church"), Level 14, Polding Centre, 133 Liverpool Street, Sydney, NSW 2000, (additional parties) of the second part.*<sup>666</sup>

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<sup>664</sup> *ibid*, pp.393:30-394:31

<sup>665</sup> *ibid*, p.397:26-38

<sup>666</sup> Exhibit 32, p.1

6.106 The Schedules of the document were said to “record the operational arrangements and/or understandings” of the parties.<sup>667</sup> Schedule one included the following clauses:-

*14. Personnel of the Catholic Church and (additional party) will encourage complainants who allege that a criminal offence has been committed to report the matter to the NSW Police. Where the alleged victim of a criminal offence does not wish for the matter to proceed to a prosecution, the victim will still be encouraged to report to NSW Police. NSW Police have an interest in receiving reports of abuse and sexual assault offences to assist in the development of an understanding of the nature and scale of abuse and sexual assault in NSW (whether or not individual matters result in prosecutions).*

*15. Personnel of the Catholic Church and (additional party) will comply with relevant laws mandating them to report child abuse. The obligation to report the matter will be explained to the complainant.*

*16. On receiving a report of physical or sexual abuse, NSW Police personnel will respond with sensitivity and consideration to the needs of the victim(s).*

*17. NSW Police acknowledge that, for a variety of reasons, victims reporting criminal offences to police sometimes prefer to avoid taking part in a criminal investigation and prosecution. Where possible, NSW Police would like to provide these victims with an opportunity to make a written acknowledgment to NSW Police that they do not wish a criminal investigation/prosecution to take place.*

*18. Where a victim indicates to personnel of the Catholic Church or (additional party) that they do not wish to have contact with NSW Police, the personnel of the Catholic Church or (additional party) will endeavour to obtain a written acknowledgement from the victim indicating their wishes.*

*19. Where a victim does not wish to have contact with NSW Police, the Catholic Church or (additional party) still has a right and an obligation to conduct its own investigation to determine whether the alleged offender should remain in a position of responsibility over others. The Catholic Church or (additional party) will not proceed to conduct its own investigation without receiving a signed statement from the complainant indicating they do not wish to report the matter to NSW Police.*

*20. Where a victim does not wish to have contact with the NSW Police, the Catholic Church or (additional party) may provide details of the alleged offence (including the alleged offender's name) to NSW Police but withhold the name of the victim.*

*21. If in the course of a Catholic Church or (additional party) assessment, allegations emerge for the first time which indicate that a criminal offence may have been committed, the Catholic Church or (additional party) assessment procedure shall cease immediately and the matter will be dealt with in accordance with clauses 14, 15, 18, 19 and 20.<sup>668</sup>*

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<sup>667</sup> *ibid*, p.2

<sup>668</sup> *ibid*, p.8

6.107 During his evidence Salmon was shown a copy of the 2004 draft MOU. He gave evidence that he had no recollection of previously seeing the document or of being consulted on its contents.<sup>669</sup>

6.108 During his evidence Salmon was shown clauses 14, 17, 20 and 21 of the draft MOU.<sup>670</sup> Salmon said he “*believed*” that those clauses “*largely*” reflected the practice that he adopted between 2003 and 2005.<sup>671</sup>

6.109 McDonald gave evidence to the Commission that he had no involvement in the drafting of the document despite his name appearing on the signature block at the end of the MOU.<sup>672</sup>

6.110 During his evidence Armstrong was shown a copy of the 2004 MOU. He said that he believed that he had compiled the document from a number of other documents. Armstrong gave the following evidence about the draft MOU:-

*I considered it to be a working document which I was using to try to see if I could, by deleting certain parts, by adding in other phrases and passages from other documents, by composing some of my own, get somewhat closer to a document that I thought might be acceptable to the police and to the Catholic Church. I don't think at this stage I had necessarily believed that I'd got to that stage, I thought there were still problems, but I used this document in reference to engagement with other parts of police over this issue.*<sup>673</sup>

6.111 Armstrong was taken to a clause in the document which recorded the practice of blind reporting. He said that this was something he thought Police Force Legal Services would want removed from any finalised version.<sup>674</sup>

6.112 Armstrong said that it was his understanding that ultimately the signature of the Commissioner of Police was required before an MOU could be entered into and

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<sup>669</sup> PIC Transcript, Michael Salmon, 14 October 2014, p.184:16-23

<sup>670</sup> *ibid*, pp.183:45-185:14

<sup>671</sup> *ibid*, p.185:25-31

<sup>672</sup> PIC Transcript, Michael McDonald, 15 October 2014, p.230:3-26

<sup>673</sup> PIC Transcript, Inspector Wayne Armstrong, 16 October 2014, pp.397:47-398:10

<sup>674</sup> *ibid*, p.398:12-28

that this version of the MOU “*never came close*” to being forwarded to the Commissioner for his signature or approval.<sup>675</sup>

6.113 The PSRG meeting of 18 March 2005 considered a draft letter to a Church authority in relation to a matter designated as Case 1394. That letter included the following paragraph:-

*Given that prima-facie the self-disclosures constitute criminal acts, the PSRG notes that, pursuant to the Crimes Act, you have an obligation to report this matter to the police. However, in accordance with this office's usual practice of notifying the police on an intelligence only basis, this has been done.*<sup>676</sup>

6.114 This part of the letter was shown to Salmon during his evidence. Salmon said that it was his understanding that reports on the blind report standard forms were reports done on an “*intelligence-only basis*”.<sup>677</sup> The following questions and answers occurred:-

*Q. And did you obtain that understanding, namely, that this was on an intelligence-only basis, from members of the NSW Police Force?*

*A. I - no, I didn't - I didn't receive that from the police force, no.*

*Q. Why is it that you described it as reporting on an intelligence-only basis then?*

*A. Because it was my understanding, it may have come from discussions with Mr Davoren, with the people - the clerical staff in the office, I can't recall, but I certainly can recall that it wasn't from any discussion with a member of the police force.*<sup>678</sup>

6.115 Salmon gave evidence that he understood that he himself and the person to whom this draft letter was addressed had an obligation to report the matter to the police under s 316 of the Crimes Act. He said he believed that both his and the informant's obligations were met by him reporting the matter to police via blind reporting.<sup>679</sup> The following question and answer occurred:-

*Q. And the terms in which this letter is written, were they terms that you would on other occasions express to other informants, namely, that they*

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<sup>675</sup> *ibid*, p.403:4-18

<sup>676</sup> Exhibit 288B, b/c 8067778

<sup>677</sup> PIC Transcript, Michael Salmon, 14 October 2014, p.172:23-27

<sup>678</sup> *ibid*, p.172:29-41

<sup>679</sup> *ibid*, pp.172:43-173:38

*didn't need to report a matter by reason of you having provided the blind report on an intelligence-only basis to the police?*

A. *Yes, that would be the information from my understanding that we had notified the police and done that and met their obligation in doing that.*<sup>680</sup>

6.116 Salmon said that he had not discussed his view that he was satisfying his obligations under s 316 of the Crimes Act by blind reporting with any member of the Police Force and that he did not receive any information or advice to this effect from Cullen.<sup>681</sup>

6.117 Minutes for the Bishops' Committee for Professional Standards for 2 – 12 May 2005 recorded the following:-

#### **MEMORANDUM OF UNDERSTANDING WITH THE POLICE**

*Recently Wayne Armstrong, Intelligence Co-ordinator, NSW Child Protection and Sex Crime Squad, arranged a meeting to re-open discussion about proposals for an information exchange MOU between NSW Police and the Catholic Church and other authorities. David Landa and Angela Ryan attended the meeting. It was explained that the police had obtained legal advice regarding the original Memorandum of Understanding document prepared by Patrick Parkinson. The initial advice indicated that the MOU would not be possible as it could involve the crime of misprision of a felony. Later advice has provided an alternative opinion that such an MOU may be possible.*

*Following the meeting the police legal department is drafting an initial document for consultation. The original plan remains that when a document is finally approved in NSW it will be used as a basis for seeking a similar Memorandum of Understanding in other States.*<sup>682</sup>

6.118 During a private hearing Armstrong was asked about the statement that later advice had been received indicating a MOU may be possible. Armstrong said that he recalled that Treadwell had expressed the view in one of his reports that *"it would still be possible to consider, from the police perspective, having an MOU but there would be a need for an operational outcome or advantage from our side to having such an agreement before it should be further considered"*.<sup>683</sup>

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<sup>680</sup> *ibid*, p.173:40-47

<sup>681</sup> *ibid*, p.174:2-16

<sup>682</sup> Exhibit 56, b/c 8093606-607

<sup>683</sup> Exhibit 367 (PIC Transcript of Private Hearing, Inspector Wayne Armstrong, 7 August 2014), p.60:1-11

6.119 Armstrong said he thought that Treadwell was mistaken in that he “was unaware that an MOU could never have that function of giving anyone any protection or exclusion from the requirements of the legislation.”<sup>684</sup>

6.120 Salmon made a statutory declaration on 26 June 2013 regarding, *inter alia*, the reporting of matters by the PSO to the police.<sup>685</sup> In that declaration Salmon said:-

*6. It is the current practice of the NSW/ACT Professional Standards Office that all allegations of sexual abuse of children made through the Towards Healing protocol, and which have not been previously reported to the police, inclusive of details of the time and place and circumstances of the alleged offence as disclosed by the informant, and any subsequent admissions disclosed by the accused person, are reported promptly to the Child Protection and Sex Crime Squad (CP & 5CS - previously Child Protection Enforcement Agency - CPEA) of the NSW Police pursuant to a long standing arrangement between the Professional Standards Office and the Police.*

*Notifications are routinely made to the Police using a pro forma document in circumstances where the informant has indicated an Intent not to go to the Police with his/her complaint.*

*...*

*It has never been the practice of the Professional Standards Office when reporting information to the Police to provide Information which would identify the victim unless such information has been formally requested by the Police. It is the practice of the NSW/ACT Professional Standards Office to always work co-operatively with police in assisting them in any enquiries.*<sup>686</sup>

6.121 Salmon was asked by Counsel Assisting what he was referring to when he referred to a “long standing arrangement” in his declaration. Salmon answered:-

*It's essentially the arrangement - the blind reporting arrangement - that I inherited, that continues to this day.*<sup>687</sup>

6.122 The following questions and answers then occurred:-

*Q. Why do you describe that arrangement as an arrangement between the Professional Standards Office and the police?*

*A. Because I believe that that's the way the - that's the - that's the way the arrangement manifests itself. I don't - my understanding was that nothing's been signed. There's no - but it is - I'm not aware of what other parts of the Catholic Church or any other body how they might report these matters to*

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<sup>684</sup> *ibid*, p.60:30-33

<sup>685</sup> Exhibit 316

<sup>686</sup> *ibid*, p.1

<sup>687</sup> PIC Transcript, Michael Salmon, 14 October 2014, pp.170:47-171:7

*the police, but the Professional Standards Office has this arrangement and that's all I can speak for.*

*Q. And when you speak of that arrangement that the Professional Standards Office has, are you suggesting that for the entirety of your time as director of the Professional Standards Office there has been an arrangement between yourself and the police whereby both sides are accepting that this is an appropriate reporting mechanism for the Catholic Church or, in particular, the Professional Standards Office to adopt in respect of the material that comes to their attention through the Towards Healing process?*

*A. That's what I'm suggesting. It's an arrangement that I inherited and it's never been reported to me by the police that it is not operational.*<sup>688</sup>

6.123 On 25 July 2013 Father Brian Lucas made a statement. That statement included the following paragraph:-

*I do accept that mistakes were made during this time but progress was achieved around 1996 with the establishment of better procedures and protocols and in particular, the intelligence reporting protocol as between the Catholic Church, Professional Standards Office and the NSW Police Child Protection Agency. This protocol achieved the necessary balance between confidential pastoral communication where necessary, the frequent desire on the part of the victim for confidentiality and the need for Police awareness at least at the intelligence level. The protocols lead to the routine reporting of complaints with identification of the alleged perpetrator but anonymity re victim identity.*<sup>689</sup>

6.124 During his evidence Salmon was shown this part of the statement. Salmon said he would not call the arrangement a “protocol” and there were no signed documents in existence which recorded the terms of any such agreement. Salmon said he would refer to the practice as an “arrangement”.<sup>690</sup> He continued:-

*Maybe it's a matter of semantics, I don't know, but I certainly know and understand that there's an arrangement between the Professional Standards Office and the NSW Police that was in place when I came into the job, it continues to this very day.*<sup>691</sup>

6.125 All witnesses except for Heslop gave evidence to the Commission about whether a formal MOU had ever been entered into between the Church and the Police Force.

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<sup>688</sup> *ibid*, p.171:9-31

<sup>689</sup> Exhibit 317

<sup>690</sup> PIC Transcript, Michael Salmon, 14 October 2014, p.175:7-12

<sup>691</sup> *ibid*, p.175:12-16

- 6.126 Davoren gave evidence that he was not aware whether a MOU with the Police Force was ultimately signed but did not think that it had been.<sup>692</sup>
- 6.127 Salmon gave evidence that there were no signed documents recording arrangements between the Church and the Police.<sup>693</sup>
- 6.128 McDonald gave evidence that it was his understanding that the MOU was not signed and that he was not aware of any MOU being entered into between the Church and the Police Force.<sup>694</sup>
- 6.129 McGee gave evidence that it was her understanding that “*the MOU wasn’t signed and wasn’t in existence*”. It was not “*the arrangement by which [the CP&SCS] was operating*”.<sup>695</sup>
- 6.130 In his evidence Armstrong said that “*categorically*” a formal MOU was not entered into between the Police Force and the Church.<sup>696</sup>
- 6.131 Cullen gave evidence that it was her understanding that a MOU between the Police Force and the Church had not been entered into.<sup>697</sup> In her evidence at a private hearing of the Commission Cullen agreed that she was not unhappy that the MOU had not been entered into, as it was her belief that “*the principles of the MOU were in place and working between the agencies*”.<sup>698</sup>

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<sup>692</sup> PIC Transcript, John Davoren, 14 October 2014, p.123:1-3

<sup>693</sup> PIC Transcript, Michael Salmon, 14 October 2014, p.175:7-12

<sup>694</sup> PIC Transcript, Michael McDonald, 15 October 2014, p.226:7-11 & pp.228:45-229:1

<sup>695</sup> PIC Transcript, Kim McGee, 16 October 2014, p.350:42-44

<sup>696</sup> PIC Transcript, Inspector Wayne Armstrong, 16 October 2014, p.401:5-10; Exhibit 367 (PIC Transcript of Private Hearing, Inspector Wayne Armstrong, 7 August 2014), p.57:41-43

<sup>697</sup> PIC Transcript, Inspector Elizabeth Cullen, 17 October 2014, p.492:17-21; Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), p.66:41-45

<sup>698</sup> Exhibit 366 (PIC Transcript of Private Hearing, Inspector Elizabeth Cullen, 6 August 2014), p.67:14-47



## 7. SUBMISSIONS RELATING TO THE FIRST LIMB

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### Submissions of Counsel Assisting

7.1 Counsel Assisting's submissions on limb one were extensive and made copious references to the evidence before the Commission. In this part of its report the Commission will endeavour to summarise only what appeared to the Commission to be the principal submissions.

7.2 Counsel Assisting submitted that on the first limb of the Commission's investigation there had been police misconduct by Cullen, Heslop and McGee. Counsel identified the issues arising on the first limb as follows:-

8. *What were the activities or steps taken by the PSRG in the period between 1998 and 2005 (the relevant period) and what was Ms Cullen's (Cullen) participation therein?*

9. *Was any police misconduct involved on the part of Cullen in the PSRG. In particular potential instances of police misconduct relate to:*

- a. *Participating in the PSRG in circumstances in which this involved a conflict of interest given her understanding of the limited scope of her role as an officer of the NSWPF whilst participating in the PSRG;*
- b. *Failing to take action (including advising the PSO to report information to the NSWPF, causing further inquiries or investigation, recording matters, reporting matters to the NSWPF through the usual reporting channels, or making further inquiries herself) with respect to reports, complaints and/or information suggesting criminal offences involving abuse had been committed which information was received by her through her participation in the PSRG;*
- c. *Failing to retain documents suggesting that criminal offences had occurred, whether or not they also included information identifying the victim or alleged offender, including documents which may have assisted in the investigation and prosecution of criminal offences; and*
- d. *Failing to advise the PSO or the PSRG as to the inconsistency between the blind reporting practice and the requirements of s 316 of the Crimes Act 1900 (NSW) (s 316) in circumstances in which this had been notified to the NSWPF by virtue of four different legal advices between 2001 and 2003 and when Cullen was, through her role on the PSRG, in the position of advising and providing guidance to the PSO?*

10. *Was any police misconduct involved in Heslop having arranged that Cullen would participate in the PSRG, and in McGee continuing that arrangement in the circumstances?*

7.3 The matters in paragraphs (a) to (d) in in paragraph 9 of Counsel's submissions can conveniently be regarded as particulars of the alleged police misconduct by Cullen.

7.4 Counsel took care, especially in paragraph 17 and 20 of her submissions, to distinguish the above issues (and the issues which Counsel said arose under the second limb of the Commission's investigation) from other matters, which Counsel submitted were not issues in the investigation.

7.5 In paragraph 17 of her submissions Counsel Assisting said:-

*The focus of this hearing, and of these submissions, is not upon the rights or wrongs of actions or omissions on the part of the Catholic Church. These are relevant only to the extent that they bear upon the issues set out above and the issue of police misconduct. Similarly, the question for the Commission is not whether or not various police officers provided a valuable contribution generally to law enforcement activities in relation to the sexual or other offending including on the part of Catholic Church personnel or employees. It is undoubtedly the case that all of the NSWPF officers who were called to give evidence at the public hearing made such a contribution, and that the collection of intelligence in relation to child sex offenders through the reporting of the PSO was of assistance in rectifying what was identified as a previous deficit in intelligence. The issue is far narrower than that, it is whether or not the matters set out above constituted police misconduct and/or whether any recommendations should be made.*

7.6 In paragraph 20 of her submissions Counsel Assisting said:-

*None of Cullen, Armstrong (in relation to the second limb of the Commission's investigation), Heslop or McGee should be found to have been consciously acting in dereliction of duty. Rather, the police misconduct in these cases arises from their failures to comply with their common law duties, and from the undertaking of their role in a manner which was tainted by unreasonableness, the taking into account of irrelevant considerations, in a manner which was improperly discriminatory, fettering their discretion as officers of the NSWPF, or arising from a mistake of law or fact.*

7.7 Most of the terms and expressions from "tainted by unreasonableness" onwards in the second part of paragraph 20 of the submissions were taken from parts of 122(1)(d) of the Police Act, which provides that Part 8A of the *Police Act 1990* (NSW) ("Police Act") applies to a complaint against a police officer that alleges or indicates:-

(d) conduct of a police officer that, although not unlawful:

- (i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
- (ii) arises, wholly or in part, from improper motives, or
- (iii) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or
- (iv) arises, wholly or in part, from a mistake of law or fact, or
- (v) is conduct of a kind for which reasons should have (but have not) been given,

7.8 Later in this report the Commission will discuss s 122(1)(d) of the Police Act and its relationship to “*police misconduct*” under the PIC Act.

7.9 The reference in the second part of paragraph 20 of the submissions to the fettering of a police officer’s discretion was based on administrative law principles which, it was submitted, would apply to a police officer as a decision-maker, for example in deciding whether information indicating that a crime may have been committed should be the subject of investigation.

## Counsel Assisting’s submissions about Cullen

7.10 In paragraph 11 of her submissions Counsel Assisting submitted:-

*As set out in more detail below, the Commission should reach the opinion that police misconduct occurred in relation to each of the matters set out above (the particulars of the alleged misconduct by Cullen). The key matters relied upon are simple to state. Cullen participated in the PSRG in a manner inconsistent with her role as a NSWPF officer. She failed in her involvement with the PSRG in most cases to take any steps to enforce the criminal law in respect of the criminal conduct which was openly disclosed to her. In this, she was party to an arrangement whereby preferential treatment was accorded to the PSO, and through it to the Catholic Church. Moreover, there was an inherent conflict of interest in her participation in the PSRG unless she were to treat all information that came to her attention, whether directly or indirectly, in that capacity as if it were being reported through the usual channels to the NSWPF. She should never have been in that position.*

7.11 There was, almost inevitably, some overlap in Counsel Assisting’s submissions between submissions relating to the various officers and some overlap in submissions relating to the four particulars of alleged misconduct by Cullen. However, in this summary of Counsel Assisting’s submissions the Commission will deal separately with the submissions relating to each officer. As regards the

particulars of alleged misconduct by Cullen there was some overlap between the submissions relating to particular (a) and the submissions relating to particular (b) and these submissions will be dealt with together. Particulars (c) and (d), on the other hand are fairly discrete and the submissions made about these particulars were quite brief. Those submissions will be dealt with separately.

#### Counsel Assisting's submissions on particulars (a) and (b)

7.12 The Commission considers, on the basis of paragraph 11 of Counsel Assisting's submissions and the submissions generally, that the essential steps in Counsel's argument can be stated as follows.

7.13 Cullen was a police officer at all times. As a police officer she was subject to the common law and statutory obligations of a police officer and, in particular, an obligation, if she received information that a serious crime might have been committed, to take steps to enforce the criminal law. Cullen remained subject to her obligations as a police officer while she was participating in the PSRG.

7.14 While Cullen was participating in the PSRG she received information or became aware that information was held by the PSO, indicating that serious crimes might have been committed. However, in general, Cullen failed to take action to enforce the criminal law with respect to that information. The reason given by Cullen for not taking action was her understanding that, while she was participating in the PSRG, it was not her role to take such action. She should not have formed this understanding. Her obligations as a police officer continued while she was participating in the PSRG.

7.15 Accordingly, given Cullen's understanding of the limited scope of her role as a police officer while participating in the PSRG, she was subject to a conflict of interest. In believing that her obligations as a police officer were curtailed while she was participating in the PSRG and acting or failing to act in accordance with that belief, her conduct was, within the terms of s 122(1)(d) of the Police Act, "*unreasonable*", "*improperly discriminatory*", conduct arising from a decision made by her that had taken an irrelevant matter into consideration and conduct arising from a mistake of law or fact.

7.16 Cullen's conduct could fall within these parts of s 122(1)(d) of the Police Act, without it being necessary that Cullen should have been aware that her conduct was unreasonable or discriminatory or that she had taken an irrelevant matter into consideration or that her conduct arose from a mistake.

#### Information received by Cullen

7.17 Counsel Assisting made a number of submissions about the nature and extent of the information Cullen received or should be taken to have been aware of, while she was participating in the PSRG

7.18 Counsel Assisting submitted that the PSRG held an advisory role under *Towards Healing* and that part of Cullen's role as a PSRG member was to advise the Director of the PSO on the "*active handling of specific complaints under Towards Healing, including complaints of criminal conduct*".

7.19 Counsel Assisting submitted that it was apparent from the evidence that individual complaints received under the *Towards Healing* process were discussed in detail at PSRG meetings. In some instances, details of these cases were given in documents provided to the PSRG. Such matters, it was submitted, were "*immediately clear from a cursory examination of the minutes and agendas of the PSRG meetings*". Davoren gave evidence that in complex cases the PSRG would be given all the information that the PSO had.

7.20 It was submitted that the members of the PSRG, including Cullen, were made aware of assessment reports in individual matters, documentation providing corroboration of complaints, correspondence relating to individual matters and medical reports relating to individuals involved in the complaints process. Cullen, it was submitted, would have known such information existed and, in many cases, it was actually drawn to her attention.

7.21 Counsel Assisting submitted that there were repeated references within PSRG documentation to complaints of sexual abuse being substantiated, including by admission, and that these matters were plainly capable of constituting serious criminal offences.

7.22 Counsel Assisting said that, while this information was generally put to the PSRG in an anonymised form, Cullen would have been aware as a result of her participation in the PSRG that in each case a complaint had in fact been made and that the PSO held identifying information over and above what was provided to the PSRG.

#### Action not taken by Cullen

7.23 Counsel Assisting submitted that upon receiving or being made aware of such information about probable offences it was incumbent on Cullen as a police officer in each case to give consideration to whether or not there should be a police investigation and to seek to obtain all relevant information for the purposes of such consideration, ensuring that such information was provided to her or another police officer. Counsel Assisting said that Cullen did not give consideration to such matters.

7.24 As to any action taken by Cullen after receiving or becoming aware of information about offences having been committed, Counsel Assisting submitted that the Commission should find that Cullen requested further information from Davoren or Salmon only on a few occasions. Such requests did not happen with any regularity and never led to that information being reported by Cullen or the PSO to the Police Force.

7.25 Paragraph 108 of Counsel Assisting's submissions was in the following terms:-

*The clear evidence of all witnesses before the Commission was that Mr Davoren and Mr Salmon would cooperate with requests for information from the CPEA or other officers in the NSWPF, including requests for identifying information (provided it was in writing in the case of Mr Salmon). Also, it was Mr Davoren's evidence that victims were not given any assurance in the Towards Healing process that their reports would be kept confidential. Cullen gave evidence that she was aware of this.*

7.26 It was also submitted that there was no evidence of Cullen taking any steps to ensure there was full and frank reporting to the Police Force of any specific case which came to her attention through her participation on the PSRG.

7.27 Counsel Assisting submitted that it was clear that Cullen did not record in her police notebook any matters which she had learned through her participation in

the PSRG. Counsel Assisting submitted that this omission on the part of Cullen was part of the police misconduct by Cullen in her participation in the PSRG, as the making of entries in a notebook would have ensured that a reliable contemporaneous account of potentially significant information was made. It was also submitted that the failure to make such a record was inconsistent with the terms of the Police Force Handbook which provided guidelines about such matters to police officers.

## Reporting by the PSO

7.28 Counsel Assisting accepted that it was true that there was reporting of alleged or substantiated offences by the PSO to the Police Force, independently of Cullen, but the only reporting by the PSO was by blind reports which contained only a summary of some of the information held by the PSO and did not disclose the identity of the victim.

7.29 Cullen had given evidence that she was aware that, unless there was an inquiry by the police, information would be communicated by the PSO to the Police Force only by blind reports.

7.30 Davoren gave evidence that while he was the Director of the PSO he did not make any report of a complaint to the Police Force, unless and until the complaint had been found to be substantiated in the *Towards Healing* process.

7.31 Salmon gave evidence that while he was the Director of the PSO he made reports of complaints to the Police Force at variable times. If a report was made early in the process, there was no established procedure to ensure that any subsequently acquired information would be communicated to the police.

## Action by Cullen would not have lacked utility

7.32 Although complaints of offences which came before the PSRG were being dealt with in a Catholic Church process pursuant to the *Towards Healing* protocol, it could not be assumed that any steps which Cullen might have taken for the purpose of enforcing the criminal law would have been fruitless.

- 7.33 It was submitted that the statement of complaint form completed by the complainant was the key document which was taken to indicate a victim's choice not to go to the police but to have the complaint processed under *Towards Healing*.
- 7.34 However, in some of the completed statement of claim forms which were in evidence before the Commission, there was no clear expression of unwillingness on the part of the complainant to have the police involved.
- 7.35 It was submitted that an indication of an unwillingness on the part of victims to report to the police themselves should not be equated with an unwillingness to cooperate with a police investigation, if one was commenced.
- 7.36 Counsel referred to evidence by Davoren that not all of the complainants whose complaints were being dealt with under Towards Healing "*were totally opposed to the police being involved*".
- 7.37 Counsel Assisting pointed to evidence by police officers that an initial lack of cooperation with police on the part of a complainant might shift over time. Counsel referred to evidence by Heslop, McGee and Cullen that a victim who was initially reluctant to make a statement for the purposes of a police investigation might subsequently agree to make a statement. Factors which might lead to such a change of position included the victim becoming aware that the offender had made admissions or had committed other criminal acts or that there was corroborating evidence.

#### Counsel Assisting's submissions about particular (c)

- 7.38 The Commission observes that the police misconduct alleged in Counsel Assisting's submissions was "*failing to retain documents*" and not, as alleged in the *Lateline* television program on 20 June 2013, that Cullen had "*shredded*" evidence. In paragraph 191 of her submissions Counsel Assisting accepted that "*there is no evidence that Cullen destroyed any evidence or destroyed any documents provided to her through the PSRG*".



7.39 The documents which Cullen did not retain were agendas for meetings of the PSRG, documents sent to Cullen with agendas and documents distributed to Cullen and other members of the PSRG at meetings of the PSRG, which Cullen left at the meeting place at the conclusion of the meeting.

7.40 It was submitted that the documents which Cullen did not retain might have assisted in the investigation and prosecution of criminal offences.

#### Counsel Assisting's submissions about particular (d)

7.41 Section 316(1) of the Crimes Act was quoted earlier in this report but it is convenient now to repeat its terms:-

*If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.*

7.42 It was submitted that s 316 is part of the criminal law of NSW and is accordingly to be enforced by police officers.

7.43 The statement in particular (d) of Cullen's alleged misconduct refers to legal advices having being notified to the Police Force. This is a reference to advices prepared by legal officers within the Police Force about the effect of s 316 of the Crimes Act. This is a reference to the legal advices prepared by legal officers within the Police Force which have already been discussed.

7.44 It was submitted, on the basis of evidence given by Cullen, that she became aware of the Treadwell advice in May 2004.

7.45 In paragraphs 152 and 153 of her submissions Counsel Assisting made the following submissions:-

*152. It was plainly implicit in the PSRG Charter and in the role of the PSRG as set out in Towards Healing that, both as regards general and specific cases, Cullen in her role on the PSRG could provide advice as to what matters should be reported to the NSWPF, how matters should be reported to the NSWPF, and as to any illegality or perceived illegality associated with the PSO's practice in relation to*

*the reporting of complaints or information relating to complaints received through Towards Healing to the NSWPF.*

153. *In this context, it was police misconduct for Cullen not to inform the PSO of the advice received by the NSWPF in relation to the practice of blind reporting, provide advice to the PSO consistent with that advice, or at the very least to have taken steps to ensure that the reporting practices of the PSO were compliant with the law as set out in those advices.*

## Submissions made by the legal representative for Cullen

7.46 It was submitted that the Commission should reject the submissions of Counsel Assisting and should not form an opinion under s 16 of the PIC Act that Cullen had engaged in police misconduct (paragraph 6).

7.47 No issue was taken with Counsel Assisting's summary of the obligations of a police officer, although it was submitted that cases relied on by Counsel Assisting were distinguishable from the present case on the ground that in each of them there was an identifiable complaint and an identifiable complainant.

7.48 It was submitted that there was another ground of distinction which was asserted to be more fundamental. Paragraph 30 of the submissions was in the following terms:-

*The second and more fundamental distinction applicable to Inspector Cullen is that it was not her role on the PSRG to be an investigator. Whilst it is correct that Inspector Cullen was a member of the Police Force at the relevant time, she was not participating in the PSRG as an investigator. Inspector Cullen was an adviser to the PSRG, not an investigator.*

7.49 The submission that Cullen's role while participating in the PSRG was that of an adviser and not that of an investigator was repeated a number of times in the submissions, for example in paragraphs 37, 42, 55, 64 and 65. In paragraph 37 it was submitted:-

*Throughout the submission by Counsel Assisting there is a determined reference to Inspector Cullen's failure to investigate, failure to comply with her common law duties to investigate crimes, and her failure to enforce the law. There was no such requirement on Inspector Cullen to investigate or enforce, because that was not her role on the PSRG.*

- 7.50 It was submitted that the particulars of alleged misconduct by Cullen provided in Counsel Assisting's submissions were *"based on a foundation of misunderstanding and/or non-acceptance that Inspector Cullen's involvement with the PSRG was that as an adviser not as an investigator"*.
- 7.51 It was submitted that there was no conflict between Cullen's role as a police officer and her role as a participant in the PSRG, if it was accepted that her role as a participant in the PSRG was that of an adviser to the PSRG.
- 7.52 It was submitted that Counsel Assisting's assertion that Cullen's decision-making was *"tainted"* by her understanding of an arrangement between the Church and the Police Force should be rejected, as there was no improper arrangement whereby the Church received preferential treatment. It was submitted that it *"beggers belief"* that the Church would invite a police officer such as Cullen, *"who has dedicated her police career to detecting and bringing to justice sex offenders"*, to join the PSRG, if the Church desired an arrangement whereby police would be deceived or information would be withheld from them.
- 7.53 As to Counsel Assisting's submission that Cullen had failed to take action with respect to information received by her which indicated that criminal offences had occurred, the submissions noted the evidence of Cullen in which she said she assessed whether the alleged offender had access to children and whether the matter had been brought to the attention of the police.
- 7.54 As regards whether matters were being reported to the police independently of Cullen, it was submitted that Cullen had given evidence that she had had discussions with Davoren and Salmon about whether particular matters should be reported to police. Cullen had built up a relationship of trust with both Davoren and Salmon and she accepted in good faith their advice that they were appropriately reporting matters to the police. It was submitted that there was no evidence that Cullen's trust in either Davoren or Salmon had been misplaced. It was also submitted on behalf of Cullen that there were several occasions when Cullen discussed with Davoren whether she should report specific pieces of information to the Police Force. Whilst Davoren did not recall such conversations, he did not dispute that they had occurred.

- 7.55 In response to the submission that Cullen had failed to make any record of information she had received at meetings of the PSRG it was submitted that the provisions of the Police Force Handbook concerning the making of records is only a guide and that it was “naïve” or “unreasonable” to suggest that Cullen should have recorded, in a notebook or a duty book or otherwise, information she had received at meetings of the PSRG.
- 7.56 In response to the submission by Counsel Assisting that Cullen had engaged in police misconduct by failing to retain documents (particular (c) in Counsel Assisting’s submissions), it was submitted that in the vast majority of cases documents provided at or before meetings of the PSRG were only summaries and did not contain information identifying either the victim or the offender. There was no facility provided by the Police Force by which such scant information could be recorded.
- 7.57 In response to Counsel Assisting’s submission that Cullen had engaged in misconduct by failing to advise the PSO or the PSRG about the inconsistency between the practice of blind reporting and the requirements of s 316 of the Crimes Act (particular (d) of Counsel Assisting’s submissions) it was submitted:-

*When Inspector Cullen was at the Ombudsman’s Office and the legal advisings were obtained, she had no knowledge of them. Her evidence was that she had only ever seen the advising of Sergeant Treadwell and when she did become aware of it after May 2004, she discussed it with the then Commander of the CPEA, Commander McGee. If there was an inconsistency between s 316 and blind reporting then it was a matter that should have been attended to by the senior officer at the CPEA.*

- 7.58 It was submitted that Cullen was not a legal practitioner and that her role as an adviser to the PSRG did not extend to providing legal advice.
- 7.59 It was submitted that the judgment of Kirby P in *Pillai v Messiter* [No 2] (1989) 16 NSWLR 197 provided some guidance on the meaning which should be attributed to the word “misconduct” in the PIC Act.
- 7.60 In the submissions it was noted that Cullen had had a distinguished police record and had devoted herself to police duties involving intelligence gathering and the subsequent prosecution of sex offences and, in particular, sex offences committed against children. It was submitted that it was inconceivable that

Cullen would deliberately or negligently fail to do anything other than what was right and proper in the performance of her duties.

## Submissions about Cullen made by the legal representative for Salmon

7.61 Reference should also be made to paragraph 12 of the submissions on behalf of Salmon which was in the following terms:

*Counsel Assisting the Commission suggests that Cullen participated in the PSRG in a manner inconsistent with her role as an NSWPF officer/ No doubt others will make detailed submissions as to why this is not so. Nevertheless, the reasonable explanation for the fact that Cullen did not bring information that was disclosed to her in the course of her membership of the PSRG to the attention of the NSWPF is her belief that it was not her role to do so. In addition, the information disclosed was generally anonymised such that there was no identifying data for Cullen to present to the NSWPF. It is clear that a practice existed whereby reporting of historical sexual assaults was made by the director of the PSO to the NSWPF. Cullen was not the conduit for that reporting. Furthermore, the evidence is that if further information were sought by the NSWPF, either Mr Davoren or Mr Salmon would supply such information. Again, this request for information was not one made by Cullen and the fact that it was not made is consistent with her understanding (together with the understanding of Davoren, Salmon and the NSWPF) that she was on the PSRG in an advisory capacity only, rather than holding a position of investigation. In this respect, she did not fail to enforce the criminal law in respect to criminal conduct disclosed to her as submitted by Counsel Assisting the Commission.*

## Counsel Assisting's submissions about Heslop

7.62 Counsel Assisting submitted that an issue arising under the first limb of the Commission's investigation was whether there was any police misconduct in Heslop arranging that Cullen would participate in the PSRG.

7.63 Counsel Assisting submitted that Heslop was "clearly involved at the outset in liaison between the PSO and the CPEA" and referred to the minutes of the PSRG meeting on 9 January 1997.

7.64 Counsel Assisting observed that Heslop, when giving evidence before the Commission, had little recollection of the circumstances in which Cullen had become a member of the PSRG. Counsel referred to evidence by Cullen that she had discussed with Heslop whether there would be any conflict of interest, if she received any payment for her participation in the PSRG and that she sought permission from Heslop to participate in the PSRG. Counsel submitted

that on the basis of Cullen's evidence the Commission should find that Heslop was involved in Cullen's decision to participate in the PSRG and gave Cullen permission to participate in the PSRG.

- 7.65 Counsel Assisting submitted that Heslop was aware that the *Towards Healing* process involved investigation of complaints including complaints of child sexual abuse and that the PSO did not routinely notify the Police Force that it had received a complaint under the *Towards Healing* process. In these circumstances Heslop should be taken to have been aware that Cullen's participation in the PSRG involved a conflict of interest.
- 7.66 Counsel Assisting submitted that the Commission should find that police misconduct on the part of Heslop within s 122(1)(d) of the Police Act had occurred.

## Submissions - Heslop

- 7.67 As already noted earlier in this report, no submissions were received by the Commission from Heslop's legal representative in reply to Counsel Assisting's submissions that there had been misconduct on the part of Heslop.

## Counsel Assisting's submissions about McGee

- 7.68 Counsel Assisting submitted that an issue arising under the first limb of the Commission's investigation was whether there was police misconduct on the part of McGee in that, after McGee became the Commander of the CPEA, she had continued the arrangement that Cullen would participate in the PSRG.
- 7.69 It was submitted that on the basis of certain circumstances, which it was submitted the Commission should find had been established, McGee should be taken to have been aware of the conflict of interest inherent in Cullen's participation in the PSRG. The circumstances relied on were that McGee was aware that Cullen was a member of the PSRG, that McGee did not discuss with Cullen what Cullen did at PSRG meetings, that McGee regarded Cullen as a representative of the on the PSRG, McGee was aware that the PSRG discussed abuse happening in the Catholic Church, that McGee was aware of

the practice of blind reporting and that it amounted to “*selectivity about the information that was disclosed by the Church to the police service*” but did not take any steps to change the practice or to check how much of the information held by the PSO was being reported to the POLICE FORCE.

7.70 Counsel Assisting submitted that the Commission should find that police misconduct on the part of McGee within s 122(1)(d) of the Police Act had occurred.

### Submissions made by the legal representative for McGee

7.71 It was submitted that McGee, on becoming Commander of the CPEA had inherited a system which was already operating. In her evidence McGee had expressed her confidence in Cullen’s ability and judgment. A number of submissions were made by McGee’s legal representative which were not directly relevant to the respect in which Counsel Assisting submitted that the Commission should find in the first limb of its investigation that there had been police misconduct by McGee.

## 8. SUBMISSIONS RELATING TO THE SECOND LIMB

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### Submissions of Counsel Assisting

- 8.1 Counsel Assisting acknowledged in her written submissions that the evidence before the Commission established that no formal written MOU (or agreement) was ever entered into between the Police Force and the Catholic Church.
- 8.2 Evidence that no formal MOU or agreement had been entered into was given by all of the witnesses Davoren, Salmon, McDonald, McGee, Armstrong and Cullen.
- 8.3 Counsel Assisting did submit that the evidence established that an informal agreement or protocol or understanding, which she said could best be described as an “*arrangement*”, had been entered into and had been influential in how the PSO reported complaints of abuse to the Police Force and how officers within the Police Force responded to such reports.
- 8.4 Counsel Assisting referred to the evidence from Heslop that from an early stage in the operations of the CPEA one its aims had been to establish an arrangement between the Police Force and the Church which would provide for the disclosure of information by the Catholic Church to the CPEA, including information about criminal behaviour.
- 8.5 Counsel Assisting referred to the first draft MOU of which there was evidence, being the draft MOU attached to Father Lucas’ memorandum of 12 June 1997. Counsel noted that in Father Lucas’ memorandum the draft MOU was said to have been submitted by the CPEA.
- 8.6 Counsel Assisting then referred to the second draft MOU in evidence before the Commission, being the draft MOU of March 2000. Counsel referred to clauses 6, 14 and 19 in the draft MOU, the terms of which have been set out earlier in this report. Clause 6 would have authorised blind reporting by the Convenor of the PSRG. Clause 14 provided for the Church to supply as much information as possible to the Police Force (without breaching an obligation of confidentiality to any person). Clause 19 provided that the Church should make available any



matter relevant to an accused's account of events, only if required to do so by a Court.

- 8.7 Counsel Assisting acknowledged that there was no evidence that clause 19 reflected the practice at any time of the PSO or the CPEA.
- 8.8 Counsel Assisting referred to the evidence in the letter from Professor Parkinson of 28 June 2000 and the interview of Professor Parkinson by Commission investigators and to Heslop's evidence, which Counsel submitted established that Heslop had been consulted in the preparation of a previous, similar draft and had not found any problems with it.
- 8.9 It was submitted by Counsel Assisting that clause 6 of the draft MOU of March 2000 reflected the practice of the PSO over many years and that this practice was known to officers of the CPEA.
- 8.10 Counsel Assisting referred to the evidence by Davoren that clause 6 accurately reflected the system of blind reporting he had used while he was the Director of the PSO, that he had had never been advised by the Police Force that blind reporting was inconsistent with s 316 of the Crimes Act, that he had never been advised by the Police Force that blind reporting was not acceptable to the Police Force and that, if he had been advised by the Police Force that he should provide the Police Force with all the information he had he would have changed the system of reporting.
- 8.11 Counsel referred to evidence by Salmon that he had used and continued to use blind reporting as his method of reporting to the Police Force, that he believed that blind reporting was done pursuant to an "*arrangement*" between the Police Force and the church and was acceptable to the Police Force and that he had never been advised by the Police Force that the arrangement was otherwise than operational.
- 8.12 It was submitted by Counsel Assisting that the Commission should find that Heslop and other officers of the CPEA were aware that the reports they were receiving from the PSO were blind reports. Heslop had accepted in his evidence that he would not have been "*comfortable*", as he said he was, with the draft MOU prepared by Professor Parkinson which contained clause 6,

unless he felt it reflected a practice that had been put in place between the church and the Police Force.

- 8.13 Counsel then referred to the four advices, from Kristoffersen, Treadwell (two advices) and Friedrich that the Police Force should not enter into a MOU containing clause 6. Counsel referred particularly to Treadwell's advice of 11 December 2001 in which Treadwell expressed the opinion that blind reporting might be "*incongruent*" with s 316 of the Crimes Act. Counsel submitted that these advices should have prompted an immediate review of the reporting process and the taking of steps to ensure that s 316 of the Crimes Act was complied with. However, notwithstanding the advices, the practice of blind reporting by the PSO continued unabated.
- 8.14 Counsel Assisting pointed to other evidence which, it was submitted, would support a finding that there was an arrangement between the Catholic Church and the Police Force.
- 8.15 This other evidence included the draft letter to be written by Davoren considered at the meeting of the PSRG on 22 June 2001, which referred to "*the long standing agreement with the police (that) they do not try to track down people who have given us information of this kind*".
- 8.16 The other evidence also included the report of the PSRG for the period from 1 June 2001 to 12 October 2001 in which it was stated that the practice of the PSO had been to advise the Police Force that a complaint had been received "*without indicating the source of the information*" and that "*the police have agreed and kept to their agreement that they will not attempt to identify the complainants in these situations*".
- 8.17 The other evidence also included the letter from McDonald to McGee of 18 June 2003 in which he sought confirmation that the unsigned MOU with the police "*remains in place*".
- 8.18 It was submitted that a consequence of the arrangement permitting blind reports was that reports by the PSO were recorded as information reports and that, in general, there would be no investigation of the criminal conduct

disclosed by the reports, unless a report could be linked to some other investigation.

8.19 It was submitted that the Commission should form the opinion that police misconduct had occurred:-

*192. On the part of Heslop:*

*a. In the entering into of an arrangement with the PSO to the effect that:*

- i. where a criminal offence was alleged and a blind report form was submitted, the NSWPF would not seek (or use available statutory powers to compel disclosure of) the identity of the victim, or identifying information in respect of the victim, from the Catholic Church other than in exceptional cases;*
- ii. attempts would not be made on the part of the NSWPF to contact victims of abuse in circumstances in which a blind report form had been submitted in respect of that abuse without first contacting the PSO;*
- iii. the NSWPF would not further investigate complaints of abuse in circumstances in which a blind report form had been submitted other than in exceptional cases where the matter as reported was identified as being relevant to an existing or future investigation; and*

*193 On the part of Heslop, McGee and Armstrong:*

- a. continuing with these arrangements and failing to take any steps to curtail such arrangements in circumstances in which legal advice had been provided to the NSWPF to the effect that there was inconsistency between this practice and the requirements of s 316.*
- b. encouraging or condoning the practice on the part of the PSO in relation to cases of potential criminal offences complained of through the Towards Healing protocol only (or in the vast majority of cases) to report the matter to the NSWPF as a "blind report" on a standard CPEA form for that purpose, without including information identifying the victim and without updating the information provided to the NSWPF over time; and/or*
- c. making decisions in relation to the handling of individual reports of sexual or other abuse which were received by the NSWPF having regard to an arrangement or protocol which was in place between the NSWPF and the Catholic Church by reason of arrangements entered into through Cullen's participation in the PSRG and thereby fettering their discretion and/or taking into account an irrelevant consideration in respect of the handling of such reports.*

- 8.20 It was submitted that the conduct of the police officers was “*police misconduct*” as falling within s 122(1)(d) of the Police Act.

## Submissions – Heslop

- 8.21 The Commission did not receive any submissions from Heslop’s legal representative.

## Submissions made by the legal representative for McGee

- 8.22 The submissions on behalf of McGee were brief and mainly concerned with McGee’s evidence about blind reporting. Reference was made to parts of McGee’s evidence as follows.
- 8.23 When McGee became commander of the CPEA she had inherited a system which was already operating. McGee was aware that the mode of reporting used “*omitted information relating to the identity of the complainant*”. However, she had never actually seen a report.
- 8.24 McGee accepted that the arrangements proposed by the draft MOU which contained clause 6 appeared to conflict with s 316 of the Crimes Act. However, the information obtained by blind reporting had utility. It could be used as intelligence and as a means of solving other crimes and was preferable to no reporting at all. It was important that the wishes of victims should be respected and that the potential damage to a victim who had already been assaulted from the police pursuing further information from the victim should be taken into account.
- 8.25 It was submitted that the Commission’s power to make findings of police misconduct is a discretionary power and that the Commission can take other matters into account when making a decision as to whether or not to make such a finding, even if the Commission considers that there is sufficient evidence to form a basis for such a finding. A matter which the Commission should take into account in McGee’s case was her distinguished record of service in the Police Force over a period of more than thirty years.

## Submissions made by the legal representative for Armstrong

- 8.26 The submissions made on behalf of Armstrong were lengthy but it appears to the Commission that the principal submissions can be summarised as follows.
- 8.27 It was submitted that there was no evidence before the Commission of any agreement, formal or informal, between the Catholic Church and the Police Force. There was evidence that a MOU was “*being explored*” but the evidence showed that a MOU was never “*completed*”.
- 8.28 It was submitted that any work done by Armstrong towards establishing a MOU was done by him at the direction of his commander.
- 8.29 A number of submissions were made about the nature of the Police Force and Armstrong’s position in the Police Force. It was submitted that the Police Force is a disciplined, hierarchical organisation. Armstrong was an intelligence officer in the CPEA or the CP&SCS. He was not an investigator and was not under a duty to investigate, or consider whether he should investigate, every, and indeed any, report of criminal activity he received in his capacity as an intelligence officer.
- 8.30 A report of criminal activity which had been received by the Police Force would be evaluated by an intelligence officer. Consideration of what further action, if any, should be taken was reserved to particular police officers such as investigation supervisors and crime co-ordinators.
- 8.31 Armstrong exercised his functions as a police officer, not by considering whether he himself should commence an investigation but by disseminating information to other police who were designated investigators.
- 8.32 A number of submissions were made about blind reporting.
- 8.33 It was submitted that blind reporting has utility. Information reports based on the blind reports, by being entered on COPS, became available to all police officers in NSW. The statistical evidence before the Commission, which was based on reports by the CCER, did not accurately quantify the actual level of police activity resulting from the receipt of blind reports.

- 8.34 Armstrong's submissions referred to the competing interests of victims whose sensitivities should be respected and of the Police Force which needs to obtain information about criminal activity.
- 8.35 Reference was made to evidence by Armstrong of his belief that an insistence on disclosing the names of victims would lead to fewer reports being made to police, with the consequence that information about the identity of some offenders, the location of some offences and the circumstances of some offences, which would be disclosed by blind reports, would not become known.
- 8.36 It was submitted that the Commission has a discretion as to what findings it should make and that, rather than make any finding of police misconduct against Armstrong, the Commission should, if it considered that there was conduct by Armstrong falling within the boundaries of police misconduct, exercise its discretion in favour of Armstrong and decline to make any finding of misconduct on his part.

### Submissions made by the legal representative for Salmon

- 8.37 Salmon is not a police officer and it was not submitted by Counsel Assisting that the Commission should form an opinion that misconduct on the part of Salmon had occurred. In her submissions Counsel Assisting said that the focus of her submissions *"is not upon the rights or wrongs of actions or omissions on the part of the Catholic Church. These are relevant only to the extent that they bear upon the issues set out (elsewhere in Counsel Assisting's submissions) and the issue of police misconduct"*.
- 8.38 Nevertheless, some submissions were made by Counsel Assisting which could be understood as criticisms of the conduct of the Catholic Church and its officers and it was appropriate for Salmon by his legal representative to respond to those submissions.
- 8.39 It appears to the Commission that the principal submissions made by Salmon's legal representative can be concisely summarised as follows.

- 8.40 Salmon on becoming the Director of the PSO adopted procedures, including procedures as to reporting, which had already been put in place by Davoren. If the Police Force had sought a change in the system of reporting, Salmon would have complied.
- 8.41 If any request in writing for further information was made by the Police Force while Salmon was the Director of the PSO, the PSO provided all the information it had about a matter, without seeking the consent of the victim.
- 8.42 It was submitted that there was no evidence of any agreement between the Police Force and the Church that there would be no investigation of matters reported by the PSO to the CPEA or the CP&SCS. The CPEA and the CP&SCS only rarely themselves conducted any investigation of any sort. However, the information received in blind reports was disseminated throughout the Police Force by being entered on COPS and, in this way, blind reports did sometimes lead to investigations. Reference was made to evidence that the CPEA or the CP&SCS received thousands of reports of sexual abuse each year and it was unrealistic to expect every report to be investigated.
- 8.43 It was submitted that there was no evidence of any agreement between the Police Force and the Catholic Church whereby preferential treatment was given by the Police Force to the PSO or the Church. There was evidence that the Police Force had sought to enter into arrangements with other organisations and that other organisations had engaged in blind reporting. Counsel asked rhetorically, why a police officer such as Cullen had been included in the PSRG, if the Catholic Church was seeking to protect itself.
- 8.44 It was submitted that there was no evidence that the Church had preferred its own interests to those of victims or that victims had not made a free choice to enter into the *Towards Healing* process. It was submitted that there was no evidence that contact officers in the *Towards Healing* process had not encouraged complainants to report matters to the Police Force or had put pressure on complainants not to report matters to the Police Force. It was pointed out that no contact officer or victim had been called to give evidence. It was submitted that the job descriptions of contact officers formed an insufficient basis for inferring that contact officers had not been trained and experienced in

matters not appearing in the job descriptions. The contact officers were not employees of the Church; they were volunteers with varying backgrounds.

8.45 As Counsel Assisting indicated in her submissions, the focus of the Commission's investigation is on the issues of police misconduct stated in Counsel Assisting's submissions. The Commission has thought it appropriate to record what appear to be the principal submissions made by Salmon's legal representative but will consider only such of the submissions as are relevant to the police misconduct alleged.

## Submissions made by the legal representative for the Commissioner of Police

8.46 Counsel for the Commissioner of Police noted that the individual police officers who were alleged to have engaged in police misconduct were separately legally represented and Counsel for the Commissioner of Police would not make submissions about individual police officers.

8.47 Counsel said that the Police Force would not oppose further consideration of the practice of blind reporting. However, it should not be inferred that the Police Force accepted all of the submissions of Counsel Assisting about blind reporting.

8.48 The submissions on behalf of the Commissioner of Police were principally concerned with "*the importance of blind reporting*" and "*the difficulties of s 316 of the Crimes Act 1900*".

8.49 As to blind reporting, Counsel referred to the evidence of a number of witnesses including Davoren, Heslop, McGee and Armstrong that, in their opinion, if blind reporting was not permitted, much intelligence would be lost.

8.50 As to the difficulties presented by s 316 of the Crimes Act, Counsel referred *inter alia* to criticisms of s 316 in the NSW Law Reform Commission Discussion Paper No 39 (1997) and the NSW Law Reform Commission Report No 93 (1999). In the report the NSW Law Reform Commission had said that s 316 undermined confidential relationships and that s 316 should be repealed.



Counsel referred to a recent statutory amendment to the Victorian *Crimes Act 1958* and to work being undertaken by the *Royal Commission into Institutional Responses to Child Sexual Abuse*.

## 9. DUTIES OF POLICE OFFICERS

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- 9.1 Counsel Assisting made general submissions about the duties of police officers. In her submissions Counsel referred to sections of the *Police Act 1900* (NSW) (“the Police Act”) and a number of cases including *New South Wales v Tyszyk* [2008] NSWCA 107 (“*Tyszyk*”). A number of the submissions made by Counsel are supported by the judgment of Campbell JA in *Tyszyk*.
- 9.2 Counsel Assisting referred to a number of sections of the Police Act, including the following.
- 9.3 Section 6(2) provides that the Police Force has, among other functions, the function to “*provide police services for New South Wales*”. Section 6(3)(a) provides that the expression “*police services*” includes “*services by way of prevention and detection of crime*”. Section 6(4) provides that “*a reference in this section to the functions of the NSW Police Force includes a reference to the functions of members of the NSW Police Force*”.
- 9.4 Section 14 provides that “*in addition to any other functions, a police officer has the functions conferred or imposed on a constable by or under any law (including the common law) of the State*”.
- 9.5 In *Tyszyk* Campbell JA observed at paragraph 72 of his judgment that “*through the chain of statutes that has governed the Police Force in New South Wales since its inception, the duties and powers attaching to the office of constable under the common law were at no time repealed*”.
- 9.6 At paragraph 84 of his judgment under the heading “*Common law duties concerning crime*” Campbell JA said in part:-

*A most important aspect of the duties of a constable concerns preventing and detecting crime...Constable's duties concerning crime extend to collecting evidence concerning crime and keeping it for as long as is necessary.*

## 10. POLICE MISCONDUCT UNDER THE PIC ACT

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10.1 In order for the Commission to determine whether there was police misconduct within either limb of the Commission's investigation, it is necessary to examine the concept of "*police misconduct*".

10.2 Section 4 of the PIC Act, which is the definitions section in the PIC Act, reads simply "*police misconduct – see section 5*".

10.3 Section 5 of the PIC Act provides:-

### **5 Police misconduct**

#### **(1) Definition**

*For the purposes of this Act, police misconduct means misconduct (by way of action or inaction or alleged action or inaction) of a police officer:*

- (a) whether or not it also involves non-police participants, and*
- (b) whether or not it occurs while the police officer is officially on duty, and*
- (c) whether or not it occurred before the commencement of this subsection, and*
- (d) whether or not it occurred outside the State or outside Australia.*

#### **(2) Examples**

*Police misconduct can involve (but is not limited to) any of the following:*

- (a) police corruption,*
- (b) the commission of a criminal offence by a police officer,*
- (b1) misconduct in respect of which the Commissioner of Police may take action under Part 9 of the Police Act 1990,*
- (c) corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988 involving a police officer,*
- (d) any other matters about which a complaint can be made under the Police Act 1990.*

#### **(3) Former police officers**

*(cf ICAC Act s 8 (3))*

*Conduct may be dealt with, or continue to be dealt with, under this Act even though any police officer involved has ceased to be a police officer.*

*Accordingly, references in this Act to a police officer extend, where appropriate, to include a former police officer.*

- 10.4 It is apparent that, while s 5 provides some guidance as to the meaning of “*police misconduct*”, it does not contain a formal definition of “*police misconduct*”.
- 10.5 Section 5(1) provides that “*police misconduct*” can consist of action or inaction and that conduct can be “*police misconduct*”, whether or not certain factors are present.
- 10.6 Section 5(2) provides some examples of what can be “*police misconduct*” but clearly indicates that the examples given are not exhaustive.
- 10.7 The part of s 5 of the PIC Act on which Counsel Assisting’s submissions focused was s 5(2)(d) providing that “*police misconduct*” can involve any matters not falling within the preceding paragraphs of s 5(2) about which a complaint can be made under the *Police Act 1990* (NSW).
- 10.8 The part of the Police Act dealing with complaints about the conduct of police officers is Part 8A. In s 121 in Part 8A “*conduct*” of a police officer is defined as meaning:-

*...any action or inaction (or alleged action or inaction) of a police officer:*

- (a) whether or not it also involves non-police participants, and*
- (b) whether or not it occurs while the police officer is officially on duty, and*
- (c) whether or not it occurs outside the State or outside Australia.*

- 10.9 Section 122 of the Police Act provides that Part 8A of the Act applies to a complaint that alleges or indicates one or more of the types of conduct listed in paragraphs (a), (b), (c) and (d). The part of s 122 on which Counsel Assisting relied was paragraph (d) of s 122(1) which provides that Part 8A applies to a complaint that alleges or indicates:-

*conduct of a police officer that, although not unlawful:*

- (i) *is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or*
- (ii) *arises, wholly or in part, from improper motives, or*
- (iii) *arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or*
- (iv) *arises, wholly or in part, from a mistake of law or fact, or*
- (v) *is conduct of a kind for which reasons should have (but have not) been given.*

10.10 It was submitted by Counsel Assisting that conduct of the police officers Cullen, Heslop, McGee and Armstrong fell within one or other of the sub-paragraphs of s 122(1)(d).

10.11 The Commission notes the close legislative connection between the *Police Integrity Commission Act 1996* (NSW) No 28 and the *Police Amendment Act 1996* (NSW) No 29 which introduced into the Police Act provisions substantially similar to the present s 122(1)(d). The responsible minister, the Minister of Police, introduced the bills which became the Acts in the same second reading speech. In his speech the Minister said that the bills would give effect to key recommendations in an Interim Report of the Royal Commission into the New South Wales Police Service.

10.12 It is clear that s 122(1)(d) and consequently s 5(2)(d) of the PIC Act are intended to have a very wide scope.

10.13 In a number of the Commission's reports the Commission, after referring to s 5(2) of the PIC Act, has commented:-

*It follows that "police misconduct" may encompass not only serious criminal activity such as perverting the course of justice but also minor disciplinary breaches by police, sanctions for which may, for example, be nothing more than additional training and development.*

(See for example the Commission's Report to Parliament in October 2009 in Operation Lantana at pp.45-46)

10.14 In *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446 Basten JA suggested at 465 ([76]) that "*misconduct*" in s 16 of the PIC Act might be confined to conduct which could constitute a criminal offence or a disciplinary offence. However, as his Honour pointed out, the expression "*disciplinary*"

*offence*” is defined in s 4 of the PIC Act as including “*any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law*”. Accordingly, even if Basten JA’s suggestion is adopted, the concept of “*misconduct*” would be very broad.

10.15 The Commission considers that it is clear that conduct of a police officer may fall within at least some parts of s 122(1)(d) of the Police Act, with the consequence that there is police misconduct within s 5(2)(d) of the PIC Act, without it being necessary that the officer should have been aware that his or her conduct involved misconduct.

10.16 For example, the Commission considers that conduct of a police officer could fall within s 122(1)(d)(iii) of the Police Act as being conduct arising wholly or in part from a decision by the police officer that has taken irrelevant matters into consideration, and hence could be “*police misconduct*” by the police officer, without it being necessary that the police officer should have been aware that a matter taken into consideration by the officer was irrelevant and that his or her conduct involved “*police misconduct*”. It is likely that a police officer who engages in conduct as a result of a decision that has taken irrelevant matters into consideration will not be aware that the matters taken into consideration should have been regarded as irrelevant. Accordingly, if awareness on the part of the police officer, that the matters taken into consideration should have been regarded as irrelevant, was required in order for s 122(1)(d)(iii) to operate, then the paragraph would seldom have any operation.

10.17 Similarly, the Commission considers that conduct could fall within s 122(1)(d)(iv) of the Police Act as arising, wholly or in part, from a mistake of law or fact and hence could be “*police misconduct*” by the police officer, without it being necessary that the police officer should have been aware that the officer’s conduct arose from a mistake of law or fact and that his or her conduct involved “*police misconduct*”. It is likely that a police officer who engages in conduct which arises wholly or in part from a mistake on the part of the officer will not be aware that, in the true state of the facts or the true state of the law, the officer’s conduct involved “*police misconduct*”. Accordingly, if awareness on the part of a police officer, that the officer’s conduct arose from a mistake on the part of the

officer and involved “*police misconduct*”, was required in order for s 122(1)(d)(iv) to operate, the paragraph would seldom have any operation.

10.18 *Pillai v Messiter* [No 2] (1989) 16 NSWLR 197, a case sought to be relied on by Cullen’s legal representative, is clearly distinguishable from the present case. In *Pillai v Messiter* the Court was concerned with the expression “*misconduct in a professional respect*” contained in the *Medical Practitioners Act 1938* (NSW) and there were no provisions in the Act elaborating on the interpretation to be given to this expression.

10.19 In later parts of this report the Commission will refer to and apply parts of this analysis of the concept of “*police misconduct*”.

## 11. BLIND REPORTING AND S 316 OF THE *CRIMES ACT 1900* (NSW)

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- 11.1 A matter common to both limbs of the Commission's investigation was s 316 of the Crimes Act and its application to what was described in evidence before the Commission as "blind reporting". As referred to elsewhere in this report, the PSO made blind reports to the Police, that is reports in which the identity of the alleged offender and some of the circumstances of the alleged offence were disclosed but the identity of the victim was not disclosed.
- 11.2 Earlier in this report the Commission has referred to parts of s 316 of the Crimes Act. It is convenient now to set out the full terms of s 316, as the section has stood since 1999.
- 11.3 Section 316 provides:-

### ***Concealing serious indictable offence***

- (1) If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.*
- (2) A person who solicits, accepts or agrees to accept any benefit for himself or herself or any other person in consideration for doing anything that would be an offence under subsection (1) is liable to imprisonment for 5 years.*
- (3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury.*
- (4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.*
- (5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).*



11.4 Section 316 was inserted in the Crimes Act by the *Crimes (Public Justice) Amendment Act 1990*. As originally enacted, the section had three sub-sections which were as follows:-

- (1) *If a person has committed a serious offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.*
- (2) *A person who solicits, accepts or agrees to accept any benefit for himself or herself or any other person in consideration for doing anything that would be an offence under subsection (1) is liable to imprisonment for 5 years.*
- (3) *It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury.*

11.5 By the same Amendment Act the common law offence of misprision of a felony was abolished. In his second reading speech on the bill which became the Amendment Act the Attorney-General said:-

*The common law offence of misprision of a felony will be abolished under the bill. It will be replaced in statutory form in a new section 316 of the Crimes Act.*<sup>699</sup>

11.6 Section 316 was amended by the *Crimes Legislation Amendment Act 1997* (proclaimed on 30 March 1998), which inserted sub-sections (4) and (5) in the following terms:-

- (4) *A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.*
- (5) *The Governor may make regulations, not inconsistent with this Act, prescribing a profession, calling or vocation as referred to in subsection (4).*

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<sup>699</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 May 1990, p.3692 (The Hon John Dowd AO QC)

11.7 These amendments were made following a review of s 316 by a Working Party of the Criminal Law Review Division of the Attorney-General's Department.

11.8 In his second reading speech on the bill which became the Amendment Act the responsible minister said:-

*The desirability of an amendment to section 316 has been drawn to the Attorney General's attention by a number of persons, including the former Minister for Health and the Law Society of New South Wales. The concern has been that there are certain classes of professional persons who are exposed to the risk of inappropriate prosecution under the section. Such persons, in the course of their work, may receive information from patients or clients concerning the commission of serious offences. The circumstances of disclosure of that information, however, may be such that the professional person believes it to be inappropriate to divulge the matter to the police. By not disclosing such information the professional person becomes liable for prosecution.*

...

*The approach recommended by the working party recognises that there will be occasions when the prosecution of professional persons for an offence of this nature will be appropriate, but that such prosecutions should not be commenced without proper consideration of all issues.*

...

*In amending section 316 in the manner that has been chosen, the Government is arguably adopting a fairly conservative approach to reform of the section. There have been calls from some quarters for the scope of the section to be more significantly restricted. In taking a more limited step, the Government is not closing the door on further reform of the section if that need becomes clear.<sup>700</sup>*

11.9 Section 316 was further amended by the *Statute Law (Miscellaneous Provisions) Act 1998* as follows:-

*Omit section 316 (5). Insert instead:*

*(5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).*

11.10 In 1998 a regulation was made (*Crimes (General) Amendment (Concealment of Offences) Regulation 1998*) in the following terms:-

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<sup>700</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 May 1997, p.8251 (Mr Richard Amery)

*5A Concealment of offences by certain persons*

*For the purposes of section 316 (4) of the Act, the following professions, callings or vocations are prescribed:*

- (a) a legal practitioner,*
- (b) a medical practitioner,*
- (c) a psychologist,*
- (d) a nurse,*
- (e) a social worker, including:*
  - (i) a support worker for victims of crime, and*
  - (ii) a counsellor who treats persons for emotional or psychological conditions suffered by them,*
- (f) a member of the clergy of any church or religious denomination,*
- (g) a researcher for professional or academic purposes.*

11.11 There has been a regulation in these terms at all times since 1998, subject to the qualification that some additional professions, callings or vocations have been prescribed.

11.12 The *Crimes Legislation Amendment (Sentencing) Act 1999* amended the Crimes Act by inserting a definition of “*serious indictable offence*” in s 4, omitting the definition of “*serious offence*” in s 311(1) and replacing all references to “*serious offence*” in Part 7 of the Act, which includes s 316, to references to “*serious indictable offence*”. “*Serious indictable offence*” was defined as being “*an indictable offence that is punishable by imprisonment for life or for a term of five years or more*”.

11.13 The same Amending Act also amended s 313 of the Crimes Act, so that it provided that, if it is an element of an offence that an offence is a serious indictable offence, it is not necessary for the prosecution to establish that the accused knew that the offence was a serious indictable offence.

11.14 Section 316 has been controversial. Apart from the review in 1996 by the Working Party of the Criminal Law Review Division, it was the subject of a NSW Law Reform Commission Discussion Paper (Discussion Paper (1997) NSWLRCDP 39) and a report by the NSW Law Reform Commission (Report 93, December 1999).<sup>701</sup> In the report the Law Reform Commission

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<sup>701</sup> NSW Law Reform Commission, *Review of Section 316 of the Crimes Act 1900 (NSW)*, Discussion Paper, No 39 (1997) & NSW Law Reform Commission, *Review of Section 316 of the Crimes Act 1900 (NSW)*, Report, No 93 (1999)

unanimously recommended that s 316(1) should be abolished.<sup>702</sup> This recommendation has not been implemented.

11.15 There is little authority on s 316. Information in the report of the Law Reform Commission reveals that most people who up to the date of the report had been charged with an offence under s 316(1) had pleaded guilty. Decisions of the NSW Court of Criminal Appeal have been on appeals against sentences and have not considered in any detail the elements of the offence. There has been some consideration of s 316 by single judges of the Supreme Court in *Prime Finance Pty Limited and Ors v Randall and Ors* [2009] NSWSC 361 (“*Prime Finance*”) and *Re David, Alan and Mary and the Director-General Family and Community Services* [2014] NSWSC 1077 (“*Re David*”). These decisions are referred to later in this part of the Commission’s report.

11.16 The Commission has referred earlier in this report to the four advices about s 316 from internal Police Force advisers, namely the advice by Kristofferson, the two advices by Treadwell and the advice by Friedrich. It is true that the issue to which all of these advices were directed was whether the Police Force should enter into a MOU in the terms of a draft written memorandum. However, the ground on which all of Kristofferson, Treadwell and Friedrich advised that the Police Force should not enter into the proposed MOU was the presence in the draft MOU of a clause authorising blind reporting. The advisers considered that the clause might be “*contrary*” to s 316, “*incongruent*” with s 316 or “*inconsistent*” with s 316.

11.17 The conditions for the operation of s 316(1) are that:-

- (i) a serious indictable offence has been committed by someone; and
- (ii) another person knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension or the prosecution or the conviction of the offender.

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<sup>702</sup> NSW Law Reform Commission, *Review of Section 316 of the Crimes Act 1900 (NSW)*, Report, No 93 (1999), pp.37-41 (The majority were of the view that sub-s (1) should be repealed entirely. The minority were of view that the section should be repealed and replaced with a new provision of greater clarity)

- 11.18 The identity of the victim of an alleged offence is clearly information which might be of material assistance in securing the apprehension or prosecution or conviction of the offender.
- 11.19 In *R v Crimmins* [1959] VicRp 46; [1959] VR 270, a case on the common law offence of misprision of a felony, the full Court of the Supreme Court of Victoria held that the trial judge had correctly directed the jury that the accused could be found guilty of misprision of a felony, where he had disclosed that an offence had been committed but had not disclosed the identity of the offender or the place where the offence had been committed.
- 11.20 In the House of Lords decision of *Sykes v Director of Public Prosecutions* [1962] AC 528, also a case on the common law offence of misprision of a felony, Lord Denning, who delivered the principal speech, said at 563 that a person who knows a felony has been committed must disclose to a proper authority “*all material facts known to him*”. His Lordship cited *Crimmins*.
- 11.21 There is no time limit expressed in s 316 for complying with the section.
- 11.22 In *Sykes* Lord Denning said at 563 that a person would commit the common law offence of misprision of a felony if he does not disclose to a proper authority all material facts known to him about the offence “*when there is a reasonable opportunity available to him to do so*”. Lord Goddard said at 569 that the offence of misprision of a felony would be committed if a person fails to disclose what he knows about an offence “*within a reasonable time and having a reasonable opportunity for so doing*”. There is nothing in the short speeches of the other three Law Lords which would cast any doubt on these statements by Lord Denning and Lord Goddard.
- 11.23 The Commission considers that the statements of Lord Denning and Lord Goddard about the common law offence of misprision of a felony should be applied to the statutory offence under s 316 of the Crimes Act, which replaced the common law offence of misprision of a felony.
- 11.24 A person making a blind report will usually at the time of making the report be aware of the identity of the alleged victim and in making the report will have the opportunity of bringing information about the identity of the alleged victim

to the attention of the Police Force or other authority. Accordingly, if information about the identity of the alleged victim is known but is not reported, then, if all the conditions for the operation of s 316 are satisfied, an offence will be committed at the time of reporting, even though the person reporting may subsequently disclose the identity of the alleged victim.

11.25 A number of witnesses before the Commission gave evidence of matters which they believed justified blind reporting. These matters were put in different ways but in the opinion of the Commission can be summarised as:-

(i) victims did not wish information they gave in confidence in a *Towards Healing* process to be communicated to the Police and the wishes of the victims should be respected; and

(ii) if blind reporting was not permitted, many persons would not make complaints about sexual assaults even under the *Towards Healing* protocol and the flow of information to Police about offences of sexual assault which the Police were receiving through blind reporting would be diminished.

11.26 It is necessary to examine whether either of these matters would, in general, amount to “*reasonable excuse*” within s 316(1) of the Crimes Act.

11.27 The Commission has already observed that there is little authority on s 316. There has not been any extended judicial discussion of the requirement under the section that the failure to bring information to the attention of the Police Force or other authority should have been “*without reasonable excuse*”.

11.28 (i) The expression “*without reasonable excuse*” or some equivalent expression has been used in other statutes creating criminal offences. However, cases decided on other statutory provisions are of little assistance in interpreting the expression “*without reasonable excuse*” in s 316.

11.29 The decision of the High Court in *Taikato v the Queen* (1996) 186 CLR 454 was referred to by Treadwell in his advice of 11 December 2001. *Taikato* concerned s 545E of the Crimes Act (NSW), as then in force. Section 545E(1)

made it an offence for a person to possess certain things in a public place. Section 545E(2) provided that it was a defence to a charge under sub-s (1) “*if the person satisfies the Court that he or she had a reasonable excuse for possessing it or possessed it for a lawful purpose*”.

11.30 At page 464 the judges forming the majority of the Court said in their joint judgment (omitting citations):-

*The term "reasonable excuse" has been used in many statutes and is the subject of many reported decisions. But decisions on other statutes provide no guidance because what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of "reasonable excuse" is an exception.*

11.31 (ii) The purpose of s 316 of the Crimes Act is clearly to serve the public interest in the administration of criminal justice, by requiring that information which might be of material assistance in securing the apprehension, prosecution or conviction of an offender be brought to the attention of the police or some other appropriate authority, so that the information may be investigated. In *Prime Finance* Johnson J said at paragraph 38 of his judgment that “*the existence of this offence (that is, an offence under s 316) emphasises the policy foundation in support of the public interest in reporting of serious crime which is believed to have occurred so that the police may investigate*”.

11.32 Where “*reasonable excuse*” for a failure to communicate information is found to exist, the purpose underlying s 316 will be defeated. The weight which should be given to the purpose underlying s 316 in determining whether a matter amounts to “*reasonable excuse*” is increased by the restriction of the operation of the section to cases of “*serious indictable offences*”. These considerations provide an argument against a liberal interpretation of “*reasonable excuse*”.

11.33 (iii) The Commission has already referred to the legislative history of s 316 and in particular to the amendment made by the introduction into the section of sub-ss (4) and (5). The Commission has also referred to parts of the second reading speech made by the responsible minister in which he described the concern which had led to the amendment, namely that certain classes of

professional persons who received information from patients or clients might consider it inappropriate to disclose that information and by not disclosing it would become liable to prosecution.

11.34 There were clearly other options open to the legislature to address the concern described by the Minister. An option which had been suggested in the Law Reform Commission's Discussion Paper was that "*Section 316 should be amended to provide that legal practitioners, medical practitioners / counsellors / psychologists / social workers and priests who acquire information about serious offences in the course of their profession or vocation are not guilty of an offence for failing to disclose it, in accordance with the doctrine of privilege*".<sup>703</sup>

11.35 However, the course taken by the legislature in amending s 316 was, not to create an exemption or defence in favour of persons practising or following certain professions, callings or vocations, but to provide that a prosecution against persons practising or following professions, callings or vocations prescribed by the Regulations should not be commenced without the approval of the Attorney-General. Persons practising or following professions, callings or vocations which were prescribed would continue to commit an offence if they did not comply with s 316 but could not be prosecuted for the offence without the approval of the Attorney-General.

11.36 The course taken by the legislature in amending s 316 by adding sub-ss (4) and (5) provides a strong argument that the fact that information was given in confidence in the *Towards Healing* process, not to be communicated to the Police, cannot, or cannot generally, amount to "*reasonable excuse*" within s 316.

11.37 (iv) The members of the Law Reform Commission which produced Report No 93 were highly qualified lawyers. The members were three serving or former Supreme Court judges, three District Court judges and a law professor. The Commission devoted a substantial part of its report to what it described as

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<sup>703</sup> NSW Law Reform Commission, *Review of Section 316 of the Crimes Act 1900 (NSW)*, Discussion Paper, No 39 (1997)



*“legitimate reasons for concealing serious offences”, including “confidential relationships”.*<sup>704</sup>

11.38 The Commission did not suggest in its report that the fact that information was received in the course of a confidential relationship would provide any defence of reasonable excuse for the person receiving the information. On the contrary, the Commission considered s 316 would apply if the information was not disclosed and that this application of s 316 was a reason for repealing s 316.

11.39 (v) In *Re David* the plaintiff sought permanent injunctive relief to restrain the Director-General of the Department of Family and Community Services, from providing to the New South Wales Police Force documents in the Department’s possession. The documents contained information about sexual contact the plaintiff had had with her brother many years before, when the plaintiff was over the age of 18 but her brother was a minor aged 12. The Director-General had informed the plaintiff that, in order to avoid a contravention of s 316, it was proposed to bring the information in the documents to the attention of the police.

11.40 Slattery J held that the Director-General’s construction of s 316 that it imposed a statutory obligation on every citizen, including the Director-General (and Departmental officers), was *“persuasive”* (paragraphs 102 and 104 of his Honour’s judgment). His honour held that the information about the plaintiff came within what his Honour described as *“both limbs”* of s 316 that is the Director-General knew or believed that an offence had been committed and that he had information which might be of material assistance in securing the apprehension, prosecution or conviction of the plaintiff.

11.41 Slattery J held that the circumstances in which the information had been received by the Department attracted an equitable obligation of confidence. However, it would appear from his Honour’s judgment that it was accepted that the existence of an equitable obligation of confidence could not amount to *“reasonable excuse”* within s 316.

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<sup>704</sup> See NSW Law Reform Commission, *Review of Section 316 of the Crimes Act 1900 (NSW)*, Report, No 93 (1999), pp.23-33

- 11.42 Slattery J held that the correctness of the position the Director-General had taken was established by the decision of the High Court in *A v Hayden (No 2)* (1984) HCA 67; 156 CLR 532 in which it was held that the public interest in the administration of justice precludes a Court in the exercise of its equitable jurisdiction from restraining a disclosure of confidential information.
- 11.43 The judgment in *Re David* is only of limited assistance on the present question but does suggest that the fact that information was received in the course of a confidential relationship does not amount to “*reasonable excuse*” within s 316.
- 11.44 (vi) The Commission has already referred to what is clearly the purpose underlying s 316. The other matter on which the interpretation of a defence of “*reasonable excuse*” was said in *Taikato* to depend was the circumstances of the individual case. It is necessary to examine the circumstances of an individual case to determine whether there was “*reasonable excuse*” for a failure to bring information in that individual case to the attention of a member of the Police Force or an appropriate authority.
- 11.45 It follows, in the Commission’s opinion, that there will not be a reasonable excuse for a failure to communicate some material information in a case, on the basis that the case is one of a large number of cases falling within the same broad class, which are to be dealt with similarly, regardless of the circumstances of the individual case. Nor would an apprehension that, if blind reporting were not permitted the flow of information to police might be reduced, amount to reasonable excuse for a general withholding of information about the complainant, regardless of the circumstances of the individual case.
- 11.46 The Commission concludes that, in general, the matters relied on by witnesses before the Commission as justifying blind reporting would not amount to a reasonable excuse within s 316(1) of the Crimes Act and that, in general, blind reporting contravenes s 316.
- 11.47 Whether in a particular case of blind reporting a contravention of s 316(1) occurs would depend on the circumstances of the particular case, including whether the conditions for the operation of s 316(1) are satisfied (such as

whether the person alleged to have committed an offence had the necessary knowledge or belief) and whether there was some matter amounting to reasonable excuse.

- 11.48 A number of witnesses before the Commission both police officers and church officials gave evidence of what they perceived to be the advantages of blind reporting and the risk of less information being received if blind reporting was not permitted. The Commission considers that there should be an urgent review of blind reporting and s 316 of the Crimes Act.

## 12. ASSESSMENT OF THE FIRST LIMB OF THE COMMISSION'S INVESTIGATION

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- 12.1 The first limb of the scope and purpose of the Commission's investigation was:-

*To investigate:*

*1. whether there was any police misconduct involved in the participation of any NSW Police Force officer in the Catholic Church Professional Standards Resource Group between 1998 and 2005.*

- 12.2 Cullen was not named in the statement of the scope and purpose of the investigation but she was the only NSW Police Force officer who participated in the PSRG at any time between 1998 and 2005.

- 12.3 In her submissions Counsel Assisting identified the issues arising on the first limb of the Commission's investigation as follows:-

*8. What were the activities or steps taken by the PSRG in the period between 1998 and 2005 (the relevant period) and what was Ms Cullen's participation therein?*

*9. Was any police misconduct involved on the part of Cullen in the PSRG. In particular potential instances of police misconduct relate to:*

- a. Participating in the PSRG in circumstances in which this involved a conflict of interest given her understanding of the limited scope of her role as an officer of the NSWPF whilst participating in the PSRG;*
- b. Failing to take action (including advising the PSO to report information to the NSWPF, causing further inquiries or investigation, recording matters, reporting matters to the NSWPF through the usual reporting channels, or making further inquiries herself) with respect to reports, complaints and/or information suggesting criminal offences involving abuse had been committed which information was received by her through her participation in the PSRG;*
- c. Failing to retain documents suggesting that criminal offences had occurred, whether or not they also included information identifying the victim or alleged offender, including documents which may have assisted in the investigation and prosecution of criminal offences; and*
- d. Failing to advise the PSO or the PSRG as to the inconsistency between the blind reporting practice and the requirements of s 316 of the Crimes Act 1900 (NSW) in circumstances in which this*

*had been notified to the NSWPF by virtue of four different legal advices between 2001 and 2003 and when Cullen was, through her role on the PSRG, in the position of advising and providing guidance to the PSO?*

*10. Was any police misconduct involved in Mr Heslop having arranged that Cullen would participate in the PSRG, and in Ms McGee continuing that arrangement in the circumstances?*

12.4 The Commission will consider these issues in turn.

**What were the activities or steps taken by the PSRG in the period between 1998 and 2005 and what was Cullen's participation therein?**

Activities or steps of the PSRG

12.5 In an earlier part of this report which provided a background to the matters investigated in Operation Protea the Commission quoted or summarised some provisions of the December 1996 and December 2000 *Towards Healing* protocols.

12.6 Clause 3.2.2 of the December 1996 *Towards Healing* protocol provided:-

*The Resource Group (that is, the PSRG) shall act as adviser to all Church bodies in the province in matters concerning professional standards, both in general and in relation to specific cases.*

12.7 The corresponding provision in the December 2000 *Towards Healing* protocol (clause 35.2.2) omitted the words "*both in general and in relation to specific cases*" but this change made no difference to the functions conferred on the PSRG.

12.8 In the same earlier part of this report the Commission set out the provisions of the Charter for the PSRG endorsed in June 1998, which set out "*the role and function*" of the PSRG, including:-

- *to act as adviser to the Bishops and Leaders (Church authorities) within the Province of Sydney in matters concerning professional standards and abuse, both in general and in relation to specific cases*

...

- *to provide advice and recommendations to the responsible Church Authority specifically in relation to:*

- a) assessment of complaints,*
- b) determination of the substance of the complaint,*
- c) outcomes relating to the complainant and or victim,*
- d) outcomes relating to the accused, including the issue of whether or not an accused person should be required to stand down from office,*
- e) preventive strategies*

12.9 In accordance with the *Towards Healing* protocols and the Charter the PSRG provided advice to the Director of the PSO both on general matters of policies and procedures, including the contents of standard form documents such as statement of complaint forms, and in relation to individual complaints of abuse.

12.10 Davoren gave evidence to the Commission that the following matters were things that he would seek advice on from the PSRG:

- (i) any complications which arose in the assessment of a complaint;
- (ii) any complications involved in reaching an appropriate recommended outcome for a particular matter;
- (iii) where a Church Authority disagreed with the recommended outcome of a particular complaint;
- (iv) where there were complicating factors relating to whether a person should be asked to stand aside from a particular role while a complaint was being investigated.

12.11 Members of the PSRG were selected for their capacity to provide input and advice drawn from their professional backgrounds and experiences to assist the PSRG in the performance of its functions. The members generally served for a limited term and the membership changed over time. The PSRG would appear to have consisted of approximately ten persons.

12.12 Generally, the PSRG would meet on a monthly basis. Minutes were taken of each meeting. Prior to each meeting at least an agenda and draft minutes of the previous meeting were distributed to each member of the PSRG.

12.13 The PSRG provided the Director of the PSO with advice as to how specific complaints of abuse made under the *Towards Healing* protocols should be handled. The complaints of abuse being dealt with under the Protocols were complaints where, generally, the complainant had indicated to the Church that they did not wish to make a complaint to the police or where any involvement the police had had in relation to the matter complained of had, to the knowledge of the Church, concluded. The complaints included allegations of abuse which, if established, could amount to criminal offences, including serious criminal offences.

12.14 In order to facilitate the PSRG providing advice on these matters members of the PSRG were provided with documents relevant to particular complaints of abuse. These documents included:-

(i) reports by assessors appointed under the *Towards Healing* protocols. These reports included records of statements made by relevant witnesses in interviews with the assessor. On at least one occasion there was a record of a statement made by an alleged offender which included admissions.

(ii) correspondence or draft correspondence, including correspondence to complainants.

(iii) completed standard form statement of complaint forms detailing allegations made by complainants.

(iv) reports by psychiatrists or psychologists.

12.15 From about April 2000 the PSO also provided the PSRG with a case summary report which contained an overview of all cases currently being considered by the PSO including details of the nature of the allegation, the age and gender of the victim and information which indicated the status of the complaint under the *Towards Healing* process. Case reports provided to

the PSRG at meetings of the PSRG indicated that active cases varied between about fifteen to about fifty. Salmon gave evidence to the Commission that this case report was a “*way of allowing the PSRG to get a sense of what the Office was dealing with*”. It was also a means by which he could “*take them (the members of the PSRG) to a particular case*” when he wanted to discuss issues in the case with the PSRG.

12.16 The information about a particular case which was provided to the PSRG was generally “*de-identified*” so that the identities of the persons involved in the particular complaint would not be disclosed to the PSRG. In his evidence to the Commission Salmon said that this practice had the purpose of “*ensuring the confidentiality of all parties and also mitigating against any conflict of interest where persons...sitting around the resource group may have known somebody*”. Nevertheless, there was enough information in the documents provided to the PSRG to indicate to a person reading the documents that criminal offences might have been committed.

12.17 It was a general practice that documents provided to PSRG members at a meeting were left at the meeting place and collected by an officer of the PSO.

#### Cullen’s participation in the PSRG

12.18 Davoren gave evidence about how Cullen came to be a member of the PSRG. Davoren said he was looking to “*broaden the base*” of members of the PSRG and approached the CPEA to see if it was willing to put a person forward who could become a member. The CPEA suggested Cullen to Davoren. Davoren said he was not specifically seeking a “*police perspective*”. He was seeking “*broad-based constructive members*” of the PSRG.

12.19 Cullen attended her first meeting of the PSRG in April 1999 and remained a member of the PSRG until May 2005. During that period the minutes of meetings of the PSRG record her as attending forty four meetings. On 20 October 2003 Salmon wrote to the CPEA and sought a replacement for Cullen who, he said, had advised him that she would no longer be able to



attend PSRG meetings. However, notwithstanding this letter, Cullen continued to be a member until May 2005.

12.20 While she was a member of the PSRG Cullen contributed to the discussions of the PSRG, including by providing advice drawn from her professional experience and expertise in the area of paedophile behaviour. She provided information on how to identify “*grooming*” behaviour and other modus operandi of sex offenders. Cullen also provided the PSRG with information to assist in identifying less serious behaviour which might be indicative of serial or serious sexual offending.

12.21 In her evidence to the Commission Cullen said that, when she was a member of the PSRG, she did not act as a conduit for the exchange of information between the Police and the PSO. Cullen did not report to the Police Force any information she obtained about individual cases as a result of her membership of the PSRG.

12.22 Cullen gave evidence that she occasionally asked Davoren or Salmon for more information about particular cases discussed at meetings of the PSRG but that this was more the exception than the rule. Her purpose in seeking this information was to satisfy herself that the PSO had taken appropriate action with respect to a particular matter.

12.23 Cullen did not record in her police notebook any information acquired by her through her membership of the PSRG.

12.24 Cullen also gave evidence that she did not make any inquiries on Police systems to see if matters which were discussed at the PSRG had been communicated to the Police or were the subject of a police investigation.

**Was there any police misconduct on the part of Cullen in the respects submitted by Counsel Assisting?**

(a) Participating in the PSRG in circumstances in which this involved a conflict of interest given her understanding of the limited scope of her role as an officer of the Police Force whilst participating in the PSRG.

- 12.25 At all times between joining the PSRG and retiring from the PSRG in 2005 Cullen was a police officer. She remained a police officer while she was on leave without pay from the Police Force and working in the Ombudsman's office.
- 12.26 Cullen was on duty as a police officer when she attended meetings of the PSRG. She made an occasional entry in her police duty book recording her attendance at a meeting of the PSRG or her reading of documents she had received before a meeting was held.
- 12.27 In the Commission's opinion, it was actually immaterial whether Cullen was on duty at meetings of the PSRG. The Commission notes that under s 5(1)(b) of the PIC Act misconduct by a police officer can occur whether or not it occurs while the police officer is officially on duty.
- 12.28 As a police officer Cullen was subject to the duty police officers have to enforce the criminal law, including to detect and prevent crime and to collect evidence concerning crime.
- 12.29 At meetings of the PSRG and sometimes before meetings Cullen received information in documents about complaints of abuse made by individual complainants, which were being dealt with pursuant to a *Towards Healing* protocol. At the meetings the convenor of the PSRG, whether it was Davoren or Salmon, spoke to the members about the documents.
- 12.30 The information in the documents was "*anonymised*" or "*de-identified*" so that the identities of the alleged victim and the alleged offender and the full circumstances of the alleged offence were not disclosed. Nevertheless, in many cases the information which was disclosed was amount to an allegation that a serious criminal offence might have been committed.
- 12.31 The receipt of this information enlivened Cullen's duty as a police officer to enforce the criminal law, including to collect evidence concerning the alleged crime.

- 12.32 When giving evidence at the public hearing Cullen was asked by Counsel Assisting whether she had taken certain steps, such as reporting the alleged crime to the Police Force or seeking to obtain further information about the alleged crime. Cullen replied that, at least in general, she had not taken any of the steps suggested by Counsel Assisting in her questions.
- 12.33 When asked why she had not taken a certain step, such as reporting or herself investigating, Cullen replied that the taking of such a step was not within her role as a participant in the PSRG. Cullen said that her role as a participant in the PSRG was as an adviser and not as a reporter or investigator.
- 12.34 The Commission accepts that Cullen acted in good faith in forming this understanding of her role while participating in the PSRG. On the evidence before it, the Commission does not consider that Cullen had this understanding of her role because of any agreement or arrangement between the Police Force and the Catholic Church about the role Cullen should have in participating in the PSRG.
- 12.35 However, the Commission considers that, as submitted by Counsel Assisting, Cullen was in a position of conflict in which her understanding of her role while participating in the PSRG conflicted with her obligations as a police officer.
- 12.36 Even if not initially upon her joining the PSRG, there was police misconduct on the part of Cullen in continuing to be a member of the PSRG, while having this understanding of her role in participating in the PSRG. In considering that her role as a participant in the PSRG was that of an adviser and not that of a police officer required to enforce the criminal law, Cullen took an irrelevant matter into consideration and made a mistake of law (Police Act ss 122(1)(d)(iii) and 122(1)(d)(iv)).
- 12.37 Cullen was not aware that she was engaging in police misconduct but, as the Commission considers it demonstrated earlier in this report, conduct can fall within ss 122(1)(d)(iii) and 122(1)(d)(iv), without it being necessary that the police officer should be aware that his or her conduct arises from a decision

that has taken an irrelevant matter into consideration or from a mistake of law or fact.

12.38 There are a number of factors which significantly mitigate Cullen's misconduct. She had no intention of engaging in misconduct. As Counsel Assisting acknowledged in her submissions, there was no conscious dereliction of duty by any police officer, including Cullen. On the contrary, Cullen was well-intentioned. As Counsel Assisting also acknowledged, Cullen, drawing on her experience as a police officer, made a valuable contribution to the discussions of the PSRG.

12.39 Notwithstanding these mitigating factors, the Commission does not consider that it should exercise a discretion in favour of Cullen, assuming that the Commission has a discretion to withhold making a finding of misconduct, even though there is evidence which would warrant such a finding.

12.40 The Commission considers that the present case involves an important principle about the duties of police officers and the misconduct, although unintentional, was not trivial.

(b) Failing to take action (including advising the PSO to report information to the Police Force, causing further inquiries or investigation, recording matters, reporting matters to the Police Force through the usual reporting channels, or making further inquiries herself) with respect to reports, complaints and/or information suggesting criminal offences involving abuse had been committed which information was received by her through her participation in the PSRG.

12.41 Much of what the Commission has said in discussing particular (a) is relevant to particular (b). Cullen was a police officer who was subject to a duty to enforce the criminal law; through her participation in the PSRG she received information which indicated that criminal offences might have been committed; however, in general, she failed to take any of the steps referred to in particular (b). Her reason for not having taken those steps was her understanding of her role while participating in the PSRG, that she was an adviser and not an investigator or reporter of crime.

12.42 As to failing to advise the PSO to report information to the Police Force, Cullen understood, correctly, that the PSO was making reports to the Police

Force. However, she was aware that the reporting by the PSO was by blind reporting and that, unless there was an inquiry by the police, the only information communicated to the police was the information in the blind report. Cullen did not see any of the blind reports being made to the Police Force and, hence, did not know how much, or how little, information was being conveyed.

12.43 In her evidence Cullen gave as an additional reason (as well as it not being her role) for her not taking some of the actions suggested by Counsel Assisting, such as making entries in her notebook and herself reporting matters to the Police Force, that the information she received while participating in the PSRG did not contain much detail and, in particular, did not identify the persons involved in the alleged criminal incident.

12.44 It is true that the information received by Cullen did not contain much detail and, as it stood, could not have been entered on COPS. However, Cullen knew that both Davoren and Salmon would, if asked, supply further information about a case without any restriction, including information about the identity of the victim. Cullen did sometimes ask Davoren or Salmon for further information but it was exceptional for her to do this.

12.45 Although complaints which came before the PSRG were being dealt with in a Church process pursuant to a *Towards Healing* protocol, it did not necessarily follow that any steps taken by Cullen to enforce the criminal law would have been futile. In some of the completed statement of complaint forms which were in evidence before the Commission, there was no clear expression of unwillingness on the part of the victim to have any involvement by the police. Furthermore, the Commission accepts that an indicated unwillingness on the part of victims to make complaints to the police did not necessarily mean that the victims would be unwilling to cooperate with a police investigation, if one was commenced. A further matter is that, as a number of witnesses testified, an initial unwillingness on the part of a victim to have the police involved might change over time, for example, if the victim became aware that the offender had made admissions or had committed other criminal acts or that evidence corroborating the victim's account had been collected.

12.46 The Commission considers that there was police misconduct on the part of Cullen within ss 122(1)(d)(iii) and 122(1)(d)(iv) of the Police Act, particularly in not recording matters and not making further inquiries herself in that she did not generally ask Davoren or Salmon for further information about an alleged offence.

12.47 For similar reasons to those stated by the Commission in considering particular (a), the Commission considers that there were circumstances mitigating Cullen's misconduct but does not consider that it should exercise in favour of Cullen any discretion it might have.

(c) Failing to retain documents suggesting that criminal offences had occurred, whether or not they also included information identifying the victim or alleged offender, including documents which may have assisted in the investigation and prosecution of criminal offences

12.48 The Commission notes that the allegation of misconduct made by Counsel Assisting fell far short of the allegation made in the *Lateline* story of 20 June 2013 that Cullen had "*shredded*" all documents she had received while participating in the PSRG. There was no evidence before the Commission that Cullen had destroyed any evidence, including any documents provided to her through her membership of the PSRG.

12.49 At meetings of the PSRG copies of documents were distributed to the members who were present, including Cullen. The originals of the documents were retained by the PSO. After a meeting had concluded Cullen, like other members of the PSRG, left the copy documents she had received at the venue of the meeting. The copy documents were then collected by the convenor of the PSRG or a member of his staff.

12.50 As adverted to by Counsel Assisting in her statement of particular (c), the copy documents about individual cases which Cullen received were "*anonymised*" or "*de-identified*", that is the identities of the alleged victim and the alleged offender and the full circumstances of the alleged offence were not disclosed in the documents. The information about the offence which was contained in the documents was remote hearsay and not an account given by the alleged victim.

12.51 Accordingly, the documents were of little value in themselves. They were certainly not evidence, in the sense of being documents which by themselves or in conjunction with other documents or oral evidence would have had any tendency to establish in any criminal proceeding the guilt of the alleged offender.

12.52 Nevertheless, the Commission considers that Cullen as a police officer should have retained the documents and that it was police misconduct within ss 122(1)(d)(iii) and 122(1)(d)(iv) of the Police Act not to have retained the documents. Despite their deficiencies, the documents might have assisted in the investigation of criminal offences. Cullen could have referred to the documents in making inquiries for further information from Davoren or Salmon.

12.53 For similar reasons to those stated by the Commission in considering particular (a) the Commission considers that there were circumstances mitigating Cullen's misconduct but does not consider that it should exercise in favour of Cullen any discretion it might have.

(d) Failing to advise the PSO or the PSRG as to the inconsistency between the blind reporting practice and the requirements of s 316 of the *Crimes Act 1900* (NSW) in circumstances in which this had been notified to the Police Force by virtue of four different legal advices between 2001 and 2003 and when Cullen was, through her role on the PSRG, in the position of advising and providing guidance to the PSO.

12.54 The four advices referred to in the statement of particular (d) are the four advices (two by Treadwell and one each by Kristofferson and Friedrich) discussed earlier in this report.

12.55 All of the advices were concerned with the issue of whether the Police Force should enter into a proposed MOU with the Catholic Church. However, the ground given in each advice for the Police Force not entering into the proposed MOU was the presence in the draft document of clause 6 authorising blind reporting.

12.56 Cullen gave evidence, which the Commission accepts, that the only one of the four legal advices she became aware of was Treadwell's advice of 11 December 2001 and that she became aware of that advice only some time

after she received a promotion in May 2004. When Cullen saw that advice she understood that it was to the effect that blind reporting might be inconsistent with s 316.

12.57 Cullen gave evidence, which the Commission accepts, that there had been communication about the advice between her Commander and the PSO and that she did not consider that it was appropriate for her to intervene.

12.58 It is true that Cullen was a member of the PSRG and a function of the PSRG was to provide advice to the PSO but she was not a lawyer and the Commission does not consider that she had the function of giving legal advice to the PSRG or the PSO.

12.59 The Commission does not consider that it should find that there was police misconduct on the part of Cullen as alleged in particular (d).

## Conclusion

12.60 The Commission considers that there was police misconduct on the part of Cullen in the respects alleged in particulars (a), (b) and (c) but not in the respect alleged in particular (d).

## Was there any police misconduct on the part of Heslop in arranging that Cullen would participate in the PSRG?

12.61 The resolution of this issue is made more difficult by the factors that Heslop, who has been retired from the Police Force for a number of years, had little recollection of many of the matters he was questioned about at the public hearing and that no submissions were made to the Commission by his legal representative.

12.62 In his evidence Heslop said he had little recollection of the circumstances in which Cullen became a member of the PSRG. However, the Commission is satisfied, on the basis of evidence given by Cullen and some documentary evidence, that Heslop was involved in Cullen joining the PSRG, that as Cullen's Commander he gave his permission for her to join the PSRG and



that he discussed with Cullen whether there would be a conflict of interest in her accepting any payment from the Church for her participation in the PSRG.

- 12.63 Heslop gave evidence that, prior to the Commission's public hearing, he had not known what the PSRG's functions were, although he accepted that, while he was in the Police Force, he might have been aware of what its functions were. He was aware that a Church process under the *Towards Healing* protocol involved an investigation of complaints, including complaints of child sexual abuse. He had not been aware that material was distributed to PSRG members before and during meetings.
- 12.64 Heslop gave evidence that he had no recollection of what he expected of Cullen as a police officer attending PSRG meetings. However, he said that, if Cullen had received information about "*child sexual offending behaviour*" while she was participating in the PSRG, he would have expected her to report that information to the Police Force.
- 12.65 It was submitted by Counsel Assisting that Heslop "*should be taken to have been aware that Cullen's participation in the PSRG potentially involved a conflict of interest*". However, the Commission is not satisfied that there is sufficient evidence to warrant the Commission drawing this inference.
- 12.66 The conflict of interest to which, as submitted by Counsel Assisting and as found by the Commission, Cullen was subject depended on Cullen's own understanding of her role as a police officer participating in the PSRG. There is no evidence or insufficient evidence on which the Commission could find that Heslop as Cullen's Commander directed her to adopt this role or that Heslop agreed with Cullen that she should adopt this role or that Heslop was aware of Cullen's understanding of her role. Evidence was given by Heslop that he would have expected Cullen while participating in the PSRG to exercise her functions as a police officer, for example by reporting to the Police Force information she had received about child sexual abuse.
- 12.67 The Commission does not make any finding of police misconduct against Heslop in arranging that Cullen would participate in the PSRG.

## Was there any police misconduct on the part of McGee in continuing an arrangement that Cullen would participate in the PSRG?

- 12.68 McGee became commander of the CPEA in 2003. She inherited a situation in which Cullen was a member of the PSRG. Cullen enjoyed McGee's trust.
- 12.69 McGee gave some evidence about what, in her view, Cullen's role was, which the Commission considers was mistaken.
- 12.70 In her evidence McGee described Cullen as being "*a representative*" of the Police Force on the PSRG. It is true that Cullen, while participating in the PSRG, was a police officer. However, while giving the PSRG the benefit of her expertise and experience as a police officer and in that sense offering a police "*perspective*", Cullen was not representing the Police Force. As Davoren said, "*there were no representatives on the PSRG*".
- 12.71 In her evidence McGee described Cullen as having a "*liaison*" role between the Police Force and the Church. When asked what she meant by a "*liaison role*" McGee gave an answer which indicated that she was not using the word "*liaison*" in any strict sense of the word. On the whole of the evidence, the Commission does not consider that Cullen occupied a liaison role between the Police Force and the Church.
- 12.72 Counsel Assisting submitted that, on the basis of certain circumstances which, it was submitted, the Commission should find had been established, McGee should be taken to have been aware of a conflict of interest inherent in Cullen's participation in the PSRG. The circumstances were that McGee was aware that Cullen was a member of the PSRG, that McGee did not discuss with Cullen what Cullen did at PSRG meetings, that McGee regarded Cullen as a representative of the Police Force on the PSRG, McGee was aware that the PSRG discussed abuse happening in the Catholic Church, that McGee was aware of the practice of blind reporting and that it amounted to "*selectivity about the information that was disclosed by the Church to the police service*" but did not take any steps to change the practice or to check how much of the information held by the PSO was being reported to the Police Force.

12.73 The Commission accepts that all of these circumstances were established by the evidence before the Commission, although, as already stated, the Commission considers that McGee was in error in supposing that Cullen was a representative of the Police Force on the PSRG. However, the Commission does not agree that, on the basis of these circumstances, the Commission should find that McGee “*should be taken to have been aware*” of the conflict of interest to which Cullen was subject. The Commission considers that it should not attribute an awareness of any matter to McGee, unless it is satisfied that McGee had that awareness.

12.74 As in the case of Heslop, there is no or insufficient evidence that McGee was aware of Cullen’s understanding of her role. Indeed, to the extent that McGee had an understanding of Cullen’s role, her understanding of Cullen’s role would appear to have differed from Cullen’s own understanding of her role.

12.75 The Commission does not make any finding of misconduct on the part of McGee in continuing the arrangement that Cullen would participate in the PSRG.

## 13. ASSESSMENT OF THE SECOND LIMB OF THE COMMISSION'S INVESTIGATION

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13.1 The second limb of the scope and purpose of the Commission's investigation was:-

*To investigate:*

...

2. *Whether there was any police misconduct involved in the participation by the NSW Police Force in any agreement, protocol or memorandum of understanding, whether or not formally entered into, between the NSW Police Force and the Catholic Church concerning the handling of complaints of abuse committed by Catholic Church personnel or employees.*

13.2 In her submissions Counsel Assisting identified the issues arising on the second limb of the investigation as follows:-

*12. Was any agreement, protocol or Memorandum of Understanding, in written form, concerning the handling of complaints of abuse committed by Catholic Church personnel or employees ever entered into between the NSWPF and the Catholic Church?*

*13. Was any such agreement, protocol or Memorandum of Understanding informally entered into between the NSWPF and the Catholic Church, and if so, what was its content?*

*14. Was any police misconduct involved on the part of any officer of the NSWPF? In particular, potential instances of police misconduct relate to:*

*a. the entering into of an arrangement with the PSO to the effect that:*

- (i) where a criminal offence was alleged and a blind report form was submitted, the NSWPF would not seek (or use available statutory powers to compel disclosure of) the identity of the victim, or identifying information in respect of the victim, from the Catholic Church other than in exceptional cases;*
- (ii) attempts would not be made on the part of the NSWPF to contact victims of abuse in circumstances in which a blind report form had been submitted in respect of that abuse without first contacting the PSO;*
- (iii) the NSWPF would not further investigate complaints of abuse in circumstances in which a blind report form had been submitted other than*

*in exceptional cases where the matter as reported was identified as being relevant to an existing or future investigation; and*

- b. continuing with these arrangements throughout the relevant period and failing to take any steps to curtail such arrangements in circumstances in which legal advice had been provided to the NSWPF to the effect that there was inconsistency between this practice and the requirements of s 316; and*
- c. encouraging or condoning the practice on the part of the PSO in relation to cases of potential criminal offences complained of through the Towards Healing protocol only (or in the vast majority of cases) to report the matter to the NSWPF as a “blind report” on a standard Child Protection Enforcement Agency (CPEA – for convenience in these submissions the CPEA is used also to refer to the Child Protection and Sex Crimes Squad after the name changed in 2003) form for that purpose, without including information identifying the victim and without updating the information provided to the NSWPF over time; and*
- d. making decisions in relation to the handling of individual reports of sexual or other abuse which were received by the NSWPF having regard to an arrangement or protocol which was in place between the NSWPF and the Catholic Church by reason of arrangements entered into through Cullen’s participation in the PSRG.*

13.3 Counsel Assisting accepted that it was clear on the evidence before the Commission that no written agreement, protocol or MOU about the handling of complaints had ever been entered into between the Police Force and the Catholic Church.

13.4 However, in paragraphs 192 and 193 of her written submissions Counsel Assisting submitted that police misconduct had occurred:-

*192. On the part of Heslop:*

*In the entering into of an arrangement with the PSO to the effect that:*

- i. where a criminal offence was alleged and a blind report form was submitted, the NSWPF would not seek (or use available statutory powers to compel disclosure of) the identity of the victim, or identifying information in respect of the victim, from the Catholic Church other than in exceptional cases;*
- ii. attempts would not be made on the part of the NSWPF to contact victims of abuse in circumstances in which a blind report form had been submitted in respect of that abuse without first contacting the PSO;*

- iii. *the NSWPF would not further investigate complaints of abuse in circumstances in which a blind report form had been submitted other than in exceptional cases where the matter as reported was identified as being relevant to an existing or future investigation; and*

193. *On the part of Heslop, McGee and Armstrong:*

- a. *continuing with these arrangements and failing to take any steps to curtail such arrangements in circumstances in which legal advice had been provided to the NSWPF to the effect that there was inconsistency between this practice and the requirements of s 316.*
- b. *encouraging or condoning the practice on the part of the PSO in relation to cases of potential criminal offences complained of through the Towards Healing protocol only (or in the vast majority of cases) to report the matter to the NSWPF as a “blind report” on a standard CPEA form for that purpose, without including information identifying the victim and without updating the information provided to the NSWPF over time; and/or*
- c. *making decisions in relation to the handling of individual reports of sexual or other abuse which were received by the NSWPF having regard to an arrangement or protocol which was in place between the NSWPF and the Catholic Church by reason of arrangements entered into through Cullen’s participation in the PSRG and thereby fettering their discretion and/or taking into account an irrelevant consideration in respect of the handling of such reports.*

13.5 The first issue identified by Counsel Assisting can readily be disposed of. As accepted by Counsel Assisting, it is clear on the evidence before the Commission that no written agreement, protocol or memorandum of understanding concerning the handling of complaints of abuse committed by Catholic Church personnel or employees was ever entered into between the Police Force and the Catholic Church. No such document was discovered in the Commission’s investigation and there was no evidence that a written agreement had been entered into. A number of witnesses gave evidence that no such written agreement, protocol or MOU had ever been entered into.

13.6 The issues left outstanding on the second limb of the Commission’s investigation are whether any informal agreement, protocol or MOU was

entered into, if so, what were its terms and whether there was any police misconduct in relation to it.

- 13.7 Counsel Assisting suggested that the term “*arrangement*” could be used to signify an informal agreement, protocol or MOU. The Commission is prepared to use the word “*arrangement*” in the sense suggested by Counsel Assisting. It is, however, important to keep in mind that the issue is whether there was some kind of consensus between the Police Force and the Catholic Church and not merely whether some state of affairs in fact existed as between the Police Force and the Church.

### Was there an informal arrangement for blind reporting?

- 13.8 The Commission considers that a convenient course is first to examine whether there was any informal arrangement between the Police Force and the Catholic Church that the PSO should make reports of its handling of complaints of abuse by Catholic Church personnel or employees, by way of blind reports. The Commission notes that each of the particulars of alleged misconduct on the part of Heslop in sub-paragraphs (i), (ii) and (iii) of paragraph 192 of Counsel Assisting’s submissions presuppose the submitting of a blind report. The alleged misconduct on the part of Heslop, McGee and Armstrong in sub-paragraph (a) of paragraph 193 of Counsel Assisting’s submissions refers to Heslop, McGee and Armstrong continuing with “*these arrangements*”, that is, the arrangements referred to in paragraph 192. The misconduct on the part of Heslop, McGee and Armstrong alleged in sub-paragraph (b) of paragraph 193 is the three police officers encouraging or condoning the practice of the PSO of making blind reports.

- 13.9 The Commission has already discussed blind reporting, that is, a form of reporting in which there is no information identifying the victim of an alleged offence, and there is no need for the Commission to repeat what it has said elsewhere in this report about the nature of blind reporting.

- 13.10 The evidence before the Commission clearly establishes that the PSO consistently made reports of its handling of complaints of abuse by Catholic Church personnel or employees by means of blind reports. The Commission will refer to only certain parts of the evidence.

- 13.11 When Davoren was giving evidence he was asked about a part of the minutes of a meeting of the PSRG held on 22 October 1999, which read in part:-

*Any abuse of a child is reported to police. If the complainant does not wish to complain to police, the information is passed to police without identifying the complainant*

Davoren agreed that this part of the minutes accurately recorded the practice of the PSO in making reports to the Police Force throughout the period that Davoren was the Director of the PSO.

- 13.12 In his evidence Davoren also agreed that clause 6 in the draft MOU of March 2000 accurately reflected the system of blind reporting he had used while Director of the PSO.

- 13.13 Salmon gave evidence that when he became Director of the PSO he had “*inherited*” the practice of blind reporting and that, to the best of his knowledge, unless there was an inquiry by the police, blind reporting was the only method of reporting the PSO used.

- 13.14 In the statutory declaration he made on 26 June 2013 Salmon said that it had never been the practice of the PSO when reporting to police to provide information which would identify the victim of an offence, unless such information had been formally requested by the police.

- 13.15 Documents in evidence before the Commission which refer to the PSO’s practice of blind reporting include:-

- (i) the part of the minutes of the meeting of the PSRG on 22 October 1999 which has just been referred to;
- (ii) part of the report of the PSRG for the period 1997 to 2000 which stated:-

*if the complainant is unwilling to report a criminal matter to the police, the PSO on behalf of the Church authority advises the NSW Police Service only that a complaint has been received but does not indicate the source of the information;*



(iii) the response by Davoren in his letter of 1 July 2002 to D'Apice that the policies and procedures in a draft MOU including clause 6 conformed with the policies and procedures being used in *Towards Healing*;

(iv) the letter of 18 June 2003 from McDonald to McGee in which McDonald sought confirmation that the draft MOU attached to his letter, which included clause 6, "*remained in place*" (notwithstanding the rather confused oral evidence McDonald gave about what he meant by the expression "*in place*").

13.16 Both Davoren and Salmon gave evidence to the effect that the Police Force had never objected to blind reporting by the PSO. Davoren gave evidence that he had never been advised by the Police Force that blind reporting was not acceptable to the Police Force. Salmon gave evidence that he believed that blind reporting was acceptable to the Police Force and that he had never been advised by the Police Force that the "*arrangement*" for blind reporting was otherwise than operational.

13.17 Heslop gave evidence that while he was the commander of the CPEA he had not been aware of the PSO's practice of blind reporting. However, Heslop when giving evidence generally had a poor recollection of what had happened while he was the commander of the CPEA.

13.18 The letter of 28 June 2000 from Professor Parkinson to Heslop was addressed "*Dear John*" and headed "*Re Protocol with Catholic Church*". In the letter Parkinson thanked Heslop for his comments on the (first) draft protocol. Parkinson attached to his letter a second draft protocol and said "*I don't think it is necessary at this stage for you to seek further legal advice on it, given that you had no problems with the first draft*". It is clear that the first draft of the protocol contained clause 6 providing that where a criminal offence was alleged and the complainant did not wish to make a report to the police, the convenor of the PSRG would report to police the name of the alleged offender but not the name of the complainant.

13.19 After he was shown the letter to him from Parkinson, Heslop accepted that he had commented on the first draft protocol and had accepted it as being appropriate. After being shown a transcript of an interview of Parkinson by

Commission investigators, Heslop accepted that in his comments on the first draft he had expressed the view that he was “*comfortable with it*” and that he would not have expressed that view, unless he had felt that the draft reflected a practice that was in place between the Church and the Police Force. Heslop further accepted that it was likely that he had been closely involved in the drafting of the first draft of the proposed protocol.

13.20 The Commission considers that it should find that, while he was the commander of the CPEA, Heslop was aware of the practice of blind reporting by the Catholic Church even though he might not have been familiar with the term “*blind reporting*”.

13.21 McGee gave evidence that she was aware, while she was commander of the CPEA and the CP&SCS, of the practice of blind reporting by the Catholic Church.

13.22 In the submissions made on behalf of McGee it was accepted by her legal representative that McGee had inherited (and continued) a system which was already operating, including a mode of reporting which “*omitted information relating to the identity of the complainant*”.

13.23 The Commission considers that it can infer from the evidence that the PSO reported to the Police Force by means of blind reports which did not identify the victims of the alleged offences; the knowledge of the Commanders of the CPEA (and the CP&SCS) that the PSO was reporting by means of blind reports; and the absence of any evidence of any objection by the Police Force made to the PSO about its reporting by blind reports; that there was an informal arrangement between the CPEA (and the CP&SCS) and the PSO permitting reporting by the PSO by means of blind reports.

13.24 When Heslop was giving evidence he said that he had no recollection one way or the other as to whether he had been informed of Treadwell’s advice of 11 December 2001. However, the Commission considers that it can be inferred that Heslop became aware of Treadwell’s advice of 11 December 2001 from the circumstances that Heslop was the Commander of the CPEA, that Heslop had been closely involved in the preparation of the draft MOU by

Parkinson and that the background for Treadwell's advice was the draft MOU prepared by Parkinson.

13.25 In McGee's case, she was aware of the advice from Treadwell and Friedrich that blind reporting was legally prohibited but she declined to accept that advice and permitted blind reporting to continue. The Commission considers that McGee, being aware of Treadwell's advice and having sought and received advice from Friedrich to the same effect, was obliged to comply with that advice.

13.26 The Commission has already held, that in general, blind reporting, whatever utility it might have and whatever advantages it might be perceived as having, contravenes s 316 of the Crimes Act. The Commission considers that it was police misconduct for Heslop to enter into an arrangement for general blind reporting, without regard to the circumstances of particular cases, and for Heslop and McGee to continue this arrangement.

13.27 It was submitted on behalf of McGee that the Commission should exercise a discretion in favour of McGee. However, even if the Commission has a discretion not to make a finding of police misconduct in circumstances where the evidence would warrant such a finding, the Commission does not consider that it should exercise any discretion in favour of a police officer who has disregarded legal advice.

13.28 The Commission has concluded that there was an informal arrangement between the CPEA (and CP&SCS) and the PSO that the PSO could report by means of blind reports. It remains for the Commission to consider whether there was any other informal arrangement and, particularly, any arrangement in the terms of any of sub-paragraphs (i), (ii) and (iii) in paragraph 192 of Counsel Assisting's submissions.

(i) - Was there an informal arrangement that where a criminal offence was alleged and a blind report form was submitted, the Police Force would not seek (or use available statutory powers to compel disclosure of) the identity of the victim, or identifying information in respect of the victim, from the Catholic Church other than in exceptional cases?

13.29 In her statement of the alleged arrangement Counsel Assisting accepted that the alleged arrangement did not apply universally, not applying in exceptional cases.

13.30 The submission that there was an arrangement that the Police Force would not use available statutory powers to compel disclosure of the identity of the victim or information identifying the victim was not developed in Counsel Assisting's submissions.

13.31 In support of the submission that there was an arrangement to the effect that the Police Force would not seek the identity of the victim or information identifying the victim Counsel Assisting referred to a passage in the report of the PSRG for the period from 1 June 2001 to 12 October 2001 in which, after a reference to blind reporting of complaints about criminal matters, it was said:-

*The police have agreed and kept to their agreement that they will not attempt to identify the complainants in these situations.*

13.32 However, the force that this piece of evidence might otherwise have had was diminished by Davoren's evidence that he had no memory of such an agreement and that he thought he would have remembered any such agreement and, accordingly, did not understand why the statement alleging an agreement appeared in the report, which presumably had been made by him.

13.33 Evidence given by Davoren and Salmon is inconsistent with there being such an arrangement.

13.34 Davoren gave evidence that he thought that, if he had been advised by police that he should give information identifying the victim in every case, he would have done so “*and, in fact, I often did*”.

13.35 Salmon gave evidence that, if a request in writing for further information was made by the Police Force, the PSO would supply full information unredacted in any way and the PSO would not seek the victim’s consent before providing the information. The PSO would permit police officers to attend the PSO’s premises and review the documents held by the PSO.

13.36 The Commission finds that there was no arrangement between the Police Force and the PSO to the effect of (i), that the Police Force would not seek from the PSO the identity of a victim or information identifying a victim. It may have happened that it was only occasionally that the Police Force sought the identity of a victim or information identifying a victim but this was not because of any consensual arrangement between the Police Force and the PSO.

(ii) - Was there an informal arrangement that attempts would not be made on the part of the Police Force to contact victims of abuse in circumstances in which a blind report form had been submitted in respect of that abuse without first contacting the PSO?

13.37 There is evidence which would lend some support to a conclusion that there was an arrangement as alleged.

13.38 Davoren gave evidence that if, after he sent a blind report, the police expressed a wish to talk to the complainant, Davoren would go to the complainant, tell the complainant that the police would like to talk to the complainant, recommend that the complainant talk to police and offer the PSO’s assistance in doing so. Davoren said that this kind of request from the police happened “*reasonably frequently*”.

13.39 Salmon gave evidence that from time to time police requested that he go back to the complainant and ask the complainant whether they would be willing to talk to police, “*which is what I’ve done, always done*”.

13.40 In the report of the PSRG for the period from 1997 to 2000 it was stated:-

*If the complainant is unwilling to report a criminal matter to the police, the Professional Standards Office, on behalf of the Church authority, advises the NSW Police Service only that a complaint has been received, but does not indicate the source of the information. The complainants are advised before this action is taken, with the understanding that the police will not contact them unless they are willing to be contacted.*

- 13.41 At a meeting of the PSRG on 22 June 2001 an individual case designated as case 1041 was considered. The documents at the meeting included a draft of a letter to be written by Davoren to the complainant, who had complained of sexual abuse by a priest. Parts of the draft letter were as follows:-

*(The priest) is no longer acting as a priest, and is never likely to be allowed to return. However, we would like to notify the police that we have received this complaint about him. We have a long-standing agreement with the police and they do not try to track down the people who have given us information of this kind. They may get back to us if they have anything else they wish to pursue with (the priest), and to ask us to let you know that they would like to hear from you, but no pressure will be put on you to get you to talk to them. Of course we can include your name and address if you want us to do this but to make sure there was no misunderstanding, I would have to have your advice in writing before I took action. I enclose a copy of the form to police. I stress that this has not gone to the police at this stage.*

- 13.42 The Commission notes that, if a report to the police was a blind report not disclosing the identity of the victim, the police would usually need to contact the PSO in order to ascertain the identity of the victim before the police would be able to attempt to contact the victim.
- 13.43 The Commission also considers that, in any event, it would have been a reasonable and acceptable courtesy and might have assisted police in any subsequent dealing with a victim, for the police to first contact the PSO before attempting to contact a victim whose complaint had been handled under the *Towards Healing* process.
- 13.44 The Commission concludes that, if there was such an arrangement for the police not to contact a victim without first contacting the PSO, there was no police misconduct in entering into or continuing such an arrangement.

(iii) - Was there an informal arrangement that the Police Force would not further investigate complaints of abuse in circumstances in which a blind report form had been submitted other than in exceptional cases where the matter as reported was identified as being relevant to an existing or future investigation?

13.45 It was submitted by Counsel Assisting that a consequence of the arrangement permitting blind reports was that reports by the PSO were recorded by the Police as information reports and that, in general, there would be no investigation of the criminal conduct disclosed by the reports. It was accepted by Counsel Assisting that there might be an investigation where a report could be linked to some other investigation.

13.46 Armstrong gave evidence that the general practice of the CPEA when it received a blind report was to enter the information in a report as an information report on the COPS system and that an event report would only rarely be made. However, the logging of information as an information report did not preclude further investigation being undertaken. The information in an information report, by being entered into the COPS system, would be disseminated to all police officers in the state who used COPS and those officers would not have understood that there was any restriction on how that information could be used.

13.47 Armstrong also gave evidence that the information in an information report would also be disseminated by being sent manually to particular Local Area Commands such as the Command where the alleged offender resided or where the alleged offence had been committed. Officers in a Local Area Command to which the information had been disseminated could take investigative steps with respect to that information.

13.48 Armstrong also gave evidence that, as adverted to by Counsel Assisting, the information contained in blind reports which was entered on COPS might also be used in investigations which had already been commenced.

13.49 Salmon gave evidence that sometimes, after he had submitted a blind report, he would receive a request from a Local Area Command that he go back to the complainant and ask whether the complainant would be willing to talk to the police.

13.50 The Commission concludes that a consequence of the PSO reporting complaints of abuse by blind reports and the Police entering the information in those blind reports as information reports on COPS was that many of these complaints were not investigated. However, the Commission does not consider that there was an arrangement between the Police Force and the Catholic Church that the Police Force would not investigate complaints of abuse in blind reports other than where the matter reported could be linked to another investigation.

### Paragraph 193 c of Counsel Assisting's submissions

13.51 In paragraph 193 c of Counsel Assisting's submissions it was submitted that there had been police misconduct in *"making decisions in relation to the handling of individual reports of sexual or other abuse which were received by the NSWPF having regard to an arrangement or protocol which was in place between the NSWPF and the Catholic Church by reason of arrangements entered into through Cullen's participation in the PSRG..."*

13.52 The Commission does not consider that there was any arrangement or protocol in place between the Police Force and the Catholic Church *"by reason of arrangements entered into through Cullen's participation in the PSRG"*.

### Alleged preferential treatment

13.53 A submission was made by Counsel Assisting in paragraph 164 of her submissions that the practice of the CPEA in permitting blind reports by the Church differed from the CPEA's normal practice and amounted to preferential treatment of the Church.

13.54 This submission was based on evidence by Heslop. However, as the Commission has already observed, Heslop's recollection of what was happening while he was Commander of the CPEA was poor.

13.55 The Commission accepts evidence by McGee that the practice of blind reporting was not new, that it had happened for many years and had been a



form of reporting used by entities other than the Catholic Church, including social workers at a Sydney Public Hospital and other groups in the “*health fraternity*” who received reports of sexual assaults from victims coming to their clinics.

13.56 The Commission accepts the evidence of Armstrong that an organisation not associated with the Catholic Church, which seeks to protect the interests of victims of sexual assault, provides information to the Police Force only on the basis that the victim remains anonymous.

13.57 The Commission concludes that there was no unique preferential treatment of the Church, in that blind reports of sexual assaults from organisations other than the Church were accepted by the Police.

## Armstrong

13.58 Counsel Assisting submitted that there had been police misconduct on the part of Armstrong in the respects specified in paragraph 193 of her submissions.

13.59 Having regard to the findings the Commission has already made in this part of its report, the issue of whether there was police misconduct on the part of Armstrong becomes whether there was misconduct by him in continuing the arrangement for blind reporting.

13.60 It is clear on the evidence that Armstrong knew that the reports from the PSO were blind reports and that the PSO held information beyond what was disclosed in the blind reports.

13.61 However, Armstrong, unlike Heslop or McGee, was never the Commander of the CPEA (or the CP&SCS). When Armstrong was asked why he had not instituted a system whereby the PSO was asked what further information it had, beyond what was included in a blind report, Armstrong said that he had not seen it as “*my place to develop or impose a system of that nature*”.

13.62 Armstrong was an intelligence officer and not an investigator. He gave evidence that the reports he was receiving from the PSO provided adequate

information for his purposes as an intelligence officer. He said that he was getting the information he fundamentally wanted and “*the name of the victim was not a massive issue for me in my role*”.

- 13.63 In the memorandum of 30 July 2004 which Armstrong sent to McGee Armstrong said, *inter alia*, that the legal advice which had previously been obtained that there was a conflict between the draft MOU (being the draft MOU considered in the previous advices) and s 316 of the Crimes Act was still valid. In the memorandum Armstrong canvassed matters which he considered militated against the establishing of a MOU between the Police Force and the Catholic Church and the single matter he could identify which would favour the establishing of a MOU. The clear tenor of the memorandum was that Armstrong did not favour the establishing of a MOU.
- 13.64 Armstrong was the author of the draft MOU dated 21 August 2004. He gave evidence that he had been asked to work on the draft by his commander McGee. He was not given the objective of seeing that a memorandum of understanding was created and adopted, rather he was to explore whether a MOU was possible.
- 13.65 Armstrong gave evidence that the document of 21 August 2004 was “*a working document*” which he had compiled from various sources. He did not consider that the document came close to being a document which might be acceptable to both the Police Force and the Catholic Church. He said that he thought that the Police Force’s Legal Services would want the reference to blind reporting removed from any final version of the document.
- 13.66 Salmon gave evidence that he had no recollection of previously seeing the document of 21 August 2004 and the Commission is satisfied that the draft document was never submitted to the PSO.
- 13.67 The Commission is not satisfied that it should that Armstrong engaged in police misconduct.

## Conclusion

13.68 On limb two of its investigation the Commission has found police misconduct on the part of Heslop in entering into and continuing, and on the part of McGee in continuing, an informal general arrangement for blind reporting.

## 14. AFFECTED PERSONS

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- 14.1 In Chapter 3 of this report the Commission set out the provisions of s 97 of the PIC Act dealing with the contents of reports by the Commission to Parliament. It is convenient in this part of the report to repeat the provisions of sub-ss (2), (3) and (4) of s 97:

*(2) The report must include, in respect of each “affected” person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:*

*(a) the prosecution of a person for a specified criminal offence,*

*(b) the taking of action against the person for a specified disciplinary offence,*

*(c) the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services or otherwise terminating the services of the police officer,*

*(d) the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer.*

*(3) An “affected” person is a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of or in connection with the investigation concerned.*

*(4) Subsection (2) does not limit the kind of statement that a report can contain concerning any such “affected” person and does not prevent a report from containing a statement described in that subsection in respect of any other person.*

- 14.2 The Commission considers the following persons to be “affected” persons in connection with the Operation Protea investigation:-

(a) Inspector Elizabeth Cullen;

(b) Mr John Heslop;

(c) Ms Kim McGee; and

(d) Inspector Wayne Armstrong.

- 14.3 In deciding in the present investigation whether it should form any opinion within s 97(2) of the PIC Act, the Commission has regard to the assessments it has made and the opinions it has formed, as stated in earlier parts of this report.
- 14.4 In paragraph 21 of her submissions Counsel Assisting stated that consideration should not be given to the prosecution of any of Cullen, Heslop, McGee and Armstrong for any criminal offence. The Commission accepts this submission.

## Cullen

- 14.5 It was submitted by Counsel Assisting that the Commission should find that the following actions or omissions by Cullen constituted police misconduct:-
- (a) Participating in the PSRG in circumstances in which this involved a conflict of interest given her understanding of the limited scope of her role as an officer of the Police Force whilst participating in the PSRG.
  - (b) Failing to take action (including advising the PSO to report information to the Police Force, causing further inquiries or investigation, recording matters, reporting matters to the Police Force through the usual reporting channels, or making further inquiries herself) with respect to reports, complaints and/or information suggesting criminal offences involving abuse had been committed which information was received by her through her participation in the PSRG.
  - (c) Failing to retain documents suggesting that criminal offences had occurred, whether or not they also included information identifying the victim or alleged offender, including documents which may have assisted in the investigation and prosecution of criminal offences
  - (d) Failing to advise the PSO or the PSRG as to the inconsistency between the blind reporting practice and the requirements of s 316 of the Crimes Act 1900 (NSW) in circumstances in which this had been notified to the Police Force by virtue of four different legal advices between 2001 and

2003 and when Cullen was, through her role on the PSRG, in the position of advising and providing guidance to the PSO.

- 14.6 For the reasons set out earlier in this report the Commission has found that there was police misconduct on the part of Cullen in the respects alleged in particulars (a), (b) and (c). The Commission has found that there was no police misconduct on the part of Cullen in the respect alleged in particular (d).
- 14.7 It was submitted by Counsel Assisting that the Commission should form the opinion that consideration should be given to the taking of action, or reviewable action, under s 173 of the Police Act against Cullen.
- 14.8 The Commission has found that there are a number of factors which significantly mitigate Cullen's police misconduct. In particular, Cullen had no intention of engaging in misconduct and there was no conscious dereliction of duty by her. On the contrary, Cullen was well-intentioned.
- 14.9 Cullen has an outstanding service record as a police officer. During her career as a police officer Cullen has made a significant contribution to the detection, investigation and prosecution of sex offenders.
- 14.10 The Commission also notes that Cullen is no longer participating in the PSRG.
- 14.11 Accordingly, in all the circumstances, and, in particular, taking into account the above matters, the Commission is of the opinion that consideration should not be given to the taking of action or reviewable action under the Police Act against Cullen.

## Heslop and McGee

- 14.12 It was submitted by Counsel Assisting that the Commission should find that under the first limb of the Commission's investigation there was police misconduct on the part of Heslop in arranging for Cullen to participate in the PSRG and on the part of McGee in continuing that arrangement. For the

reasons set out earlier in this report the Commission has not made a finding of police misconduct on the part of either Heslop or McGee in these respects.

14.13 For the reasons set out in this report, the Commission has found that it was police misconduct for Heslop to enter into an arrangement for general blind reporting, without regard to the circumstances of particular cases, and for Heslop and McGee to continue this arrangement.

14.14 Both Heslop and McGee have retired from the Police Force and, accordingly, are no longer police officers. In these circumstances, paragraphs (c) and (d) of s 97(2) of the PIC Act have no application. The Commission accepts that both Heslop and McGee were well-intentioned and had no intention of engaging in police misconduct.

## Armstrong

14.15 For the reasons set out in this report, the Commission has not made any finding of police misconduct on the part of Armstrong.

14.16 Accordingly, and in all the circumstances, the Commission is of the opinion that consideration should not be given to the taking of action or reviewable action under the Police Act against Armstrong.

## 15. RECOMMENDATIONS

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15.1 Counsel Assisting submitted in paragraph 197 of her submissions that the Commission should recommend that:-

- a. *The officers of the NSWPF should reconsider the practice of blind reporting;*
- b. *The officers of the NSWPF should seek to ensure that, in all cases of abuse from within the Catholic Church, steps are taken to ensure that the Church provides all available information to the NSWPF, including information identifying victims who have not themselves indicated a willingness to report the matter;*
- c. *The decision as to how to respond to such reports, including whether or not to investigate any particular case, should be made on the basis of the merits of the particular case and not by reference to any agreement or understanding; and*
- d. *There should be no participation by an officer of the NSWPF on a committee or body of the Catholic Church which would curtail the common law duties of that officer to enforce the law without regard the merits of each particular case.*

15.2 In the submissions on behalf of the Police Force it was stated that, “so far as the proposed recommendations are concerned the NSW Police Force does not offer any submissions in opposition to any recommendation that the NSW Police Force reconsider the practice of blind reporting and, more particularly, as part of that reconsideration, the matters set out in paragraph 197 (b) – (d) of Counsel Assisting’s submissions”.

15.3 No submissions about any of the recommendations above made by Counsel Assisting were received from any other person.

15.4 The Commission considers that it should make recommendations a, b and c. As to recommendation d, the Commission considers that it should make a general recommendation that there should be no participation by an officer of the Police Force on any committee or body which would curtail the duties of that officer to enforce the law.

15.5 Blind reporting is controversial and there are arguments for and against it. What appear to the Commission to be the principal arguments on each side



have been referred to in the Commission's summaries of the evidence on the two limbs of its investigation, in its summaries of the submissions made to the Commission and in its determination of whether blind reporting contravenes s 316 of the Crimes Act.

15.6 The Commission refers particularly to:-

- (i) the evidence by Davoren, Salmon, Heslop and McGee under the heading "*Reporting by the PSO to police*";
- (ii) the evidence by Heslop, McGee and Armstrong under the heading "*Matters relating to the victim's wish not to approach police*";
- (iii) the evidence by McGee under the heading "*Value of blind reporting*";
- (iv) the evidence by Armstrong under the headings "*Blind reporting to the Police Force*", "*Dealing with blind reports*" and "*Section 316 of the Crimes Act*"; and
- (v) the evidence by Cullen under the headings "*Reporting by the PSO*" and "*Blind reporting*".

15.7 The Commission considers that there is an urgent need for a reconsideration of blind reporting and of s 316 of the Crimes Act, including whether it should be repealed or substantially amended.

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## Police Integrity Commission

### Protea Report 2015



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