

25 March 2024

Mr Benjamin Cranwell
Executive/Research Officer
Crime and Public Integrity Policy Committee

By email: cpip@parliament.sa.gov.au

Dear Mr Cranwell

Submission to Crime and Public Integrity Policy Committee: Inquiry into the performance of functions and exercise of powers by the Ombudsman

I thank the Committee for the opportunity to make a submission.

Briefly stated, my submission is threefold:

1. The functions of the OPI should be subsumed by the Ombudsman.
2. The *Ombudsman Act 1972* should be amended to explicitly confer powers on the Ombudsman.
3. The independence of the Ombudsman should be further fortified.

Transfer of functions of the OPI

The Office for Public Integrity (OPI) and the Ombudsman are created and regulated by the *Independent Commission Against Corruption Act 2012* (the ICAC Act) and the *Ombudsman Act 1972*.

Broadly speaking, the functions of each agency are as follows:

- The primary functions of the OPI are to receive, assess and (where appropriate) refer complaints and reports about public administration to public authorities, public officers and inquiry agencies (i.e. the Commission, Ombudsman and Judicial Conduct Commissioner). The OPI also oversees South Australia Police's (SA Police) handling and investigation of complaints and reports about police officers under the *Police Complaints and Discipline Act 2016* (PCD Act).

- The Ombudsman receives and investigates complaints about State and local government agencies, breaches of service standards under the *Return to Work Act 2014*, conducts Freedom of Information reviews, audits and monitors compliance with the *Criminal Law (Forensic Procedures) Act 2007*, and receives, assesses and investigates complaints and reports about misconduct and maladministration in public administration.¹ It has evaluation and education functions relating to the prevention and minimisation of misconduct and maladministration in public administration.

In my submission, the overlap in complaint and report handling functions causes disruption to the smooth running of the public integrity scheme.

First, it creates confusion about where complaints and reports should be made. The Commission regularly receives information to the effect that it is unclear to whom complaints and reports of corruption, misconduct and maladministration in public administration should be made. In the face of confusion, some people may be deterred from making any report at all. The best complaint handling systems are those which are easy to access and navigate, starting with ease of identifying *where* complaints or reports should be made. A single complaint and report handling body would make the position simpler. It is the most effective way of ensuring corruption, misconduct and maladministration in public administration is reported.

Secondly, it results in incomplete and potentially misleading data in relation to complaints and reports about public administration. Where reports about the same (or substantially the same) subject matter can be made to two separate agencies, only costly and time-consuming information sharing and data matching processes can produce a reliably complete data set for either agency, for example, to eliminate duplicate reports about the same issue by the same reporter. These processes are not currently undertaken. Even if such an exercise were performed, the data is still likely to be incomplete due to the issue identified above; that is, a lack of reporting due to confusion about *where* to report.

Incomplete or unreliable data is problematic not only because it obscures the true picture of public administration in this State, but also because such data is important for both the Ombudsman and the Commission in determining how to exercise their investigative, evaluation and education functions. Best value can be achieved by both the Ombudsman and Commission if these activities are directed to areas which most need them. Reliable complaint and report data is an important source of information about which parts of public administration are most in need of assistance.

A single set of complaint and report data, compiled using a single approach, would also serve an important wider strategic intelligence purpose.

Complaint and reporting data is also important in informing the assessment function itself. While each complaint or report must be assessed on its own merits, assessments do not occur in a vacuum. This is particularly so in relation to questions of maladministration, where systemic issues are the focus and it is necessary to consider individual reports in a wider context.

¹ [Ombudsman SA 2022-2023 Annual Report](#), p 2.

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This leads to the third problem created by duplicated functions, namely, inconsistencies in the assessments of complaints and reports. This, I suggest, is an inevitable consequence of having two independent agencies responsible for essentially the same task. The approach taken to assessments will be informed by several factors, including each agency's concept of the 'big picture' – that is, their views of what the pressing issues are in the integrity landscape – and the application by each agency of the 'test' set out in the relevant legislation. Greater consistency can be achieved where all persons tasked with assessing complaints and reports are subject to direction and guidance by the same person, and where, ultimately, there is a single decision maker in respect of each matter to be investigated, referred or otherwise dealt with.

Finally, the duplication of functions creates significant inefficiencies. Complaints or reports received by the OPI which raise potential issues relevant to the Ombudsman's jurisdiction can be referred to the Ombudsman by the OPI (s 18E(1) of the ICAC Act), following which the Ombudsman's staff are required to make their own assessment of the matter to determine what action should be taken (ss 12E and 12H of the Ombudsman Act), including whether it should be referred to another law enforcement agency, inquiry agency, public authority or public officer. Direct reporting of all matters to the Ombudsman would remove this double handling, likely resulting in quicker assessment and resolution of these matters.

In respect of the OPI's police oversight functions, there is a strong policy argument that these functions should be subsumed by the Ombudsman.

At present where a police complaint requires investigation independent of SA Police, the matter is referred to the Commission. This is so even if the conduct falls short of corruption. Unlike the Ombudsman the OPI itself has no investigative functions or expertise.

Placing the PCD Act functions in the Ombudsman means that when an independent investigation of misconduct or maladministration is required, it can be conducted by the Ombudsman, who already has expertise in conducting investigations of this type. Arguably, this better reflects the original intent of the PCD Act, which placed both the complaint and report oversight function, and any investigative functions in the same agency (the Independent Commissioner Against Corruption). The general approach in other jurisdictions is to consolidate those functions in one body.

The consolidation of the PCD Act functions in the Ombudsman, who already has a history of reviewing police conduct under the *Criminal Law (Forensic Procedures) Act 2007*, would inevitably result in efficiencies and the better application of public funds.

The Ombudsman Act 1972 should explicitly confer powers

The Ombudsman Act vests the Ombudsman with the powers of a Royal Commission for the purposes of an investigation. Section 19 provides that the *Royal Commission Act 1917* applies to an investigation as if the Ombudsman were a commission as defined in that Act, and as if the subject-matter of the investigation were set out in a commission of inquiry issued by the Governor under that Act. In my view this is an undesirable and unnecessarily complicated way of giving the Ombudsman investigative powers.

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As expressed, the Royal Commission Act in its entirety applies to investigations undertaken by the Ombudsman. Without having conducted an exhaustive review of the operation and interaction of the two Acts, it is apparent that this gives rise to inconsistencies which are apt to cause uncertainty.

For example, s 29 of the Ombudsman Act purports to give the Inspector (appointed under Schedule 4 of the ICAC Act) the power to review, *inter alia*, 'any particular exercises of power by the Ombudsman'. This would appear to include any exercise of power made during an investigation. However, s 9 of the Royal Commission Act expressly prohibits the questioning or review in any way of any decision, determination, certificate or other act or proceeding of the Ombudsman, or anything done or the omission of anything, or anything proposed to be done or omitted to be done, by the Ombudsman. This creates an apparent tension between provisions of the Ombudsman Act and provisions imported from the Royal Commissions Act. How this tension might be resolved is of no present interest, but it illustrates the need for greater clarity.

A simpler approach would be to expressly provide for powers in the Ombudsman Act. While those powers might ultimately mirror the powers of a Royal Commission, they should be provided for in the Ombudsman Act rather than relying on the operation of the Royal Commission Act.

I would suggest, however, that consideration should be given to how the functions of the Ombudsman vary from those of a Royal Commission, and whether somewhat different powers might better achieve those functions. For example, the Ombudsman has an evaluation function, but at present has no complementary powers directed towards that function. The Commission's evaluation function is assisted by s 40(2) of the ICAC Act which provides that an inquiry agency or public authority subject to an evaluation by the Commission must assist the Commission as requested. A similar provision in the Ombudsman Act may be considered appropriate.

Increased independence of Ombudsman

Essential to the Ombudsman's ability to effectively perform her functions, and to public confidence in the Ombudsman's capacity to act as a check and balance to government power, is true independence from those into whose conduct the Ombudsman may from time to time inquire. In this respect the Ombudsman is in a similar position to the Commission. However, the Ombudsman does not currently enjoy the same degree of separation from other parts of the executive government as does the Commission.

For example, the Ombudsman (like the OPI) relies on the Attorney-General's Department for some Corporate Services (including, for example, human resources, procurement, information management, and finance functions) and for her technology network. Similarly, the Ombudsman uses technology solutions provided by the Department of Premier and Cabinet. Ombudsman Annual Reports disclose that every year complaints are received by the Ombudsman in relation to the Attorney-General's Department and the Department of Premier and Cabinet. While this number is relatively small, nonetheless it is highly undesirable that the Ombudsman remains so closely aligned to Departments in these circumstances.

In particular, it is intolerable that an agency which may be the subject of an investigation or evaluation by the Ombudsman, or which employs a person the subject of an investigation by the Ombudsman, should be responsible for the electronic storage of the Ombudsman's information. Only a little imagination is required to see how reliance on the Attorney-General's Department technology network might compromise an investigation or evaluation.

By contrast, the Commission maintains its own Corporate Services division, including its own technology network, thus providing an effective barrier between the Commission and any agency that may be the subject of an investigation or evaluation. Unlike the Attorney-General's Department, the Commission is an agency in respect of which the Ombudsman does *not* have jurisdiction to investigate or conduct an evaluation: s 3(1) of the Ombudsman Act.

A further measure which should be introduced to fortify independence is to enable the Ombudsman to directly employ staff on terms and conditions determined by the Ombudsman, mirroring the arrangements of the Commission. Section 12 of the ICAC Act states the Commission may engage employees on terms and conditions determined by the Commissioner. Employees of the Commission are not Public Service employees and are, generally, not subject to the provisions of the *Public Sector Act 2009*, or any Determinations or Directions issued under that Act.

Section 12 of the Ombudsman Act, by contrast, provides that the Ombudsman's staff consists of Public Service employees assigned to work in the office, and those appointed under subsection (3). Subsection (3) provides that the Ombudsman may, *with the consent of the Minister*, appoint staff for the purposes of the Act. The terms and conditions of appointment are determined by the Governor, and such persons are not Public Service employees. Accordingly, although the Ombudsman Act does allow direct appointment of staff, it is only with the consent of the Attorney-General.² Clearly, this provides no real independence.

Financial Advantage

In addition to promoting greater efficiency, and the other advantages already set out there is potentially significant financial benefit to combining the functions of the Ombudsman and the OPI. The OPI has a budget of approximately \$2.8 million per annum to receive and assess complaints and reports about public administration and SA Police, and to oversee the handling of complaints and investigations of police by SA Police. The Ombudsman receives only slightly more to perform her complaint handling functions *as well as* many other significant functions, including investigating misconduct and maladministration.

A consolidated complaints and reports handling function in the Ombudsman would achieve efficiencies and would likely be able to be administered using only a portion of the current costs allowed for in the OPI budget.

² As the Minister to whom the Ombudsman Act is committed.

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The savings (being the balance of the current OPI budget) could be used by the Ombudsman to perform the functions of the PCD Act and better perform her other functions, including the prevention and minimisation of misconduct and maladministration in the public sector. This would increase the public value of the Ombudsman's office.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ann Vanstone', written in a cursive style.

The Hon Ann Vanstone KC
COMMISSIONER

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