

POLICE LINE DO NOT CROSS



ICAC

Independent Commission
Against Corruption
SOUTH AUSTRALIA

When duty calls, who is responding?

The importance of police affidavits

August 2024



**When duty calls,
who is responding?**

The importance of police affidavits

Published August 2024

Level 9, 55 Currie Street
Adelaide SA 5000
(08) 8463 5191
GPO Box 11066
Adelaide SA 5001
icac.sa.gov.au

Table of contents

Commissioner’s foreword	2
The importance of SAPOL to the South Australian community	4
Duties of SAPOL officers	4
Experience of the Commission in investigating the conduct of police officers	7
Experience of SAPOL	8
Consequences	10
Recommendation	12
Annexure A – Police oath	13



Commissioner's foreword

The Commission plays an important role in overseeing the conduct of South Australia Police (SAPOL) officers. That involves investigating alleged corruption and any other issue involving the conduct of a SAPOL officer that the Office for Public Integrity (OPI) refers to the Commission.¹ The Commission may also investigate a complaint or report about a SAPOL officer on its own initiative.²

Prior to amendments in 2021 to the *Independent Commission Against Corruption Act 2012 (SA)* (ICAC Act), the definition of corruption was much broader. It included conduct which amounted to any offence committed by a public officer while acting in his or her capacity as a public officer. Those offences included dishonesty offences and offences of violence committed by SAPOL officers.

This report stems from an investigation conducted by the former Commissioner into the conduct of two SAPOL officers who had allegedly assaulted a member of the community during and shortly after an arrest. In that investigation, several SAPOL officers who were potential witnesses to the conduct, or the surrounding circumstances, refused to provide affidavits³ to Commission investigators. This meant investigators were unable to consider the entirety of the circumstances when deciding whether or not to recommend a referral for prosecution. It also effectively prevented those officers from being witnesses in the prosecution that arose from the investigation.

This is not the first time an investigation by the Commission into the conduct of a SAPOL officer has been hindered by other SAPOL officers, not themselves suspected of any wrongdoing, refusing to provide affidavits to investigators. At times, where a SAPOL officer has provided an affidavit, they have indicated in the affidavit that they have been directed to provide the affidavit by another officer, and that they do so under the duress of that direction.

The Commission has not experienced this practice of refusals or indications of duress by SAPOL officers in investigations into the conduct of public officers who are not SAPOL officers.

1 *Police Complaints and Discipline Act 2016 (SA)* s 29.

2 *Ibid* s 30.

3 A written statement declared on oath. This is the required form of a witness statement to be filed in court pursuant to the *Criminal Procedure Act 1921 (SA)* s 111(4).

In the ordinary course, where a SAPOL officer witnesses, or is involved in the investigation of, an alleged corruption offence, they provide investigators with an affidavit containing an account of what they witnessed or their involvement in the investigation. There is no reason why that practice should differ when the person being investigated is a SAPOL officer.

The overriding impression these refusals and indications of duress leave is that some SAPOL officers are more interested in protecting their fellow officers than upholding and enforcing the law.

If allowed to continue, this practice could be insidious. It is likely to lead to a culture among SAPOL officers conducive to corruption. It could also lead to the erosion of confidence and trust in SAPOL in the community.

It is with the above in mind that I determined to write a report in accordance with section 42 of the ICAC Act. I do so to raise awareness of this practice with a view to the prevention and minimisation of corruption in public administration.

This report is not intended to cover circumstances where a SAPOL officer suspected of committing an offence exercises the right to silence or makes a claim of privilege against self-incrimination. The rights and protections afforded to suspects are just as important when the suspect is a SAPOL officer. This is about other SAPOL officers not cooperating with an investigation into the conduct of another SAPOL officer in direct conflict with their duty to enforce the law.



The Hon. Ann Vanstone KC

Commissioner

INDEPENDENT COMMISSION AGAINST CORRUPTION

The importance of SAPOL to the South Australian community

SAPOL employs about 6,000 staff.⁴ Through its officers and other staff, it provides many essential services to the South Australian community. The importance of SAPOL to the state of South Australia and the community cannot be overstated.

The community rightly expects the highest levels of integrity from SAPOL officers. Necessarily, they possess substantial powers and assume significant responsibilities and duties. The community trusts and expects that those powers will be exercised lawfully and carefully and that the responsibilities and duties will be discharged faithfully.

I have no doubt that most of the time those expectations are met. However, there are times when the conduct of a SAPOL officer falls short.

Sometimes the conduct is such that a complaint or report is made about a SAPOL officer's conduct. When that occurs, SAPOL officers, like other public officers, should have their conduct properly investigated. Depending on the nature of the alleged conduct, it is usually investigated by the Internal Investigation Section of SAPOL. In some circumstances it is investigated by the Commission.

Duties of SAPOL officers

One of SAPOL's purposes is to reassure and protect the community in relation to crime and disorder by the provision of services to uphold the law and prevent crime.⁵

The oath taken by a SAPOL officer includes an undertaking to serve "without favour or affection" and to "faithfully discharge all duties imposed" on them as a SAPOL officer.⁶ I have set out the oath as **Annexure A** to this report.

Decisions of Australian and overseas courts have held that police have a duty to enforce the law.⁷ However, a broad discretion remains in the way in which the duty is carried out.⁸

Regulation 10 of the *Police Regulations 2014* (SA) contains further duties of SAPOL officers. It provides that every member of SAPOL must use all lawful means in his or her power—

- (a) *to uphold the law, preserve the peace, prevent crime and carry out the other functions of SA Police; and*
- (b) *to ensure that all employees under his or her command perform their duties efficiently and in a proper manner.*

4 Including those who are not SAPOL officers <https://www.police.sa.gov.au/about-us/who-we-are>.

5 *Police Act 1998* (SA) s 5.

6 *Police Regulations 2014* (SA) Schedule 3.

7 See *R v Metropolitan Police Commissioner, Ex Parte Blackburn* [1968] 2 QB 118 at 138 (*Blackburn*); *Director of Public Prosecutions (Vic) v Zierk* (2008) 184 A Crim R 582 at 18.

8 *Blackburn* at 136.

SAPOL officers are not Public Service employees.⁹ Other public sector employees are bound by the public sector Code of Ethics which obliges public sector employees to actively cooperate and assist with any investigation into alleged corruption. This applies to SAPOL employees other than SAPOL officers.

SAPOL has its own Code of Conduct which applies to SAPOL officers.¹⁰ It provides that a designated officer must at all times act with honesty and integrity, whether in the course of his or her employment or otherwise.¹¹ The converse of that is that a designated officer must not, in the course of his or her employment or otherwise, behave in a manner that—

- (a) reflects or is likely to reflect adversely on SAPOL; or
- (b) is prejudicial to good order and discipline in SAPOL.¹²

A SAPOL officer is also required to be impartial in their dealings with another SAPOL officer at all times.¹³

Section 12 of the *Police Complaints and Discipline Act 2016* (SA) contains mandatory reporting obligations for SAPOL officers. Where a SAPOL officer “reasonably suspects that another [SAPOL] officer has engaged in conduct that constitutes corruption”, a report to the Internal Investigation Section of SAPOL or the Office for Public Integrity must be made. A failure to comply may be dealt with as a breach of discipline.

Section 21(5) of the *Police Complaints and Discipline Act 2016* allows members of the Internal Investigation Section of SAPOL to direct a SAPOL officer to “furnish information, produce property, a document or other record, or answer a question” during any disciplinary investigation. Refusing or failing to do any of the above (even if doing so would incriminate them) can be dealt with as a breach of discipline. Importantly, the provisions do not apply in criminal investigations whether undertaken by SAPOL or the Commission.

Regulation 4 of the *Police Complaints and Discipline Regulations 2017* (SA) provides that a designated officer must not, without good and sufficient cause, disobey a lawful order or direction or fail to carry out a lawful order, direction or duty promptly and diligently.

The practice of refusing to provide an affidavit or indicating an affidavit is being provided under duress in investigations into other SAPOL officers does not sit well with these duties and obligations.

It does not display the impartiality required by both the oath and the Code of Conduct. In my view it reflects adversely on SAPOL.

More than that, in my view the practice of refusing to provide an affidavit is unlawful. It does not serve to uphold or enforce the law or prevent crime. The discretion a police force and an officer have in how duties are carried out is not absolute. Prioritising finite resources, such as choosing to investigate a more serious matter before investigating a less serious matter, would clearly be within any police officer’s discretion. Targeting certain types of offences over others is also likely to be within discretion. A blanket decision not to investigate certain types of offences is unlikely to be within discretion.¹⁴

9 *Public Sector Act 2009* (SA) s 25.

10 Established pursuant to section 7 of the *Police Complaints and Discipline Act 2016* (SA).

11 SAPOL Code of Conduct *Police Complaints and Discipline Regulations 2017* (SA) Schedule 3, clause 2.

12 SAPOL Code of Conduct clause 3.

13 SAPOL Code of Conduct clause 7.

14 See *Blackburn* where a policy decision by the police to not enforce a law against illegal gambling was held to not be within the discretion of police (although in that case the policy decision had been reversed by the time of the Court’s decision so it was unnecessary to order the police to reverse the decision).

Extreme examples can be given. In the United Kingdom case of *R v Dytham*,¹⁵ a police officer was convicted of Misconduct in Public Office because he failed to intervene in a violent assault resulting in death, despite being present at the scene. This was clearly a failure to uphold or enforce the law, preserve the peace, and prevent crime.

A decision by a SAPOL officer not to provide an affidavit to assist in an investigation into the conduct of a certain class of persons (other SAPOL officers) could not be said to be within their discretion in how they uphold or enforce the law.

This practice is not unique to SAPOL. What is known as the 'blue code' or 'blue wall of silence' is a problem faced by police forces and other like bodies around the world. It was referred to as the 'blue-shirt code' in the Commission's evaluation of the practices, policies and procedures of the Department for Correctional Services tabled in Parliament on 24 June 2021.

If this were just about camaraderie, it would be commendable. Unfortunately, it appears to have developed into a code of ignoring poor conduct by other officers, including criminal and corrupt conduct, in breach of a duty to uphold and enforce the law.

The Commissioner of Police has a broad power to make general orders for the control and management of SAPOL officers.¹⁶ That power does not restrict the Commissioner of Police from giving other binding orders or directions.¹⁷

One such general order is *General Order – Complaints and Disciplinary Framework*. It contains an order related to the provision of statements from employees. I was provided with the relevant order by the Commissioner of Police. It came into operation on 29 March 2022. The order is:

An employee who is or may be a witness to an incident, who responds to a reported incident, or who is involved in the investigation of an incident, must, at the request of the investigating officer provide a signed statement outlining their involvement, actions and observations. The employee will provide a copy of all notes and advice or other relevant materials within a reasonable period of time after the incident if not by completion of the shift. A signed sworn or affirmed affidavit is preferred as the accepted format for presenting evidence before the court. Should the matter proceed to court, the witness must provide their statement in the format required by the court. A signed sworn or affirmed affidavit enables the court to accept evidence without the need to provide oral evidence. There will be occasions however, when the employee will be required to attend court and provide oral evidence.

This does not apply to Commission investigations.

¹⁵ [1979] QB 722.

¹⁶ *Police Act 1998* (SA) s 11.

¹⁷ *Police Act 1998* (SA) s 11(4).

Experience of the Commission in investigating the conduct of police officers

The Commission investigates the conduct of SAPOL officers in the circumstances I referred to in the foreword. This was of course more frequent prior to the 2021 amendments to the ICAC Act. It has been common in these investigations for SAPOL officers who are not themselves suspected of any wrongdoing to refuse to be interviewed by Commission investigators or to provide any written account of events.

In the investigation I referred to in the foreword, a number of SAPOL officers were at the scene at the time of the incidents or arrived shortly afterwards. They were asked by Commission investigators to provide an affidavit, but several refused. Some of the officers were likely to be important witnesses. Others were likely to have only peripheral information.

Neither my investigators nor I have power to direct a SAPOL officer to provide an affidavit. I do have the power to require the production of a written statement of information but not in the form of an affidavit.¹⁸ I also have the power to compulsorily examine a SAPOL officer, as I do with any other potential witness. However, that is time consuming and resource intensive. It can also be futile if the witness chooses not to adopt in an affidavit what they have said during the examination.

In the investigation I am referring to, the former Commissioner exercised his examination power. Significantly, during the examination of one of those SAPOL officers who had refused to provide an affidavit, the following exchange took place:

Commissioner:

Q. As a law enforcement officer, would you not want to cooperate in an investigation into criminal conduct if it were thought that your evidence was relevant?

SAPOL officer:

A. You would think that that would be the answer, Commissioner, but, no, I do not wish to unless I'm obliged to.

The indication from that SAPOL officer was that his stance was based on advice that was given to him. The content of that advice is not known. Presumably it is legal advice that would be protected from disclosure by legal professional privilege.

The SAPOL officer said during the examination that he was friends with one of the SAPOL officers whose conduct was being investigated. He was asked several times during the examination if he was willing to provide an affidavit. On each occasion he indicated that he was not.

It appears the SAPOL officer in the examination appreciated how strange his position was. That is no doubt because it is inconsistent with his duty that he should choose not to assist an investigation into the conduct of a fellow officer. The occupation of an alleged offender should make no difference to this, just as much as any other feature of an alleged offender should not matter.

¹⁸ ICAC Act s 28.

As mentioned, in some instances where a SAPOL officer has provided an affidavit to Commission investigators, they have indicated in the affidavit that they have been directed to provide the affidavit by another officer and that they do so under the duress of that direction. The specific wording used in one such affidavit is set out below:

I have been directed by [rank and name of SAPOL officer] to provide this affidavit, on [date and time], and I do so under the duress of that direction.

The hierarchical nature of SAPOL necessarily means SAPOL officers are directed to undertake tasks. I can see no reason why a SAPOL officer should consider themselves under duress when they are directed by another SAPOL officer to provide an affidavit.

The very suggestion that a SAPOL officer would need to be directed to provide an affidavit to assist in an investigation suggests a standard that is far below what the community should expect from SAPOL officers. In my view, it is inconsistent with their duty to enforce the law.

The lack of cooperation in these investigations by some SAPOL officers poses considerable difficulties for the investigation and prosecution of alleged criminal conduct by those entrusted to protect the community. I expect it is an issue that the Commission will encounter again.

As it happens, responsibility for the investigation of the conduct of the two SAPOL officers I have been referring to was transferred to SAPOL well over a year prior to the trial of each. This was due to the 2021 amendments to the ICAC Act, and an undertaking given by the Director of Public Prosecutions to the High Court not to rely on Commission staff for assistance in prosecutions commenced before the amendments.

Experience of SAPOL

I wrote to the Commissioner of Police asking him about SAPOL's experience of its officers refusing to provide statements or affidavits in circumstances such as these.

The Commissioner of Police informed me that SAPOL¹⁹ had previously encountered occasions when a SAPOL officer who was a potential witness in a disciplinary or criminal investigation had refused to provide a written statement. However, he advised that since the update to the *General Order – Complaints and Disciplinary Framework* in 2022, there had not been any SAPOL officers refusing to provide a statement or affidavit except for a small number who themselves were under suspicion of having committed a criminal offence (as is their right).

The Commissioner of Police further advised that SAPOL does not collect data on the number of SAPOL officers who were potential witnesses to any alleged criminal conduct refusing to provide an affidavit or statement.

He advised that he considers that SAPOL officers are duty bound to uphold the law and preserve the peace and abide by the Code of Conduct. He considers that the updated General Order means an investigator can direct another SAPOL officer to provide a signed statement setting out a version of events. Refusals without fair reason can result in disciplinary action.

That there was a need to update the General Order to give investigators that power suggests there was an issue that needed to be addressed.

¹⁹ Ethical and Professional Standards Branch.

The Commissioner of Police further advised that, like the Commission, SAPOL has experienced occasions where a SAPOL officer had been requested to provide a statement and then, in the statement, has stated they are only doing so “under direction” or similar wording.

At the time the investigation relating to the two SAPOL officers was transferred to SAPOL, the updated General Order was in operation. It follows that the investigating officer had the power to direct any of the SAPOL officers who were potential witnesses to provide affidavits.

I asked the Commissioner of Police if any SAPOL officers who were potential witnesses in that investigation refused to provide an affidavit or written statement during the time that SAPOL had conduct of the investigation (including any who had earlier refused). The Commissioner of Police advised that no SAPOL officer who was a potential witness refused to provide an affidavit or statement for the purposes of the prosecution of either SAPOL officer in that matter. He did not advise whether any requests were made of those officers who had earlier refused.

In fact, those officers who had earlier refused to provide an affidavit all gave evidence for the prosecution in the trial of one officer. In the trial of the second officer, only one of those officers gave evidence for the prosecution. The other officers were unlikely to have been relevant witnesses in that trial.

However, at no stage did any of those officers provide a signed affidavit or written statement to SAPOL.

This shows that the General Order was at least effective in compelling the officers to give evidence at trial. However, it does not appear to have been effective in compelling the officers to provide an affidavit. It tells me that they were either not directed under the General Order to provide an affidavit or, if they were directed, were not reported for their failure to comply.

If directions are not being given by investigators pursuant to the General Order, then it is unlikely that the Commissioner of Police would become aware of any refusal to provide an affidavit. Given the Commission’s experience of SAPOL officers refusing to assist in investigations of other officers, it would not be surprising if there were instances of an investigator not directing another officer to provide an affidavit or not making a report in the case of a refusal.

Consequences

Some of the consequences of this practice are obvious; others less so.

Clearly, in these circumstances, the evidence available to investigators will be incomplete. Often the conduct being investigated will only be witnessed by the alleged victim and one or more other SAPOL officers. The alleged victim is often accused of committing one or more offences themselves and may have a criminal history. Having an account of events from any other SAPOL officer present, whether it be incriminating, exculpatory, or neutral, would allow investigators and prosecutors to properly assess the evidence in its entirety.

There are further consequences if an investigation leads to a prosecution. Where a SAPOL officer refuses to provide an affidavit, the prosecution will be very reluctant to require them to give evidence at trial. Fairness to the accused would likely mean that the Court would not allow a witness to be called on the prosecution case if the accused is not on notice about what the witness would say. Where there has been an account given during an examination, the absence of a signed affidavit might still mean a prosecutor is not willing or able to call them as a prosecution witness without the agreement of defence counsel.

Having incomplete evidence in an investigation or prosecution is not in the public interest.

The long term consequences of the refusals are that they are likely to lead to a culture among SAPOL officers conducive to corruption and other criminal conduct. Where an officer knows another officer will not assist in any investigation into their conduct, they can act without fear of repercussions.

It goes further than that, though. If some SAPOL officers are refusing to assist in the investigation of other officers, they are likely not reporting suspected corrupt or criminal conduct of other officers in the first place. Potential corruption offences or other criminal offences committed by SAPOL officers are likely never reported. That is because the practice applies to the reporting of conduct just as it does to assisting in an investigation.

There is no more sure way of breeding corruption than for those who witness it to do nothing about it.

While this would be in breach of clear reporting obligations, it is almost impossible to detect. A breach of those obligations is considered a breach of discipline only. Any penalty is likely to be minimal.

Those are the obvious consequences. There are some that are perhaps less obvious but no less significant. Two likely insidious consequences are:

- ▶ the erosion of community confidence and trust in SAPOL
- ▶ a negative impact on the safety of the community.

SAPOL, like any police force, relies on the goodwill of the community to assist it in carrying out its functions. One way to erode that goodwill is by SAPOL officers selectively refusing to perform their duties.

Imagine a member of the community alleging that a SAPOL officer has committed an offence against them, only to find out that other SAPOL officers present at the incident have refused to assist in any investigation, those officers being the very persons the community expects to uphold and enforce the law. The community quite rightly expects and deserves better.

In almost all investigations conducted by SAPOL, officers rely on members of the community to provide affidavits. The provision of affidavits is voluntary. However, if members of the community stopped providing affidavits to SAPOL officers then the justice system would grind to a halt and few prosecutions could proceed. In that way the erosion of community confidence and trust in SAPOL would have a negative impact on the safety of the community, as offences would go unpunished.

There is a further hidden impact on the safety of the community. If SAPOL officers who do commit offences are not able to be properly investigated and brought to justice, then they are able to continue with that conduct. Other officers, seeing no repercussions for such conduct, might be minded to do the same themselves. By allowing this conduct to continue, the safety of the community is jeopardised.

While the practice is insidious, thankfully there are only a limited number of SAPOL officers who engage in it. Even in the investigation I have referred to, some officers did assist in the investigation. The alleged conduct of one of the officers was only discovered because of the report by another officer. There are no doubt many examples of police officers, here or elsewhere, assisting in the investigation and prosecution of fellow officers. That should be the norm.

It is worth mentioning one example of officers faithfully carrying out their duties to illustrate the importance of the issue. It is a case in which officers from the NSW Police Force assisted in the investigation and prosecution of another police officer.²⁰

In that case, a Sergeant of NSW Police was off duty and driving a vehicle when she was stopped at a random breath testing site by officers stationed at the same station. As the officer of lower rank went to breath test her, the Sergeant told the officer not to breath test her and drove away.

The Sergeant may well have expected her colleagues to protect her. Fortunately, they did not, and her conduct was reported.

Without the evidence from the police officers on duty, there would have been no way of proving the offence of Perverting the Course of Justice of which the Sergeant was convicted.²¹ In fact, it would never even have been reported but for a junior police officer staying true to duty.

This case illustrates why it is in the public interest to raise awareness of this practice. The consequences for SAPOL, the Commission and the community are such that it is a practice that needs to be addressed. To do so, I make one recommendation set out below.

20 *Johnston v The Queen* [2019] NSWCCA 108 where the prosecution case was that the Sergeant used her rank and authority to avoid the administration of a breath test and that she did so contemplating possible criminal proceedings against her for an alcohol related driving offence.

21 Pursuant to the *Crimes Act 1900* (NSW) s 319.

Recommendation

As set out earlier, an investigating officer from SAPOL has the power to direct another SAPOL officer to provide an affidavit in accordance with the *General Order – Complaints and Disciplinary Framework* set out above.

It is with some hesitation that I recommend the Commissioner of the Independent Commission Against Corruption be given a similar power. I hesitate because it should not be necessary. However, I make the recommendation as it will assist the Commission to properly investigate reports or complaints involving the conduct of SAPOL officers. The power should extend to all public officers, not just SAPOL officers.

.....

RECOMMENDATION

That the Commissioner be given a power in the ICAC Act to direct a public officer (other than a person suspected of committing an offence) to provide an affidavit to Commission investigators if they are a potential witness in an investigation being conducted by the Commission or jointly by the Commission and another agency; and that a failure to comply with a direction be constituted a summary offence.

.....

Annexure A – Police oath

Police Regulations 2014 Schedule 3 – Form of oath or affirmation

1 – Form of oath or affirmation for member of SA Police (other than a community constable)

I, AB, do swear [or I, AB, do solemnly and truly declare and affirm] that I will well and truly serve Her Majesty Queen Elizabeth II and Her heirs and successors according to law, as a member of South Australia Police, without favour or affection, malice or ill-will; that to the best of my power I will cause Her Majesty's peace to be kept throughout the State and prevent the commission of offences against the peace or against the laws of the State; and that I will faithfully discharge all duties imposed on me as a member of South Australia Police – [So help me God!]

Taken at:

this day of 20

Before me

Justice of the Peace:



ICAC

Independent Commission
Against Corruption
SOUTH AUSTRALIA