



NSW GOVERNMENT
RESPONSE TO THE
SPECIAL COMMISSION OF
INQUIRY INTO THE NSW
CRIME COMMISSION

Recommendations	Paragraph	NSW Government Response
A (a) That the Minister no longer be a member of the Management Committee.	98	Supported.
A (b) That there be added to the Management Committee an independent part time Chairperson and the permanent head of the Ministry for Police and Emergency Services.	102 -103	Supported. The CEO of the Ministry will commence duties on the Committee as soon as the necessary legislation is enacted.
A (c) the Independent Chairperson be a retired or former judge of an Australian Court, and he or she be appointed for a relatively short fixed period, such as three years.	103	Supported. Recruitment of an appropriate person will commence as soon as possible. While the Report only suggests a three year term, the Government will enshrine this as the fixed term in the legislation.
A (d) That the minutes of a meeting of the Management Committee resolving to refer a matter to the Commission for investigation should state that the Committee has satisfied itself that ordinary police methods of investigation are unlikely to be effective	107	Not supported. The recommendation that the minutes of a meeting of the Management Committee should reflect the Committee deliberations is supported. However, the wording of the recommendation is predicated on the assumption that the “ordinary police methods” requirement is retained, however, the Government is of the view that a different threshold is more appropriate considering modern policing techniques. See discussion below in relation to recommendation I(d) for further detail. Consequently, the Government proposes that the minutes of the meeting of a Management Committee resolving to refer a matter to the Commission for investigation should state that the Committee has satisfied itself that the reference is compliant with the <i>New South Wales Crime Commission Act 1985</i> .

Recommendations	Paragraph	NSW Government Response
A (e) That the Management Committee have power to obtain independent legal advice at the expense of the Commission	111	Supported.
B (a) That there be no change in the responsibilities of the Commission under the <i>Criminal Assets Recovery Act 1990</i> .	146	Supported.
B (b) That in complicated cases, provision for meeting legal expenses under s 10B (3) (b) of the <i>Criminal Assets Recovery Act 1990</i> be made in stages	142	<p>Supported.</p> <p>While the Government is mindful of the impact of returns to the Crown from confiscated proceeds and the deterrent effect of proceeds being forfeited from criminals, the NSW Crime Commission will on a case by case basis adopt the system and seek such arrangements from the Court in appropriate complicated cases.</p>
B (c1) That the Act be amended to provide that there is to be no settlement or compromise of proceedings under the <i>Criminal Assets Recovery Act 1990</i> without the approval of the Supreme Court.	148	<p>Supported in part.</p> <p>Currently, there are two ways confiscation matters may proceed under the <i>Criminal Assets Recovery Act 1990</i>.</p> <p>First, if the matters are contested, the <i>Criminal Assets Recovery Act 1990</i> empowers the Supreme Court, on the application of the NSW Crime Commission, supported by sufficient evidence to make confiscation orders and retraining orders for the property interests of suspected criminals.</p> <p>Secondly, by consent between the parties. The majority of confiscation cases are settled in this way - with consent orders made by the Court under the Uniform Civil Procedure Rules 2005 - Reg 36.1a. In addition, the Supreme Court has issued a practice note stipulating that orders under the</p>

Recommendations**Paragraph NSW Government Response**

Criminal Assets Recovery Act 1990 shall only be made by a judge of the Court (ie not by the Registrar). As is the case with most civil settlements, in these matters the judge is neither required nor expected to examine the evidentiary material underlying the proceedings. Before making the orders proposed by the parties in civil suits, the judge must be satisfied only that there is proper jurisdiction and that there are no minors or people with diminished capacity affected by the settlement.

In the case of proceedings under the *Criminal Assets Recovery Act*, there is an exception to this in relation to consent orders for a settlement that includes an agreed order for legal expenses. In the case of *NSW Crime Commission v Cook [2011] NSWSC1348* it was found that even if the Commission is consenting, a defendant must adduce evidence to the Court before the Court can be satisfied that provision for the payment of any legal expenses has been assessed.

The Government supports the position that all settlements must be approved by consent orders issued by a Supreme Court judge, as is already case.

However, to the extent that this recommendation proposes that the Supreme Court look into the merits of the settlement before making the orders agreed by the parties, it is not supported. It is contrary to the fundamental nature of civil proceedings for a court to hold what may amount to evidentiary hearings when both parties are seeking consent orders.

Consequently, the Government seeks to clarify the role of the Court in relation to settlements, including those

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<p>B (c2) That the Chief Justice be requested to prescribe by Practice Note, the evidence required to be available to the Court on application for approval of settlement or compromise.</p>	149	<p>providing for legal expenses, by implementing a provision based on s316 of the Commonwealth <i>Proceeds of Crime Act 2002</i> which stipulates that the Court "may make an order without consideration of the matters that the court would otherwise consider in the proceeding". This provision would give a clear legislative basis for the Court to approve consent orders, without distorting the civil nature of the proceedings, with all the advantages in terms of a speedy and lower cost resolution.</p> <p>Not supported.</p> <p>The Government supports Patten's proposition that there should be increased accountability in relation to settlements under the <i>Criminal Assets Recovery Act 1990</i>.</p> <p>However, for the reasons set out above, it is not proposed that the Chief Justice be requested to prescribe by practice note the evidence required to be available to the Court on application for approval of settlement or compromise.</p> <p>Rather it is proposed that the Management Committee, once its new independent chair has been appointed, develop a binding set of guidelines for the Commission detailing the steps required before a settlement is reached, including full justification for allocation of legal costs.</p> <p>Furthermore, it is proposed that the <i>Criminal Assets Recovery Act 1990</i> be amended to require the Commissioner of the NSW Crime Commission to certify to the Supreme Court in respect of every application for confiscation orders by consent that the guidelines have been adhered to.</p>

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		<p>Documentation setting out how the guidelines have been applied in each settled <i>Criminal Assets Recovery Act 1990</i> matter must be retained by the NSW Crime Commission and be available to the Inspector of the NSW Crime Commission on request.</p> <p>The above process will ensure both consistency and accountability.</p>
<p>B (d) That the Commission put in place protocols or procedures which demonstrate the separation of its investigative powers from confiscation powers under the <i>Criminal Assets Recovery Act 1990</i>.</p>	<p>150</p>	<p>Supported.</p>
<p>C (a) That the Commission establish a Committee chaired by the Commissioner or an Assistant Commissioner and comprising the Investigations Manager of G3, the Solicitor to the Commission, the Director of Investigations and an Assistant Commissioner, if an Assistant Commissioner is not the chair of the Committee.</p> <p>The purpose and function of the Committee will be to hold minuted meetings:</p> <ul style="list-style-type: none"> (i) to formally evaluate relationships with all human sources every six months; (ii) to make decisions concerning the payment and quantification of rewards to human sources; and (iii) to formally review, at least twice a year, any decision to pay regular sustenance payments to a human Source. 	<p>Not publicly available.</p>	<p>Supported.</p> <p>The NSW Crime Commission has established a separate Human Source Management Committee.</p>

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D (a) That all recruitment and promotion at the Commission should be on merit, following a competitive selection process. If there are any exceptions to the use of a competitive selection process, such exceptions should be approved by the Commissioner, the reasons for the exception documented and the decision reported to an Inspector, if such a position is created.	177	Supported.
D (b) That all new staff, or at least new staff at or above a certain level, should receive Commonwealth security clearance and that the Commission should receive additional funding to obtain such clearances.	192	<p>Supported.</p> <p>The NSW Crime Commission will undertake a one-off process of security clearing existing staff as well as obtaining security clearances for new staff.</p> <p>In addition and, as supported by Patten, the NSW Crime Commission will also continue with some of its own security clearance work because the NSW Crime Commission's clearance work focuses on organised crime whereas the Commonwealth's clearance focuses on national security.</p>
D (c) That all new staff should be required to furnish a full employment history and that such history be verified by the Commission, including by making contact with a person's direct supervisor where possible.	198	<p>Supported.</p> <p>This process mirrors that occurring in some other Government agencies.</p>
D (d) That the <i>New South Wales Crime Commission Act 1985</i> and/or Regulations made under that Act should empower the Commissioner to require an officer of the Commission or applicant for a position to:	199	<p>Supported.</p> <p>The NSW Crime Commission has established a Governance, Integrity and Audit Team to implement these and other recommendations.</p>

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<p>(i) disclose personal particulars and financial information in approved form, verified by statutory declaration;</p> <p>(ii) produce specified documents that would assist in verification of information disclosed;</p> <p>(iii) update personal particulars and financial information in the event of significant change.</p>		
<p>D (e) That the <i>New South Wales Crime Commission Act 1985</i> and/or Regulations made under that Act be amended to include an equivalent provision to cl. 15 of the <i>Independent Commission Against Corruption Regulation</i>.</p>	200	<p>Supported.</p> <p>This is consistent with appropriate and improved employment processes.</p> <p>In summary the Independent Commission Against Corruption Regulation provides that it is a condition of an officer's employment that the officer complies with the requirements of this Regulation.</p>
<p>D (f) That the <i>New South Wales Crime Commission Act 1985</i> be amended to include provisions that are equivalent to s. 110 of the <i>Independent Commission Against Corruption Act</i> and cls 10 and 11 of the <i>Independent Commission Against Corruption Regulation</i>.</p>	209	<p>Supported.</p> <p>These provisions relate to disclosure of pecuniary interests and disclosure of financial information and changes to financial status; and are consistent with appropriate and improved employment processes.</p>
<p>D (g) That the Commission formulate a written policy for managing unsatisfactory performance, remedial and disciplinary action.</p> <p>This policy should include provisions in relation to prevention, identification and management of unsatisfactory performance, guidelines as to the choice of remedial and disciplinary action</p>	253	<p>Supported.</p> <p>The NSW Crime Commission is conducting a general review of all policies and procedures.</p>

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and the documentation to be retained.		
E (a) That the Commission to the extent it has not done so put in place procedures recommended by the Police Integrity Commission in its Project Rhodium report.	229	Supported. This will be included in the NSW Crime Commission's general review of policies and procedures.
E (b) That the Commission review its approach to complaints made by legal practitioners during the course of litigation in order to differentiate and pursue those which make an allegation of serious misconduct.	230	Supported. To be included in the NSW Crime Commission's general review of policies and procedures.
E (c) That the Commission establish a procedure for dealing with complaints against the Commissioner personally.	230	Supported. To be included in the NSW Crime Commission's general review of policies and procedures. There may be a specific role for the Inspector to be the avenue by which complaints are made against the Commissioner. This recommendation does not appear to reflect any outstanding matter against the former or current Commissioner, but is rather a matter of thoroughness.
F (a) That the Management Committee issue a direction pursuant to s. 27(2) of the <i>New South Wales Crime Commission Act 1985</i> requiring the provision to it of any report by Internal Audit and Risk Committee as well as the Commission's response and that it direct the Commissioner to invite the Chair of Internal Audit and Risk Committee to the next Management Committee meeting following such report and response.	241	Supported. This recommendation has now been implemented.

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F (b) That the Commission ask the Internal Audit and Risk Committee for written advice as to the sufficiency of the resourcing of its internal audit function relative to the risks facing the Commission, such advice and the Commission's response to it is to be provided to the Management Committee.	247	Supported. This recommendation has now been implemented.
G (a) That the provisions for members of the Commission and meetings of the Commission be omitted.	254	Supported.
G (b) That the Commission be constituted by the Commissioner alone.	254	Supported.
G (c) That the Commissioner be appointed for a fixed term or terms not exceeding 10 years in total.	256	Supported. This proposal is consistent with the Director of Public Prosecutions and allows for the particular long term cases under the NSW Crime Commission to be properly managed.
G (d) That any future parliamentary committee for the Commission have the power to veto any proposed appointment of the Commissioner.	257	Supported. The proposed Parliamentary Committee to oversee the Crime Commission will have the opportunity to consider the upcoming appointment of the permanent Crime Commissioner.
G (e) That the Commissioner be a retired or former judge of an Australian court or qualified for appointment to a superior court in Australia.	258	Supported.
G (f) That two full time Assistant	259	Supported.

Recommendations	Paragraph	NSW Government Response
Commissioners be appointed, one to be a retired or former judge of an Australian Court or qualified for appointment to a superior court in Australia.		Implementation of this recommendation will follow the appointment of the new Commissioner to ensure that the management team is cohesive and the functions of the Assistant Commissioners are based on the direction of the Commissioner after the long term appointment.
G (g) That the Assistant Commissioners be approved by the Commissioner before being appointed by the Governor, for fixed renewable terms, to perform the roles and responsibilities determined by the Commissioner.	260	Supported.
G (h) That s. 24(6) of the <i>New South Wales Crime Commission Act 1985</i> be amended to provide for Assistant Commissioners to attend Management Committee meetings and participate in discussion, with the Committee's consent.	261	Supported.
H (a) That an Inspector be appointed to the Commission.	269	Supported.
H (b) That the Inspector be a position with a fixed term appointment, not exceeding in total five years.	269	Supported
H (c) That there be provision for staff of an Inspector, with the proviso that the Inspector should have the right to make use of Police Integrity Commission's facilities if required.	269	Supported in part. If it is determined that the Inspector requires staff, consideration will be given to funding the position from existing justice cluster funding.
H (d1) That the Inspector be primarily involved	270	Supported.

Recommendations	Paragraph	NSW Government Response
<p>in auditing the operations of the Commission to ensure compliance with the law, in assessing the effectiveness and appropriateness of its procedures and in dealing (by reports and recommendations) with complaints of misconduct and conduct amounting to maladministration.</p>		
<p>H (d2) That the Inspector have powers similar to those contained in s. 57C of the <i>Independent Commission Against Corruption Act 1988</i>, and be required to refer instances of criminal activity or serious misconduct to the Police Integrity Commission.</p>	271	<p>Supported in part.</p> <p>The Commissioner of Police, Crime Commissioner and NSW Ombudsman have obligations under the <i>Police Integrity Commission Act 1998</i> to refer <u>any</u> misconduct to the Police Integrity Commission. Patten has recommended that the threshold be <u>serious</u> misconduct. For consistency the government proposes that the obligation on the Inspector of the Crime Commission be the same as the Crime Commissioner.</p>
<p>H (e) That the <i>Police Integrity Commission Act 1996</i> be amended to provide that the Police Integrity Commission not exercise its powers under s.23(2) and s. 24 (in relation to a preliminary investigation into matters covered by s. 23(2)) without the consent of the Inspector.</p>	275	Supported.
<p>H (f) That there be a joint parliamentary committee to have oversight of the Commission and its Inspector, with functions similar to those set out in s. 95 of the <i>Police Integrity Commission Act 1996</i>, with the exception of s. 95(1)(d).</p>	283	<p>Supported in principle.</p> <p>However, rather than establishing a new joint Parliamentary Committee, the existing Committee on the Office of the Ombudsman and Police Integrity Commission will be given oversight of the Commission and its Inspector as</p>

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<p>In lieu of s. 95(2) of the <i>Police Integrity Commission Act 1996</i>, the Committee should not be authorised to reconsider a decision of the Management Committee, compromises in litigation subject to the approval of a court under the <i>Criminal Assets Recovery Act 1990</i> and operational decisions or procedures in relation to a particular reference or investigation.</p>		<p>recommended by Patten.</p>
<p>I (a) That paragraphs (a1) and (b) of the definition of “relevant offence” in s. 3 be replaced with a reference to any offence for which the maximum penalty of imprisonment is a period not less than three years, and that, as a result of its inclusion via this new formulation, paragraph (e) of the definition be removed.</p>	353	<p>Supported.</p> <p>Patten’s suggestion of ensuring that common law offences and offences attracting life imprisonment are relevant offences will be implemented.</p>
<p>I (b) That s. 3(2A) be repealed.</p>	353	<p>Supported.</p> <p>It will remain clear that fraud, especially the emerging crimes of internet fraud and the relationship of organised crime with online activity, is still captured by the definition of relevant offence.</p>
<p>I (c) That the reference to “may be about to be” in the definition of “relevant criminal activity” in s. 3 be omitted and the words “may in future be” substituted instead.</p>	362	<p>Supported.</p>
<p>I (d) That s. 25(2) be amended to provide that the Management Committee must not refer a matter for investigation unless it is satisfied</p>	376	<p>Not supported.</p> <p>It is proposed to include an amendment to s25(1) of the</p>

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that the investigation of the matter by the Commission is in the public interest and that the subsection retain the “ordinary police methods” requirement.		<p data-bbox="1205 196 2114 480"><i>New South Wales Crime Commission Act 1985</i> to provide that the Management Committee may refer a ‘serious crime concern’ to the Crime Commission for investigation. Since the release of the Patten report, it has become apparent that in certain circumstances such as the spate of drive-by-shootings it is useful to be able to use the NSW Crime Commission’s expertise in investigation, which may require a broader form of reference.</p> <p data-bbox="1205 520 2114 624">The definition of serious crime concern will be refined during drafting, however, it is likely to adopt a definition based on the following:</p> <p data-bbox="1205 663 2114 799">Any circumstances implying, or any allegations, that relevant offences of a particular type or class are being, and are likely to continue to be, committed in an organised, systemic or sustained way so as:</p> <ul data-bbox="1272 807 2114 1126" style="list-style-type: none">• to have, or be likely to have, a significant impact on the community, or• to involve, or be likely to involve, substantial proceeds (within the meaning of proceeds in the Criminal Assets Recovery Act 1990) of criminal activity, or• to make it, in the opinion of the Management Committee, in the public interest that the Commission investigates them. <p data-bbox="1205 1166 2114 1366">The government supports the amendment of s25(2) to require that the Management Committee must not refer a matter for investigation unless it is satisfied that the investigation of the matter by the Commission is in the public interest. However, the government does not support the retention of the “ordinary police methods” requirement.</p>

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<p>I (e) That s. 25(2) (or a new s. 25(2A)) provide that, without limiting the matters that the Management Committee may take into account in deciding whether investigation of the matter by the Commission is in the public interest, the Management Committee is to take into account the matters currently set out in s. 3(2A) pertaining to the relevant offence involved.</p>	377	<p>The current “ordinary police methods” requirement was inserted by the <i>State Drug Crime Commission (Amendment) Act 1990</i>. This now outdated consideration focused the emphasis on what police could <i>not</i> do rather than on what the Commission <i>could</i> do in the public interest.</p> <p>The powers of the NSW Crime Commission are used in significant situations where they use methods that are now, in a modern law enforcement agency, considered ‘ordinary police methods’. The NSW Crime Commission also works in conjunction with the NSW Police Force rather than because the methods utilised by police have failed.</p> <p>Not supported.</p> <p>The government proposes to abolish the current s25(2) of the <i>New South Wales Crime Commission Act 1985</i> and instead adopt a provision that prevents the Management Committee referring matters relating to a relevant criminal activity or a serious crime concern to the Commission for investigation unless it is satisfied that:</p> <ul style="list-style-type: none"> • the use of the Commission’s functions may be necessary to fully investigate the relevant criminal activity or serious crime concern; and • the investigation of the relevant criminal activity or serious crime concern by the Commission is in the public interest; and • the relevant criminal activity or serious crime concern is sufficiently serious or prevalent to warrant its investigation by the Commission. <p>The proposed approach essentially takes a positive</p>

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		<p>formulation of the Crime Commission's capacity rather than a negative formulation of the NSW Police Force's capacity.</p> <p>Also see discussion for recommendation I(d).</p>
<p>I (f) That the requirement be inserted that the Management Committee review each reference on an annual basis, within three months of the anniversary of the granting of the reference, or such longer period (not exceeding two years) as the Management Committee thinks appropriate. Upon review, the Management Committee should be required to determine whether to renew or discontinue the reference, using the same criteria as when the reference is granted. A reference should be able to be renewed more than once. The review requirement should apply to a renewed reference.</p>	380	Supported.
<p>I (g) That the word "review" in s. (1)(b1) be replaced with "reinvestigate".</p>	385	Supported.
<p>I (h) That s. 6(1)(d) be amended to refer to providing investigatory, technological or analytical services to such persons or bodies as the Commission thinks fit.</p>	386	Supported.
<p>I (i) That s. 6 be amended to provide that the Commission can engage in taskforces with other government agencies, including non-police agencies, with the approval of the Management Committee.</p>	388	Supported.

Recommendations	Paragraph	NSW Government Response
<p>I (j) That s. 6(2) be amended to confer authority on the Commission, in its discretion, to furnish evidence of the type referred to in the subsection to the relevant DPP or Attorney General; and that the Management Committee should approve guidelines for such releases.</p>	390	<p>Supported.</p> <p>Guidelines will be approved following the appointment of the Commissioner</p>
<p>I (k) That s. 7 be amended to provide that the Management Committee can issue guidelines on the dissemination of information and to confirm that taskforce personnel may be provided with information in accordance with agreed guidelines for taskforce operations without this being a dissemination requiring the Management Committee's approval.</p>	393	<p>Supported.</p> <p>Guidelines will be approved following the appointment of the Commissioner.</p>
<p>I (l) That s. 17 be amended to make clear that the Commission can require persons to take reasonable steps to generate a document from electronic data that does not exist in hard copy at the time the s. 17 request is made; and to provide that documents or things produced pursuant to that section must be deposited with the Commission.</p>	396	<p>Supported.</p>
<p>I (m) That s. 18B(3)(e) be amended to clarify that the provision applies both to a proceeding for the falsity of evidence given by the witness to the Commission and to a proceeding for the falsity of evidence given by the witness to a court.</p>	402	<p>Supported.</p>

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I (n) That s. 29(1) be amended to insert a new paragraph similar to s. 111(1)(b) of the <i>Independent Commission Against Corruption Act 1988</i> and s. 56(1)(c) of the <i>Police Integrity Commission Act 1996</i> .	410	Supported.
I (o) That s. 29(1)(d) be amended to indicate that it is the person giving the information whose understanding that the information is confidential counts, provided the recipient is told of that understanding.	418	Supported.
I (p) That s. 29(3) be amended to accord with s. 111(3) and (4) of the <i>Independent Commission Against Corruption Act 1988</i> , with the qualification that the provision equivalent to s. 111(4)(c) should refer to the "Commissioner, Inspector or Management Committee".	418	Supported.
I (q) That a provision for the Minister to conduct a regular statutory review, perhaps at five year intervals, be inserted.	420	Supported.
J (a) That s. 14 (of the <i>Criminal Assets Recovery Act 1990</i>) be amended to include within its purview both pending applications for a proceeds assessment order and for an unexplained wealth order.	429	Supported.
J (b) That ss. 31A and 31B (of the <i>Criminal Assets Recovery Act 1990</i>) be amended to make provision for the making of a restraining order pending resolution of any application to	431	Supported in principle.

Recommendations**Paragraph NSW Government Response**

the Court pursuant to those sections and that the definition of "assets forfeiture order" in s. 4 be amended to include orders under ss. 31A and 31B.
