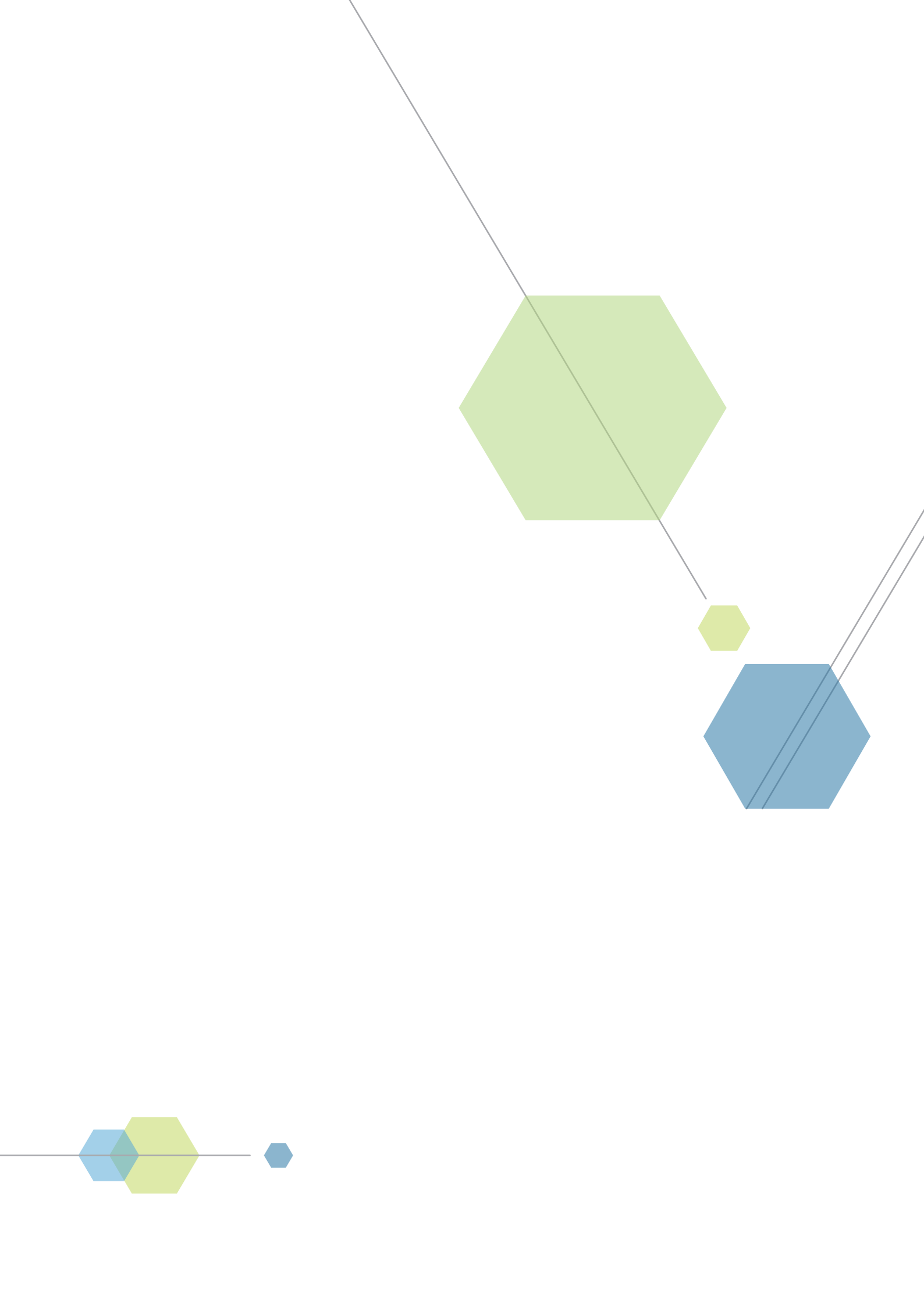
REVIEW OF LEGISLATIVE SCHEMES

THE OVERSIGHT AND MANAGEMENT OF COMPLAINTS ABOUT POLICE

THE RECEIPT AND ASSESSMENT OF COMPLAINTS AND REPORTS ABOUT PUBLIC ADMINISTRATION

ICAC
Independent Commissioner Against Corruption
SOUTH AUSTRALIA



CONTENTS

LETTER OF TRANSMITTAL

The Honourable John Rau MP
Deputy Premier
Attorney-General

Dear Deputy Premier

By letter dated 30 October 2014 you requested that I undertake a review of the legislative schemes governing:

- the oversight and management of complaints regarding the conduct of members of South Australia Police, in the *Police Act 1998*, the *Police (Complaints and Disciplinary Proceedings) Act 1985* and the *Independent Commissioner Against Corruption Act 2012* ('ICAC Act'); and
- the making of complaints and reports to the Police Ombudsman, the Ombudsman and the Office for Public Integrity with a particular focus on whether or not the complaint/report processes to those offices can be consolidated in one office.

You also invited me to exercise my powers under section 40 of the ICAC Act to evaluate the practices, policies and procedures of the Police Ombudsman. I have dealt with this evaluation in a separate report.

I have conducted the reviews of the legislative schemes as you requested. I enclose a copy of my final report and recommendations.

Some of the recommendations I have made extend beyond the matters you asked me to review. However, I have made those recommendations where I felt it was necessary in order to propose a more complete model that addresses many of the issues regarding the existing scheme.

I have recommended a number of significant changes, particularly in respect of the oversight and management of the conduct of police. In my opinion, the changes are necessary in order to address some of the serious problems in the existing system, particularly in relation to delay, duplication, complexity and formality.

I would be pleased to discuss my proposals in more detail as required.

Yours sincerely

The Hon. Bruce Lander QC

INDEPENDENT COMMISSIONER AGAINST CORRUPTION

INTRODUCTION

Integrity in public administration is a fundamental requirement of good government. The public are entitled to expect that every public officer will observe the highest standards of integrity. The public are also entitled to expect that government will provide a system to identify and deal effectively with public officers who fail to meet the standards of propriety expected.

That system should, itself, operate efficiently, effectively and fairly. The system should be flexible in order to appropriately respond to conduct ranging from a minor management issue to serious misconduct and criminal conduct. The system should deal with complaints and reports promptly, but in a manner that is proportionate to the nature of the alleged impropriety and in a manner that is fair to all concerned.

The existing integrity system in South Australia provides an avenue for anyone to complain about public administration, but the system is cumbersome. A hallmark of the existing integrity system is delay. Complaints and reports about public administration are taking too long to resolve. There are too many agencies and those agencies overlap in their respective responsibilities.

The recommendations in this report, if accepted, would seek to change the system to maximise the potential for the effective and efficient resolution of complaints and reports about public administration. The new system would remove much of the duplication that presently exists and would streamline the processes involved while maintaining a robust but fair system for the oversight and management of unacceptable conduct in public administration.

Some of the recommendations may be seen as controversial, particularly in relation to the oversight and management of the conduct of police. However, I am convinced that these reforms are necessary and in the best interests of those involved in public administration and the public alike.

I have discussed my proposals with key stakeholders who I am pleased to say have indicated approval for the proposals.

I am hopeful that, if accepted, the further development and ultimate transition to the new arrangements will be assisted by the co-operation of all agencies involved.

THE LEGISLATIVE REVIEWS

To conduct these reviews I have undertaken an analysis of the literature and the legislative schemes operating in other jurisdictions, including every Australian state, the Commonwealth, the United Kingdom and New Zealand. I have considered over 100 published works, including academic literature, agency publications and legislative reviews undertaken in other jurisdictions.

I took part in more than 20 teleconferences with members of the various integrity bodies and police forces from jurisdictions including the Commonwealth, New South Wales, Queensland, Western Australia, Tasmania, Victoria and New Zealand. I personally visited six agencies in New South Wales and Victoria.

In addition, I met more than once with key stakeholders, including the Police Commissioner and other representatives of South Australia Police ('SAPOL'), the South Australian Ombudsman ('the Ombudsman'), the former Police Ombudsman, the current Acting Police Ombudsman and the Police Association of South Australia ('PASA').

On 13 February 2015 I published a discussion paper in relation to the reviews. The discussion paper identified the issues that I thought were important to consider. I invited interested parties to make submissions and explained how to do so. Twenty three written submissions were received from various parties, including the Ombudsman, the Acting Police Ombudsman, the Police Commissioner, PASA, the Aboriginal Legal Rights Movement, the Environmental Defenders Office SA, the Commissioner for Public Sector Employment ('CPSE'), the State Coroner, Professor Timothy Prenzler of the University of the Sunshine Coast, the Public Law and Policy Research Unit of the University of Adelaide, the Police Disciplinary Tribunal, the Commissioner for Victims' Rights, Anthony Wainwright (former Police Complaints Authority), the Cheltenham Park Residents Association Inc and nine members of the public.

A copy of most of the submissions received is contained within **Appendix 1** to this report. I have not included submissions that were provided in confidence or where the content of the written submission made it inappropriate for publication.

After reviewing the written submissions, I conducted public hearings over three days in order to allow invited parties to present their views in an open forum. The hearings were held at the Riverside Centre Building on North Terrace in Adelaide on 23, 24 and 28 April 2015.

At these hearings Mr Michael Riches acted as counsel assisting and outlined in detail, for the benefit of the invited parties and the public, the scope of the inquiry and the matters that would need to be addressed. I heard from the Ombudsman, the Police Commissioner and other representatives of SAPOL, PASA, the Acting Police Ombudsman and two members of the public who had had experience with the existing process for police complaints. Members of the public and the media were invited to attend and the hearing room was filled to capacity on each day of the hearings.

A copy of the transcript of the public hearings is contained within **Appendix 2** to this report.

While I have not addressed every submission or every issue raised in those submissions, I have considered them all and I am grateful to have received them.

At the conclusion of the public hearings, I formulated draft proposals for reform and discussed those draft proposals with key stakeholders.

The proposals were further reviewed in light of those discussions and my final recommendations are summarised below.

I want to record my appreciation for the invaluable assistance that Mr Michael Riches has provided in the conduct of this review and the writing of this report.

He has made a very significant intellectual and practical contribution to this exercise.

There is no doubt that this review was able to be completed and the report written much earlier because of Mr Riches' efforts.

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION #1: The *Police (Complaints and Disciplinary Proceedings) Act 1985* should be repealed and replaced by a new Police Complaints Act giving effect to the police complaints and disciplinary scheme proposed in this report.

RECOMMENDATION #2 The Police Ombudsman should be abolished.

RECOMMENDATION #3: New police complaints legislation should invest the role of overseeing the management of complaints and reports about police in the OPI.

RECOMMENDATION #4: SAPOL should have the primary responsibility for the assessment of complaints and reports about police.

RECOMMENDATION #5: The ICAC should be empowered to investigate, or to assume the conduct of an investigation of, misconduct or maladministration in public administration, using the same powers as those available to SAPOL investigators tasked with investigating misconduct.

RECOMMENDATION #6: The OPI should be empowered to assess complaints and reports where:

1. the conduct complained of involves a member of the Internal Investigation Section; or
2. the conduct complained of involves an officer of or above the rank of Superintendent; or
3. in all of the circumstances the OPI considers it appropriate to assess the matter.

RECOMMENDATION #7: The OPI should be given full and unfettered access to the police complaints management system used by SAPOL and to any other system used for the purposes of assisting in the assessment of a complaint or report about police.

RECOMMENDATION #8: The OPI should be able to audit and review the manner in which SAPOL deals with complaints and reports about police.

RECOMMENDATION #9: The OPI should be empowered to issue a direction to SAPOL in relation to the assessment of a complaint or report, after consulting with SAPOL on the matter.

RECOMMENDATION #10: SAPOL should continue to have the primary responsibility for the investigation and resolution of complaints and reports about police.

RECOMMENDATION #11: The OPI should be empowered to issue a direction to SAPOL in relation to an investigation of a complaint or report, after consulting with SAPOL on the matter.

RECOMMENDATION #12: The new Police Complaints Act should provide for a process of management resolution of complaints and reports in accordance with the terms set out in this report.

RECOMMENDATION #13: The new Police Complaints Act should provide for the investigation of breaches of discipline in accordance with the terms set out in this report.

RECOMMENDATION #14: Those parts of the *Police (Complaints and Disciplinary Proceedings) Act 1985* that deal with the process for hearing contested allegations of a breach of discipline should be included in the new Police Complaints Act, subject to such modifications as have been proposed in this report and as necessary to ensure consistency with these recommendations.

RECOMMENDATION #15: The ICAC should be empowered to audit, on a yearly basis, disciplinary sanctions imposed by the Police Commissioner and to provide a report to both Houses of Parliament regarding that audit.

RECOMMENDATION #16: The OPI should be empowered to make use of statistical data obtained through complaints and reports to identify and act on trends and issues arising in particular complaints or reports, or in a number of complaints or reports, and to make recommendations to SAPOL concerning training, changes in policy or procedure or other proactive interventions.

RECOMMENDATION #17: The OPI should be empowered to identify to the ICAC issues of specific concern arising from the analysis proposed in Recommendation #16, which might ultimately result in a report being provided to both Houses of Parliament in accordance with section 42 of the ICAC Act.

RECOMMENDATION #18: The new Police Complaints Act should maximise the engagement of complainants by:

1. maximising accessibility to the complaints process by ensuring complaints can be made in a variety of ways;
2. ensuring systems are in place to assist a complainant to make a complaint;
3. conciliating complaints that are to be resolved through management resolution where possible; and
4. in all cases ensuring a complainant is kept informed of the way in which his or her complaint is dealt with.

RECOMMENDATION #19: The OPI should be empowered to nominate a complainant to attend during disciplinary proceedings before the Police Disciplinary Tribunal and for the Police Disciplinary Tribunal to permit that complainant to observe those proceedings unless satisfied that it is not appropriate to do so.

RECOMMENDATION #20: Section 39(1) of the *Freedom of Information Act 1991* should be amended to make the South Australian Ombudsman the external reviewer of all Freedom of Information determinations, including SAPOL Freedom of Information determinations.

RECOMMENDATION #21: The following legislation should be amended to provide that the relevant review and audit functions will be carried out by a suitably qualified person appointed by the Governor:

1. *Criminal Law (Forensic Procedures) Act 2007;*
2. *Listening and Surveillance Devices Act 1972*; and
3. *Telecommunications (Interception) Act 2012*.

RECOMMENDATION #22: Reference to 'Inquiry Agencies' should be removed from the ICAC Act and replaced with statutory provisions dealing expressly with referrals to public authorities and referrals to the Ombudsman.

RECOMMENDATION #23: The ICAC Act should be amended to empower the OPI to assess and refer matters to a public authority (with directions) or to the Ombudsman.

RECOMMENDATION #24: Section 24(2) of the ICAC Act should be amended to permit the referral of a matter assessed as raising a potential issue of misconduct or maladministration in public administration to the most appropriate public authority as determined by the OPI or the ICAC.

RECOMMENDATION #25: The ICAC Act should be amended to remove the power to direct or provide oversight of matters referred to the Ombudsman.

RECOMMENDATION #26: The ICAC Act should be amended to provide that a matter referred to the Ombudsman under the ICAC Act is deemed to be a complaint under the *Ombudsman Act 1972*.

RECOMMENDATION #27: The ICAC Act should be amended to provide that the ICAC may investigate potential misconduct and/or maladministration and may do so utilising the powers under the *Royal Commissions Act 1917*.

RECOMMENDATION #28: Section 36 of the ICAC Act should be amended to have effect whether the investigation relates to corruption in public administration or misconduct and/or maladministration in public administration.

RECOMMENDATION #29: Section 42 of the ICAC Act should be amended to permit a report to be made to Parliament about a particular matter the subject of assessment, investigation or referral, subject to such preconditions to the exercise of that power as Parliament considers appropriate.

DIAGRAM 1 — PROPOSED NEW FRAMEWORK FOR THE OVERSIGHT AND MANAGEMENT OF COMPLAINTS AND REPORTS ABOUT POLICE

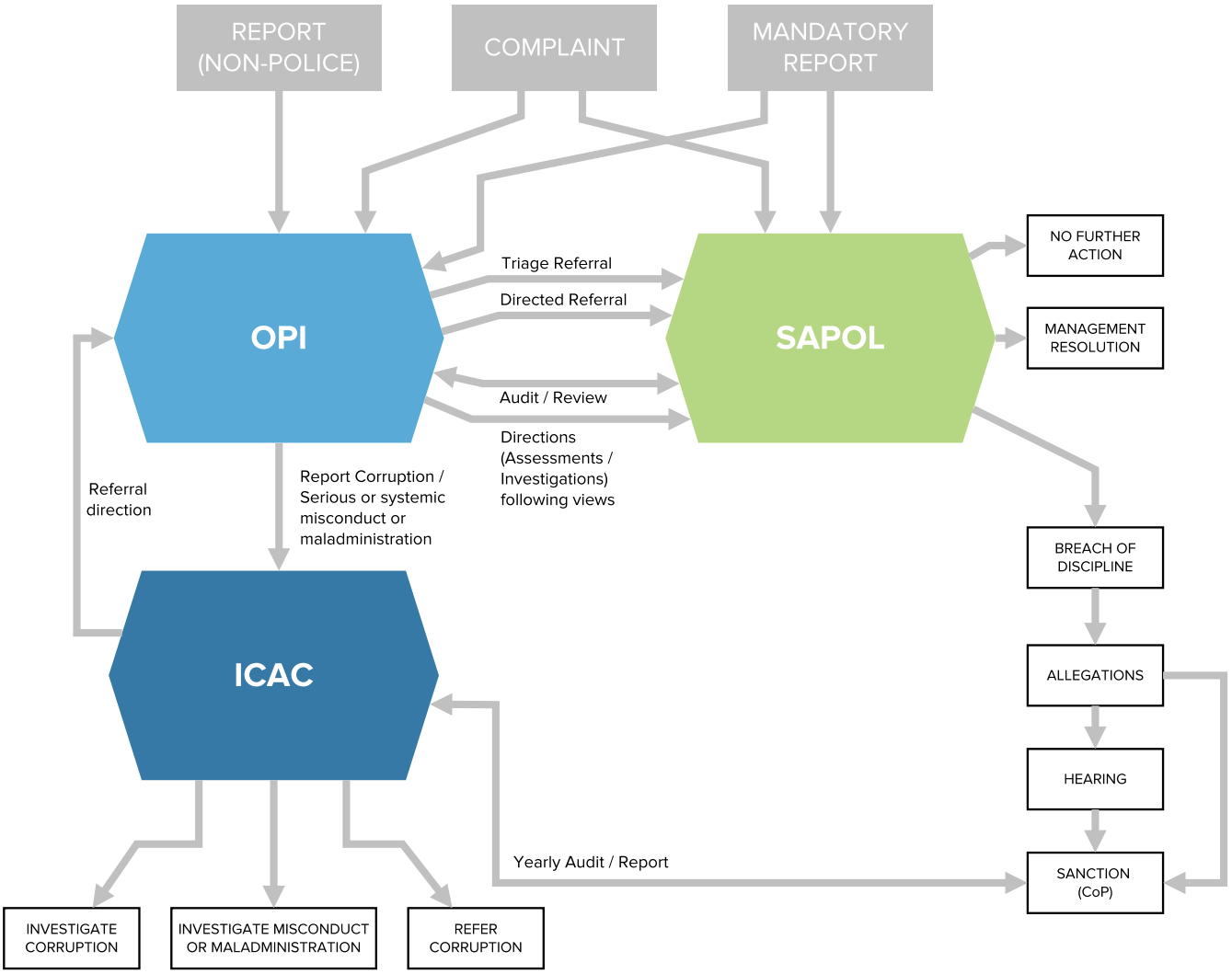
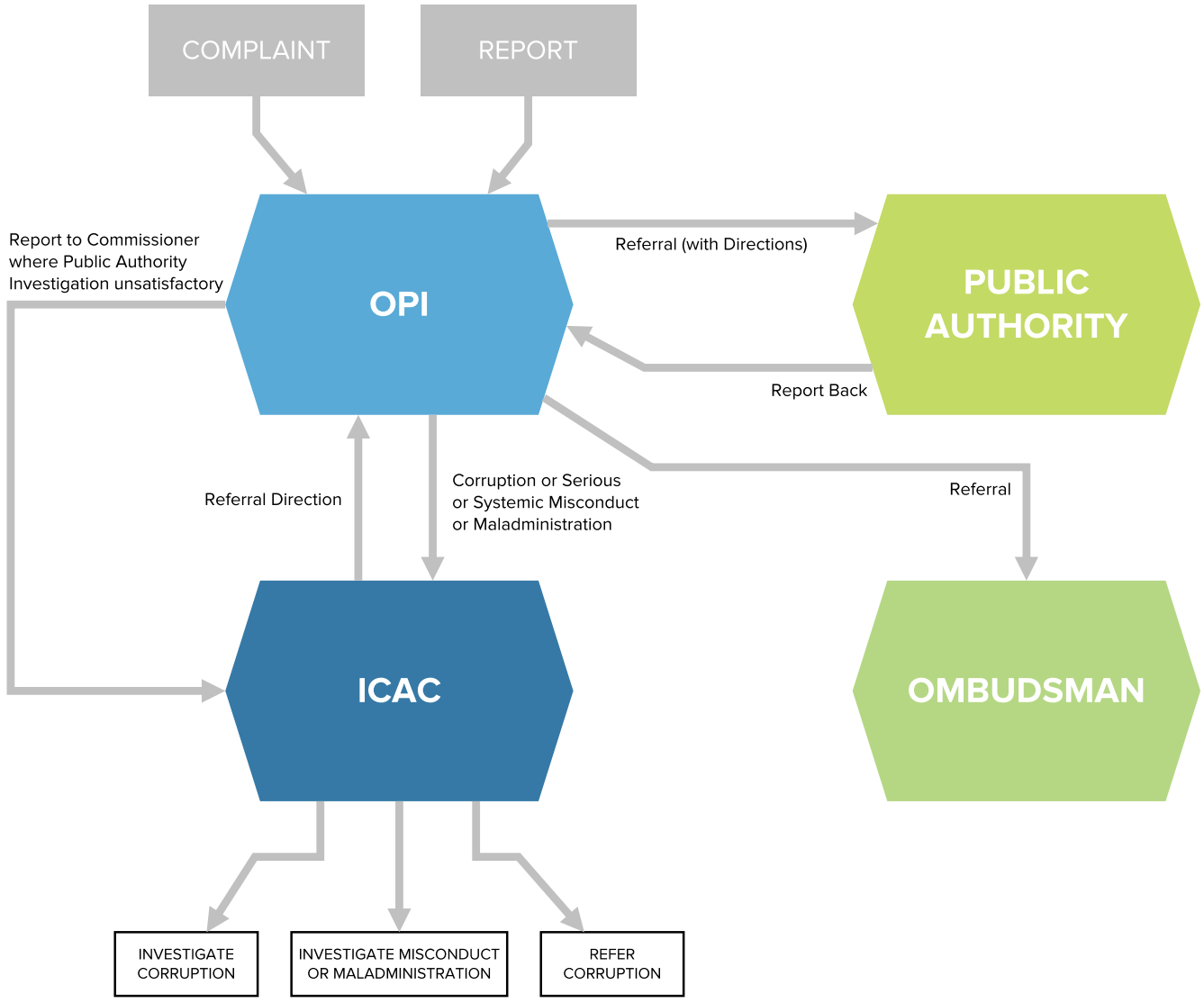


DIAGRAM 2 — PROPOSED NEW FRAMEWORK FOR THE RECEIPT, ASSESSMENT AND REFERRAL OR INVESTIGATION OF COMPLAINTS AND REPORTS ABOUT PUBLIC ADMINISTRATION



THE INTEGRITY SYSTEM IN SOUTH AUSTRALIA

COMPLAINTS AND REPORTS ABOUT PUBLIC ADMINISTRATION

Before turning to my proposals for change, it is useful to consider the existing integrity regime in South Australia.

In broad terms, complaints about public administration can be made to the Office for Public Integrity ('OPI'), the Ombudsman, or directly to the agency involved. Complaints about police conduct can be made to the Police Ombudsman, the OPI or directly to police. Public officers are obliged to make reports to the OPI in accordance with the Directions and Guidelines published under the *Independent Commissioner Against Corruption Act 2012* ('ICAC Act'). Members of SAPOL are obliged to report suspected breaches of the Code of Conduct[1] to the Police Commissioner. Within the public sector the CPSE may also receive complaints or reports about alleged misconduct.

There are, of course, other agencies that might receive complaints about public officers, such as the Commissioner for Equal Opportunity and the Health and Community Services Complaints Commissioner. However, this review has focussed on the scheme involving the OPI, ICAC, the Ombudsman, the Police Ombudsman and the CPSE.

ICAC AND OPI

The OPI and my office commenced operations on 2 September 2013. The OPI is created by section 17 of the ICAC Act and has the statutory functions of:

1. receiving and assessing complaints about public administration from members of the public;
2. receiving and assessing reports about corruption, misconduct and maladministration in public administration from inquiry agencies, public authorities and public officers;
3. making recommendations as to whether and by whom complaints and reports should be investigated; and
4. performing other functions as assigned by the ICAC.

The OPI is responsible to me for the performance of its functions.

According to the second reading speech to the ICAC Bill, the OPI was intended to 'act as a clearing house so to speak, referring complaints and reports to existing agencies and authorities for action (where appropriate).'[2]

However, that intention has not been realised.

The ICAC Act is drafted such that the OPI is empowered to do no more than receive complaints and reports, assess those complaints and reports, and make a recommendation to me as to how the complaint or report should be dealt with. For the purposes of the ICAC Act a complaint is made by a member of the public and the report is made by an inquiry agency, public authority or public officer. It then falls to me to determine what action, if any, is to be taken. In that respect, the OPI itself does not act as a clearing house as it does not determine what action will be taken in respect of a complaint or report.

1 Established in the *Police Regulations 2014*.

2 South Australia, *Parliamentary Debates*, House of Assembly, 2 May 2012, 1357 (The Hon. Tom Kenyon MP).

The OPI is obliged to assess a matter in accordance with section 23 of the ICAC Act. In short, a complaint or report must be assessed as to whether it raises a potential issue of corruption, misconduct or maladministration in public administration, raises some other issue, or that no action need be taken. I too can assess a matter or modify an assessment already made, but I must still do so in accordance with section 23.

It is then a matter for me as to what action is to be taken. However, the options available are constrained by the assessment made and by the pathways prescribed in section 24 of the ICAC Act.

Where a matter is assessed as raising a potential issue of corruption in public administration, I can determine to investigate the matter myself or to refer it to a law enforcement agency, such as SAPOL or, if the matter involves a police officer or special constable, the Police Ombudsman.

The definition of corruption in public administration is, in itself, curious. Unlike integrity agencies in other states, the South Australian legislation defines corruption by reference only to criminal offending. However, the range of criminal offences captured by that definition is very wide. The definition not only captures the types of offences that would be associated with ordinary notions of corruption (such as abuse of public office or bribery of a public official), but is extended to include any offence committed by a public officer while acting in his or her capacity as a public officer. That definition can lead to some interesting examples. A public sector employee who is drink driving while undertaking public duties commits an offence captured by the definition of corruption. An employee of the public service who steals stationery from the workplace commits an offence captured by the definition of corruption. There are many other examples.

If the matter is assessed as raising a potential issue of misconduct or maladministration in public administration, I can refer the matter to an inquiry agency or a public authority. Alternatively, I can exercise the powers of an inquiry agency and investigate the matter myself. An inquiry agency is defined in the ICAC Act to be the Ombudsman, the Police Ombudsman, the CPSE or other person as prescribed by regulation. No other person has been prescribed by regulation to be an inquiry agency.

If a matter is assessed as raising other issues that should be dealt with by an inquiry agency, public authority or public officer, I must refer the matter, or the complainant or reporting agency must be advised to refer the matter, to the relevant agency, authority or officer.

Finally, I can decide to take no action. I may determine to take no action where, for example, the complaint or report is deemed to be trivial, vexatious or frivolous, or where the matter has already been dealt with by another agency and there is no reason to re-examine it.

Where I refer a matter of misconduct or maladministration to an inquiry agency or public authority, I may issue directions or guidance with that referral. If I am not satisfied that an inquiry agency or public authority has duly and properly taken action in relation to the referral, the ICAC Act provides a mechanism by which I can express my dissatisfaction with the agency or authority initially, then the relevant Minister, then ultimately by way of a report tabled in both Houses of Parliament.

I have been given a number of statutory functions. I am required to identify and investigate corruption in public administration, to assist inquiry agencies and public authorities to identify and deal with misconduct and maladministration in public administration, to evaluate the practices, policies and procedures of inquiry agencies and public authorities and to conduct or facilitate the conduct of educational programs designed to prevent or minimise corruption, misconduct and maladministration in public administration.

Between 2 September 2013 and 31 March 2015, the OPI received 1,591 complaints and reports, comprising 791 complaints and 800 reports. Of those complaints and reports that had been assessed as at 31 March 2015, 285 matters had been assessed as raising a potential issue of corruption in public administration, while 297 matters had been assessed as raising a potential issue of misconduct or maladministration in public administration. 905 complaints and reports were deemed not to require further action.

SOUTH AUSTRALIAN OMBUDSMAN

The Ombudsman was the second office of its kind in Australia when it was first established in 1972. Since then there have been six Ombudsmen appointed under the *Ombudsman Act 1972* ('the Ombudsman Act') and a number of Acting Ombudsmen.

The Ombudsman can investigate complaints about administrative acts of an agency captured within the Ombudsman's jurisdiction, such as a government department, a local council or a statutory office holder. The Ombudsman can also investigate such matters on his or her own initiative, even if a complaint has not been received. The Ombudsman Act expressly excludes from its operation complaints which are captured by the *Police (Complaints and Disciplinary Proceedings Act 1985* ('P (CDP) Act').

Aside from the power to deal with complaints about administrative acts, the Ombudsman is an external reviewer for the purposes of the *Freedom of Information Act 1991* ('the FOI Act'). With the commencement of my office and the OPI in September 2013, the Ombudsman must now also investigate matters raising a potential issue of misconduct or maladministration in public administration that are referred by me. The Ombudsman may also carry out audits and investigations pursuant to the *Local Government Act 1999*.

According to the Ombudsman's most recent annual report, his office received 3,090 complaints and 116 requests for FOI external review in the 2013-2014 financial year. The Ombudsman received over 10,000 approaches during the same period and completed 45 reports in accordance with section 25 of the Ombudsman Act.

COMMISSIONER FOR PUBLIC SECTOR EMPLOYMENT

The CPSE is established by section 13 of the *Public Sector Act 2009* ('the Public Sector Act') and has a range of functions, including advancing the objects of the Public Sector Act, issuing the public sector code of conduct and public sector employment determinations and investigating or assisting in the investigation of matters in connection with public sector employee conduct or discipline as required or on the CPSE's own initiative.

I am advised by the Office for the Public Sector that, generally speaking, investigations are not undertaken by the CPSE, even though the CPSE has widespread investigative powers given to the CPSE under section 18 of the Public Sector Act. As I understand it, where the CPSE does receive a report of alleged misconduct, the usual procedure is to refer the matter back to the relevant Chief Executive for investigation and action. In rare cases, the CPSE will contract an investigator to carry out an investigation. The CPSE does not have dedicated investigators on staff.

COMPLAINTS AND REPORTS ABOUT POLICE

The Police Ombudsman is a separate office established under the P (CDP) Act which until December 2012 had been known as the Police Complaints Authority. According to the Police Ombudsman website, South Australia was the last Australian state to adopt a system of independent oversight of police with the introduction of the *Police Complaints Authority in 1985*.

The Police Ombudsman is responsible for the receipt of complaints about the conduct of members of SAPOL and the action taken in relation to those complaints. The scheme under which the Police Ombudsman operates is complex. Since its commencement, the P (CDP) Act has been amended by 14 amending Acts. Indeed, the legislative history to the P (CDP) Act, which identifies all of those amendments, is in itself 14 pages long.

While the P (CDP) Act empowers the Police Ombudsman to conduct the Police Ombudsman's own investigations, the P (CDP) Act is geared heavily towards the external oversight of internal investigation. In other words, the P (CDP) Act presumes that, in most cases, police will be responsible for the investigation of a complaint about police conduct. Indeed, section 13 of the P (CDP) Act requires the Police Commissioner to constitute within the police force a separate section to carry out investigations under the P (CDP) Act. That section within police is known as the Internal Investigation Section ('IIS').

Under the P (CDP) Act, complaints about police can be made directly to the Police Ombudsman or to SAPOL.[3] A complaint that is made to SAPOL must (subject to one exception) be sent to the IIS for investigation and the Police Ombudsman must be notified of the complaint and furnished with particulars. Conversely, a complaint that is made to the Police Ombudsman must be notified to the Police Commissioner who must be furnished with its particulars. Subject to some exceptions which I will explain shortly, the Police Ombudsman must refer the complaint to the Police Commissioner.

On a complaint being received or referred, the Police Ombudsman can deal with the matter in a number of ways. Whilst as I have already said the presumption in the P (CDP) Act is that the complaint will be referred to the IIS for investigation, there are exceptions.

First, the Police Ombudsman may determine not to entertain a complaint for one of a number of reasons contemplated in the P (CDP) Act, such as where the complaint is deemed to be trivial, frivolous or vexatious, or that further investigation of the complaint is unnecessary or unjustifiable.

Secondly, the Police Ombudsman may determine that the complaint is a minor complaint to be dealt with by way of an informal inquiry. A complaint may be categorised as a minor complaint if it is conduct that constitutes 'minor misconduct'. Similarly, the Police Commissioner may, in accordance with the *Police Act 1998* ('Police Act'), determine that a suspected breach of the Code of Conduct involves minor misconduct only. 'Minor misconduct' is in turn defined by way of an agreement reached between the Police Ombudsman and the Police Commissioner. That agreement must be tabled in both Houses of Parliament. An agreement that was signed by the then Police Ombudsman on 28 August 2014 and the Police Commissioner on 9 September 2014 was not tabled in either House of Parliament, as is required under the P (CDP) Act. The previous agreement, entered into between the Police Commissioner and the then Police Complaints Authority in 2002, was tabled in both Houses of Parliament. That 2002 agreement was relied upon until a new agreement that was signed by the Police Commissioner on 27 April 2015 and the Police Ombudsman on 1 May 2015 was tabled in both Houses of Parliament on 16 June 2015.

Neither the existing agreement nor the 2002 agreement is published on either the Police Ombudsman's website or the SAPOL website. There is no legislative requirement for the agreement to be published.

The 2015 agreement provides that any breach of the Code of Conduct is deemed to be minor misconduct unless it is of a kind prescribed in the agreement, such as 'a breach which involves integrity or dishonesty' or a breach 'which is serious by its nature or circumstances'. No explanation is given in the agreement as to what these exceptions mean in practice or how the exceptions are to be applied to actual cases.

3 Since September 2013 complaints about police can also be made to theOPI under the ICAC Act.

Matters that involve minor misconduct can be dealt with by way of an informal inquiry. The way in which an informal inquiry can be heard is prescribed in both the P (CDP) Act and the Police Act. While the process is termed an 'informal inquiry', the process itself is really anything but and has many hallmarks of a formal disciplinary process.

For example, the officer the subject of the allegation must be told of the particulars of the breach and that the Police Commissioner has determined that the matter involves minor misconduct, at which point the subject officer can elect to require that the matter be dealt with by way of a full investigation or to proceed with the informal inquiry. The officer conducting the inquiry must make a determination on the balance of probabilities whether the subject of the inquiry involves a breach of the Code of Conduct. The subject officer can admit the breach or can make submissions in relation to the breach. Where a breach is admitted or is found to have occurred, there are a range of sanctions prescribed in the legislation, including transfer, recorded or unrecorded advice, counselling, education or training.

An officer can seek a review of an adverse finding following an informal inquiry on the grounds that he or she did not commit a breach of the Code of Conduct or that there was a serious irregularity in the processes followed in the informal inquiry. The ensuing review must be undertaken and the subject officer given an opportunity to make submissions. On completing the review, the reviewing officer can order that a new informal inquiry be conducted, or affirm or quash any findings or determinations, or make a determination that should have been made in the first instance.

As I have already said, this is a process that is designed only to deal with minor misconduct.

Thirdly, the Police Commissioner (with the approval of the Police Ombudsman) or the Police Ombudsman can attempt to conciliate the complaint. The Police Commissioner or the Police Ombudsman must report to the other on the results of the attempt to conciliate the matter. If the Police Ombudsman is satisfied that the matter has been resolved by conciliation the Police Ombudsman may determine that the matter not be investigated.

Fourthly, the Police Ombudsman can decide that a matter is to be investigated on his or her own initiative where he or she is satisfied that the matter concerns possible misconduct that has become a matter of public interest or comment or may raise questions as to the practices, procedures or policies of the police. However, having decided that the matter is to be investigated, the Police Ombudsman must advise the Police Commissioner of the matter and refer the matter to the Police Commissioner, who must in turn refer the matter to the IIS for investigation. The Police Commissioner is empowered under the P (CDP) Act to disagree with the Police Ombudsman's decision that the matter be investigated. If the Police Commissioner does disagree, the investigation must cease until the disagreement is resolved either between the parties or by the matter being referred to the Minister for resolution.

The Police Ombudsman is empowered under the P (CDP) Act to investigate a matter personally, whether that matter arises by virtue of a complaint or on the Police Ombudsman's own initiative. In those circumstances, the Police Ombudsman must advise the Police Commissioner. The Police Ombudsman cannot commence an investigation unless 1) the Police Commissioner agrees, or 2) the Police Commissioner has been given a period of 5 working days to comment on the determination and the Police Ombudsman takes into account any comments received from the Police Commissioner within that period.

The Police Ombudsman is given a range of powers to investigate matters but, as I understand it, the Police Ombudsman rarely investigates matters personally for no other reason than the Police Ombudsman does not have investigators on staff and has not had for some years.

I have already said that the P (CDP) Act is geared towards the investigation of complaints by the IIS. In reality all investigations are undertaken by police, at least in recent times. The manner in which a matter is to be investigated by the IIS and the powers given to the IIS are provided for in the P (CDP) Act. This includes the power to direct a police officer to furnish information, produce property, a document or other record or answer a question, where relevant to an investigation. An officer may refuse to furnish such information or answer questions where it might tend to incriminate himself or herself or a close relative, but any such refusal may itself be dealt with as a breach of discipline.

The Police Ombudsman is empowered to oversee an investigation, and can require at any time the IIS to provide information about the progress of the investigation and access to documents or records relevant to the investigation or to arrange for the Police Ombudsman to interview a person in relation to an investigation.

The Police Ombudsman may give directions to the Officer in Charge of IIS as to the matters to be investigated, or the methods to be employed, in relation to a particular investigation. However, the Police Commissioner can disagree with those directions, in which case those directions will cease to be binding unless and until the matter is resolved between the parties or the matter is referred to the Minister for a determination.

In my opinon it is inappropriate for a Minister to act as a referee in respect of such disagreements. The very purpose of an oversight body is to ensure that complaints and reports are dealt with appropriately. An oversight body that does not have the right to impose a direction lacks the authority and autonomy that an oversight agency must have.

When the IIS has completed an investigation, the report must be prepared and delivered to the Police Commissioner. The Police Commissioner must then send the report to the Police Ombudsman unless the Police Commissioner directs that further investigation be undertaken.

The Police Ombudsman must then consider the report and make an assessment of the conduct of the officer complained of and a recommendation as to whether action should be taken and what action should be taken. Such a recommendation could include that the officer be charged with a breach of discipline, or to alter a practice, procedure or policy on which a decision was based, or any other action that should be taken (if any) in relation to the matter.

The Police Ombudsman can also refer the matter back to the Police Commissioner for further investigation, who must in turn refer the matter to the IIS.

Having received the Police Ombudsman's assessment and recommendations, the Police Commissioner must notify the Police Ombudsman in writing of his or her agreement or disagreement. If the Police Commissioner agrees, he or she must then give effect to the recommendations. If the Police Commissioner disagrees, then the Police Ombudsman must reconsider the assessment and recommendations.

If the Police Ombudsman and the Police Commissioner cannot agree, the matter is referred to the Minister for determination.

The Police Commissioner must notify the Police Ombudsman of the laying of charges or other action consequential on an investigation. Where a police officer is charged with a breach of discipline, if the officer does not make an admission of guilt then the matter is heard by the Police Disciplinary Tribunal ('PDT'), a body created by the P (CDP) Act and constituted by a magistrate appointed by the Governor.

Where proceedings are commenced, the Police Commissioner is obliged to indicate to the PDT the categories of punishment that the Police Commissioner considers would, on the facts then known, most likely be appropriate if the PDT finds the officer guilty of a breach of discipline. There are three such categories defined in the P (CDP) Act. Category A includes termination or suspension of the officer's appointment or reduction in the officer's rank for an indefinite period; Category B includes transfer, reduction in remuneration or rank or imposition of a fine; Category C includes recorded or unrecorded reprimand, counselling, education or training.

It is not altogether clear from the language in the P (CDP) Act the purpose of identifying the type of sanction that might be imposed if the allegations are found proved. However, where the PDT does find that an officer is guilty of a breach of discipline then the PDT may indicate to the Police Commissioner the PDT's assessment of the seriousness or otherwise of the breach and the Police Commissioner must, when making his or her determination as to punishment, have due regard to the PDT's assessment.

Where the PDT finds that the officer has committed a breach of discipline, the matter is remitted to the Police Commissioner for the imposition of sanction. While the Police Commissioner must have due regard to any comments from the PDT as to the seriousness or otherwise of the breach of discipline, it is for the Police Commissioner to determine the appropriate sanction. The Police Ombudsman has no role to play in this process.

There is another aspect to the police discipline system that I have not addressed, but which is very important. Section 38(1) of the Police Act provides that 'a member of SA Police or police cadet who becomes aware of circumstances in which it is reasonable to suspect the commission of a breach of the Code must report the matter to the [Police] Commissioner as directed by the [Police] Commissioner'. Section 38(2) provides that if the Police Commissioner suspects that a member of SAPOL or a police cadet has committed a breach of the Code of Conduct, the Police Commissioner may, subject to a determination of the Police Ombudsman to investigate the matter himself or herself, cause the matter to be investigated.

Historically, both SAPOL and former Police Ombudsmen have shared the view that these 'mandatory reports' fall outside of the jurisdiction of the Police Ombudsman, and therefore the manner in which those matters have been dealt with has not been the subject of independent oversight. In December 2012, section 38 of the Police Act was amended to include a new sub-section that requires the Police Commissioner to provide to the Police Ombudsman details of each report as soon as practicable after it is made. Nevertheless, as I understand it the then Police Ombudsman and SAPOL continued to express the view that mandatory reports fall outside of the jurisdiction of the Police Ombudsman.

I do not agree with the construction put upon section 38 of the Police Act by the then Police Ombudsman and SAPOL. I do not read the P (CDP) Act and the Police Act as excising from the Police Ombudsman's jurisdiction the capacity to oversee and direct the conduct of investigations arising from reports made under section 38 of the Police Act.

There are two reasons for a construction that a mandatory report must also be subject to oversight by the Police Ombudsman. The first is that it is a report that has come to the attention of the Police Commissioner who is a designated officer under the P (CDP) Act.

A designated officer must deal with complaints that are made to that officer in accordance with section 18 of the P (CDP) Act, which means that the IIS must notify the Police Ombudsman in accordance with section 18(3) of the P (CDP) Act. Moreover section 38(1a) of the Police Act requires the Police Commissioner to provide the Police Ombudsman with details of each report as soon as practicable after the report is made.

Secondly, if the Police Ombudsman has no jurisdiction in relation to a report of this kind why is the Police Commissioner obliged to report it to the Police Ombudsman? There is no point in requiring the Police Commissioner to report it to the Police Ombudsman if the Police Ombudsman cannot deal with the report. If the Police Ombudsman has no jurisdiction over these reports it may mean that a serious report involving a senior officer is not subject to oversight even though the Police Ombudsman is aware of the report.

Putting aside legal argument as to the correct interpretation of the relevant legislation, the matter raises the broader question of whether the manner in which such internal reports are dealt with should be the subject of external oversight.

The Police Ombudsman has other functions. Pursuant to the FOI Act the Police Ombudsman acts as the external reviewer of decisions made in relation to FOI applications to SAPOL. The Police Ombudsman is also required to audit SAPOL's record keeping and compliance with legislation concerning listening and surveillance devices, forensic procedures and telecommunications interceptions.

As can be seen, the existing integrity system comprises a number of agencies, some of which have overlapping functions. The legislative scheme underpinning the operation of the agencies is, in many respects, unnecessarily complicated, making it difficult to efficiently and effectively address complaints and reports about public administration.

OTHER JURISDICTIONS

During the course of the legislative reviews, I have considered the integrity schemes that operate in other jurisdictions in Australia and elsewhere. I summarise some of those schemes for the sake of comparison.

COMMONWEALTH

A complaint about public administration can be directed to either the Commonwealth Ombudsman or the Australian Capital Territory ('ACT') Ombudsman, depending on whether the administrative action which forms the subject of the complaint relates to the Federal or ACT Government. The relevant Ombudsman, upon completing an investigation, must submit a report to the agency concerned setting out his or her findings and (if desired) recommendations.

Complaints about police are dealt with under a different regime. The jurisdiction of each Ombudsman includes the Australian Federal Police ('AFP'). The Commonwealth Ombudsman can investigate complaints against AFP but, if the complaint raises 'significant corruption issues' which are to be reported to the Australian Commission for Law Enforcement Integrity ('ACLEI'), the Ombudsman must refrain from investigating and refer the matter to ACLEI.

ACLEI is empowered to investigate corruption within Commonwealth law enforcement agencies. It can receive complaints from the public, but it does not appear that such complaints form a significant portion of matters received by ACLEI. Rather, most matters arise by virtue of mandatory notifications from the heads of law enforcement agencies when any issue of corruption is identified. Whether the issue is investigated by ACLEI or the agency will depend on an assessment of the seriousness of the alleged conduct.

ACLEI can also commence investigations on its own initiative or upon referral from the Minister. Upon receipt of an allegation of corruption, ACLEI can choose to investigate independently, investigate jointly with another agency, or refer the matter to another agency for investigation. If, during the course of an investigation, ACLEI obtains evidence of an offence that would be admissible in a prosecution, the evidence must be provided to the appropriate authority authorised to prosecute the offence. Before taking action, the Integrity Commissioner must take reasonable steps to consult with the head of the law enforcement agency concerned unless to do so would prejudice the investigation.

Most allegations about police are raised directly with the AFP, whose Act includes a detailed scheme for the handling of police complaints. Under the scheme, allegations are split into four categories depending on the seriousness of the alleged conduct. Only the most serious category, raising 'corruption issues' must be reported to ACLEI. Less serious conduct can be dealt with through investigation by an internal AFP unit set up for that purpose, while low level misconduct is addressed managerially by AFP, with no external oversight.

The AFP deals with misconduct matters largely without oversight, although complainants may complain to the relevant Ombudsman. ACLEI oversees the investigation of corruption matters with a focus on significant corruption but does not get involved with less serious conduct.

Complaints about public administration not involving police can be made to the agency concerned or to the relevant Ombudsman. The manner in which an agency deals with such a complaint is not the subject of oversight.

VICTORIA

Complaints about public administration in Victoria can be directed to the Victorian Ombudsman who is empowered to look into 'administrative action taken by or in an authority'.[4] The Ombudsman is prohibited from investigating administrative action which appears to involve corrupt conduct. The Ombudsman is also prohibited from investigating certain bodies, including Victoria Police and the Independent Broad-based Anti-corruption Commission ('IBAC').

The Ombudsman initiates matters either in response to a complaint, on a referral or on the Ombudsman's own motion. Upon conclusion of an investigation, the Ombudsman must report to the relevant authority or the responsible Minister as to whether the administrative action in question breached certain criteria and the Ombudsman may make recommendations in consequence of his or her findings.

The IBAC can also receive complaints about public administration but only if the complaint relates to 'corrupt conduct', which is defined widely in section 4(1) of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ('IBAC Act') and involves dishonesty in official functions, breach of public trust or misuse of information involving public officers. The IBAC's jurisdiction includes public bodies and public officers. Matters commence as the result of a complaint, a notification or on the IBAC's own motion. Matters can be dismissed, investigated or referred to another agency for investigation.

The Ombudsman must notify the IBAC when the Ombudsman becomes aware of corrupt conduct or police personnel conduct.

Complaints about police can be made either directly to Victoria Police or to the IBAC. In the case of police complaints, the IBAC can consider 'corrupt conduct' or 'police personnel conduct'. 'Police personnel conduct' is defined in detail in section 5 of the IBAC Act and involves any act or omission by a police or protective services officer or employee or recruit of Victoria Police relating to his or her duties, any offence punishable by imprisonment, any conduct which would bring Victoria Police into disrepute or any disgraceful or improper conduct.

If a complaint is made directly to the Victoria Police, it is dealt with according to the process outlined in the *Victoria Police Act 2013* (Vic). The Chief Commissioner can attempt conciliation but otherwise must investigate complaints made to police about misconduct by police. The Chief Commissioner has the power to commence an investigation on his or her own motion if a breach of discipline is suspected. Officers can be charged with a breach of discipline. If a charge is found to be proved, the Chief Commissioner or a person authorised by the Chief Commissioner can impose one or more sanctions, ranging from reprimand to dismissal.

Victoria Police is overseen by the IBAC. The Chief Commissioner of Victoria Police has an obligation to notify the IBAC of complaints in relation to corrupt conduct or police personnel misconduct and must report to the IBAC about Victoria Police investigations into police personnel misconduct.

The Victorian system appears to have clearly defined roles for each of the key agencies, with significantly less crossover than some other jurisdictions. In simplified terms, complaints about public administration are dealt with by the Ombudsman if they do not reach the threshold of corrupt conduct and by the IBAC if they do. Complaints about police are dealt with either by the IBAC or by Victoria Police itself with oversight provided by the IBAC.

NEW SOUTH WALES

Complaints about public administration in New South Wales can be directed to the NSW Ombudsman or the Independent Commission Against Corruption ('ICAC NSW'). The Ombudsman can investigate the 'conduct' of a public authority. 'Conduct' is defined in section 5 of the *Ombudsman Act 1974* (NSW) to be any action or inaction (whether actual or alleged) relating to a matter of administration. The Ombudsman cannot investigate the conduct of the Governor, ministers, members of parliament or a court.

4 *Ombudsman Act 1973* (Vic) s 13(1).

Any person can make a complaint to the Ombudsman about the conduct of a public authority. The Ombudsman can attempt to deal with a complaint by conciliation or can investigate the matter. Upon completion of an investigation, the Ombudsman may make a report (which can include recommendations) to the responsible Minister and the head of the relevant public authority. If the Ombudsman so requests the head of the public authority is to notify the Ombudsman of any action taken or proposed in consequence of the Ombudsman's report.

The Ombudsman is obliged to report to the responsible Minister and the head of the relevant public authority if he or she is of the opinion that the public authority may have committed misconduct such as to warrant dismissal, removal or punishment. The Ombudsman can, at any time, furnish information obtained in the discharge of his or her functions to the DPP or the ICAC, other than information that could not be disclosed under the *Ombudsman Act 1974* (NSW).

The ICAC NSW can also receive complaints about public administration if the matter concerns or may concern corrupt conduct. Matters can be referred or reported to the ICAC NSW by Parliament or initiated on the ICAC NSW's own motion.

Corrupt conduct is widely defined in section 8 of the *Independent Commission Against Corruption Act 1988* (NSW) focussing primarily on dishonesty, partiality, breach of public trust or misuse of information or material. In order to satisfy the definition, the conduct must be capable of constituting a criminal or disciplinary offence or amount to reasonable grounds for dismissal.

Following an investigation, the ICAC NSW can prepare a report in which it can make findings and recommendations but the report cannot include a finding of criminal liability or a recommendation for criminal prosecution.

The Ombudsman, the Police Commissioner (but not if it relates to police corrupt conduct), the principal officer of a public authority, an officer who constitutes a public authority and a minister are obliged to report to the ICAC NSW any matter suspected on reasonable grounds to involve corrupt conduct.

Before or after an investigation the ICAC NSW can refer a matter for further investigation or action to any person or body considered appropriate with a recommendation as to the action to be taken. If not satisfied with the action taken, the ICAC NSW can submit a report to the Minister and ultimately to both Houses of Parliament.

Complaints about police are dealt with under Part 8A of the *Police Act 1990* (NSW) ('Police Act NSW'). Complaints can be made to the Police Commissioner, the Ombudsman or the Police Integrity Commission ('PIC'). Complaints can also be lodged at a local court.

The Police Act NSW provides that agreements can be made between the Police Commissioner, the Ombudsman and the PIC as to the conduct that need not be dealt with under Part 8A and as to complaints that must be notified to the Ombudsman NSW (called 'notifiable complaints').

The recording of complaints on a complaints management system is mandated by legislation.

The Ombudsman can direct the Police Commissioner in relation to whether a complaint will be investigated but investigations are carried out by NSW Police and the Ombudsman can monitor those investigations as required. Alternatively, the Ombudsman can carry out an investigation if it is deemed to be in the public interest to do so.

The principal function of the PIC is to prevent, detect and investigate police misconduct. The PIC can conduct an investigation on its own initiative or on a complaint made by another agency or member of the public. It may investigate or take over an investigation of a police complaint or part of the complaint, or refer the complaint or part of the complaint to the Police Commissioner or Ombudsman to be dealt with in accordance with Part 8A of the Police Act NSW.

The system in New South Wales is complicated by at least three separate oversight bodies having some jurisdiction over the NSW Police Force. The arrangements currently in place are the subject of ongoing debate in New South Wales and have recently been the subject of scrutiny in the New South Wales Parliament.

Recently the NSW Government commissioned a review of police oversight in that state. The review, being undertaken by Mr Andrew Tink AM, is expected to report by 31 August 2015.

QUEENSLAND

Complaints about public administration in Queensland can be directed to the Queensland Ombudsman or the Crime and Corruption Commission ('CCC QLD'). The Ombudsman can investigate administrative actions of agencies including departments, local government and public authorities. The Ombudsman is not permitted to investigate a decision of a minister or cabinet, administrative action taken by a tribunal or certain conduct of members of the police service.

The Ombudsman can investigate such matters as the result of a complaint, on his or her own motion or as a result of a referral by Parliament. After an investigation, the Ombudsman can submit a report including recommendations to the principal officer of the appropriate agency if of the view that the administrative action was inappropriate and should be remedied or addressed. In addition, the Ombudsman must report to the principal officer and, if appropriate, to the Minister if he or she considers during or after the investigation that there is a breach of duty or misconduct on the part of an officer of the agency.

The Ombudsman may request the principal officer to notify the Ombudsman of the steps taken or proposed in consequence of the Ombudsman's report. If dissatisfied the Ombudsman can provide a report to the Premier and, if appropriate, the Parliament.

Any person can complain to the CCC QLD about corruption. Except in exceptional circumstances, such complaints must be made by way of statutory declaration. Corrupt conduct is defined in legislation and focuses primarily on dishonesty, partiality, breach of public trust or misuse of information or material.

The Police Commissioner is obliged to report police misconduct to the CCC QLD. However, the Police Commissioner retains primary responsibility for dealing with matters of police misconduct. The Police Commissioner also has responsibility to deal with matters of corrupt conduct which are referred to him or her by the CCC QLD. Similarly, public officials must notify the CCC QLD of corrupt conduct and have a responsibility to deal with complaints about corrupt conduct which are referred to them by the CCC QLD. However, the CCC QLD has the primary responsibility for dealing with complaints about corrupt conduct.

The CCC QLD can deal with complaints itself, refer complaints to a public official or the Police Commissioner or take no action, among other options.

If the CCC QLD investigates and forms the view that a prosecution or disciplinary action should be considered, it can report on the investigation to the DPP, the chief judicial officer of the relevant court, or the CEO of the relevant unit of public administration.

Whilst as I have already said in Queensland the primary responsibility for dealing with matters of police misconduct rests with the Police Commissioner, the Police Commissioner can nevertheless ask the CCC QLD to deal with a complaint about police misconduct or to deal with it in cooperation with police.

Under the *Police Service Administration Act 1990* (QLD) a police officer is liable to disciplinary action where the officer has committed misconduct or a breach of discipline on such grounds as are prescribed by the *Police Service (Discipline) Regulations 1990* (QLD). If an allegation of misconduct or breach of discipline is brought against an officer, the Police Commissioner must notify the Queensland Civil and Administrative Tribunal and the CCC QLD of the allegations. The respective disciplinary powers invested in the Police Commissioner, Deputy Commissioner, Assistant Commissioner, commissioned officers and non-commissioned officers are prescribed by regulation.

Sanctions include caution, reprimand, deduction from salary and dismissal. Sanctions may be suspended on an officer agreeing to perform voluntary community service or undergoing voluntary counselling, treatment or some other program designed to correct or rehabilitate.

Every police officer has a statutory duty to report misconduct to the Police Commissioner and to the CCC QLD. The CCC QLD is responsible for monitoring how the Police Commissioner deals with police misconduct and can issue advisory guidelines regarding the investigation of police misconduct. The CCC QLD can review or audit the manner in which the Police Commissioner has dealt with police misconduct and can assume responsibility for and complete an investigation into police misconduct.

WESTERN AUSTRALIA

Complaints about public administration in Western Australia can be directed to either the WA Ombudsman[5] or the Corruption and Crime Commission ('CCC WA'). The Ombudsman can receive complaints about public officers, subject to some exceptions, as long as the complaint relates to a decision or action in administration. 'Administration' appears to be defined broadly.[6]

The CCC WA can take complaints about almost all public officers provided that the allegation relates to 'misconduct'. Misconduct is specifically defined and focuses primarily on conduct that is deemed to be corrupt and/or dishonest.

The Ombudsman can either deal with a matter informally or conduct a formal investigation. Upon finalising an investigation, the Ombudsman must submit a report (which can include recommendations) to the agency's principal officer if of the view that the action was inappropriate and should be remedied or addressed. The Ombudsman must also report any breach of duty or misconduct by a public officer to the principal officer of the relevant agency.

The CCC WA can choose to investigate a matter itself or in cooperation with another agency or can refer the matter for action to the appropriate agency.

The Ombudsman and heads of government agencies must report to the CCC WA any matter involving misconduct and the Police Commissioner must report 'reviewable police action' which is defined broadly to capture inappropriate exercise of power by police. The CCC WA also oversees the manner in which agencies deal with matters referred to them.

Both the Ombudsman and the CCC WA can receive complaints about police, but there is also another mechanism for these complaints to be heard. A practice exists within the Western Australia Police which involves informal attempts to resolve matters prior to the lodging of a formal complaint. These processes are not outlined in legislation but appear to be well-established. If a complainant is unsatisfied or an allegation is of a serious nature, complaints proceed to formal investigation. A formal examination process, akin to a trial, is provided for in legislation. This process is subject to the oversight of the Police Commissioner, who is obliged to report certain allegations to the CCC WA.

TASMANIA

Complaints about public administration in Tasmania can be directed to either the Tasmanian Ombudsman or the Tasmanian Integrity Commission. The Ombudsman can receive complaints about 'any administrative action taken by or on behalf of a public authority'.[7] The Integrity Commission can receive complaints about 'misconduct' by a 'public officer'.

The Ombudsman's role is to investigate administrative action and submit a report to the appropriate person with recommendations. Although the Ombudsman has no power to compel action, he or she may report to the Minister and Parliament if dissatisfied with the action taken following the making of recommendations.

The Integrity Commission's role is to assess and refer matters for action as appropriate. The Integrity Commission can also investigate matters for itself, recommend that a commission of inquiry be established or establish an Integrity Tribunal to carry out an inquiry, although it appears that the Integrity Commission generally refers matters to the agency involved and focuses on oversight. Once a matter is referred the Integrity Commission can monitor how the matter is addressed but has limited influence on the progress of the matter.

Police complaints can be made to the Ombudsman or the Integrity Commission, or can be dealt with through an internal process within Tasmania Police. The Police Commissioner is responsible for this process and can impose sanctions ranging from reprimand to dismissal.

5 The full title of the WA Ombudsman is the Parliamentary Commissioner for Administrative Investigations.

6 Ombudsman Western Australia, 'Annual Report 2013-2014' (Annual Report, Ombudsman WA, 2014) 36-42.

7 *Ombudsman Act 1978* (Tas) s 12.

The Integrity Commission has special oversight over police and will investigate serious police misconduct or misconduct by a commissioned officer. The Integrity Commission can also assume responsibility for an investigation commenced by the Police Commissioner into police misconduct and direct that the police investigation cease.

The Integrity Commission is unusual in that it is controlled by a Board which includes the Ombudsman, Auditor-General and State Service Commissioner.

TOWARDS A MODEL SYSTEM

A legislative scheme that includes independent oversight of integrity across public administration is widely accepted throughout Australia and around the world as critical. Likewise, the practice of incorporating external oversight of police into the police management model has become common throughout the world. When most of the provisions of the ICAC Act came into force in 2013, South Australia became the last state in Australia to introduce an overarching anti-corruption body with extensive powers to investigate corruption and to oversee the management of misconduct and maladministration in public administration.

While most agree that such a scheme is critical to public confidence, the mechanism by which the scheme operates is often the subject of contrasting views and, at times, fierce debate. Much of that debate is focussed upon the way in which the conduct of police is overseen and dealt with. Given it is a central part of these legislative reviews, it is appropriate to consider some of the more controversial aspects of police integrity systems and the role played by complainants more generally.

I will specifically focus on the following issues:

- whether police should investigate police;
- whether oversight of police should be undertaken by a dedicated agency or an overarching anti-corruption body;
- disciplinary vs management approaches to dealing with police conduct;
- how conduct should be categorised;
- the role played by the independent oversight body in complaints and reports about police; and
- the role a complainant plays in the process.

EXTERNAL OVERSIGHT AND INTERNAL INVESTIGATION

Perhaps the area of most debate is the question of what level of independence is required for an oversight agency to serve its purpose and whether it is appropriate for investigations into police conduct to be undertaken internally by police officers.

This is not a new issue.

In a 1970 inquiry in Victoria, conducted in light of a number of allegations of police corruption in that state, it was suggested that the police were incapable of adequately investigating themselves when there is 'cohesive' corruption.[8] In a 1974 article Matthew Goode explored the criticism of police being responsible for investigating other police and proposed the establishment of a civilian review board.[9]

Those who criticise the police investigating police model claim there is a tension between loyalty and impartiality. Criticisms centre on the potential for police to 'band together' and serve themselves or their organisation rather than the public interest, and the lack of transparency surrounding internal processes which makes public scrutiny difficult.[10]

8 Garth Den Heyer and Alan Beckley, 'Police Independent Oversight in Australia and New Zealand' (2013) 14(2) *Police Practice and Research: An International Journal* 130, 138; Colleen Lewis, *Complaints against police: The politics of reform* (Hawkins Press, 1999) 27.

9 Matthew Goode, 'Administrative Systems for the Resolution of Complaints Against The Police: A Proposed Reform' (1973) 5(1) *The Adelaide Law Review 55*.

10 Chip Chapman, 'An Independent Review of the Police Disciplinary System in England and Wales' (Independent Review, UK Home Office, 2014) 11.

Historically, police forces have been in charge of handling complaints about police. There are many recorded instances in other jurisdictions of inadequate investigations and even intimidation of those who wish to lodge a complaint.[11] According to Tim Prenzler and Louise Porter, reviews and inquiries across the globe have 'repeatedly found internal investigations functioned to protect corrupt officers and limit damage to the organisation'.[12]

It is unsurprising that in such an environment, there has been a sustained call for independent oversight of police. I have already said that the existence of oversight bodies in relation to police complaints is now accepted in Australia. The general principle that such an oversight agency should be independent is not controversial. The issue of contention is how that independence is defined in the context of investigations. The need for an oversight agency arises because police investigate police. If it were otherwise and an agency separate to police were investigating police there would be no need for an oversight agency with the powers that police oversight agencies have.

There appears to be two schools of thought in relation to what an appropriate independent oversight agency should look like. At one end of the spectrum is the 'civilian control model', where an independent agency staffed by civilian (non-police) investigators investigates all complaints about police. An example of such a body can be found in the Police Ombudsman for Northern Ireland. While this body can refer matters to police for investigation it apparently conducts almost all formal investigations itself.[13] This arrangement is rare. Indeed, it is the only model of its type that I have come across in my research. A body that is solely responsible for the investigation of complaints is not strictly an oversight agency. Oversight involves supervision. An agency that does not oversee, but rather acts in accordance with its own decisions and deals with matters itself, is an investigation and resolution agency, not an oversight body.

The other end of the spectrum is the 'minimal review model' which Prenzler has described as a model where 'agencies audit police complaints investigations, recommend changes to procedures or disciplinary decisions and respond to appeals from dissatisfied complainants'.[14]

Proponents can be found for both ends of the spectrum.

A key issue in the debate is that of independence.

In a 2009 paper about the investigation of police complaints Tamar Hopkins argued that independence cannot be satisfied by a system of internal investigations by police which are supervised by an independent authority (ie the minimal review model), as this is not an adequate safeguard.[15] She argued that the initial fact gathering undertaken by the investigator is not a neutral process but is in fact a crucial part of the investigation, inadequate execution of which can compromise the entire investigation and the later process of making findings. She explored a number of examples of incidents in various jurisdictions around the world where a lack of independence in police investigations has resulted in poor outcomes.[16]

In a subsequent article in 2011 Hopkins reiterated the criticism of police investigating police complaints, stating that no Australian jurisdiction had adopted the recommendations made by the Commissioner for Human Rights in his opinion concerning independent and effective determination of police complaints published in 2009.[17] She suggested that as a result of this practice Australian police complaint mechanisms were not adequate to meet international human rights standards.[18] She also argued that the Police Ombudsman for Northern Ireland is an example of a 'resourced civilian agenc[y] ... capable of investigating complaints against police' and that as a result the police in Northern Ireland are 'reported to be conforming better to human rights standards'.[19]

11 Tim Prenzler and Louise Porter, 'Improving Police Behaviour and Police-Community Relations through Innovative Responses to Complaints' in S. Lister and M. Rowe (eds), *Accountability in policing: Contemporary debates* (Routledge, 2015, in press), 2.

12 Ibid.

13 Ibid 32.

14 Tim Prenzler, 'The evolution of police oversight in Australia' (2011) *Policing and Society* 284, 284.

15 Tamar Hopkins, *An effective system for investigating complaints against police: A study of human rights compliance in police complaint models in the US, Canada, UK, Northern Ireland and Australia* (Victoria Law Foundation, 2009) 23.

16 Ibid 34-5.

17 *Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against the Police* (2009) 4 CommDH 3.

18 Tamar Hopkins, 'When Police Complaint Mechanisms Fail: The Use of Civil Litigation' (2011) 36(2) *Alternative Law Journal* 99, 99.

19 Ibid 100.

A report by the Home Office in the United Kingdom in 2014 found that some people chose not to come forward with complaints because of the involvement of the police, with as many as 35% of people lacking confidence in the ability of the police to deal fairly with complaints.[20] The report suggested that the independence of the system could be increased.[21]

It is suggested that the level of cooperation required between the police and the oversight agency in order to facilitate a minimal review model will in itself present a challenge to independence. In general terms, it is argued that true independence (in the sense of a total absence of any positive or negative gearing towards a person or organisation) is almost impossible given that people instinctively react and form opinions about anyone with whom they interact. For this reason, even in a civilian model independence can be challenging because, as Prenzler has noted, it is not straightforward for employees of oversight agencies to be entirely unconnected with police, as 'protective solidarity [can] extend beyond one agency to another agency that works cooperatively with it or in a common field'.[22]

However, there are also many supporters of a review model.

The opinion of the Commissioner for Human Rights to which I have earlier referred did not recommend a purely external investigation process. His recommendation was that five principles, including the principle of independence, should be applied in all cases of death or serious injury and should be considered as useful guidelines in other cases.[23] He suggested that police should work in conjunction with an independent body, noting that the head of the police force is the police force's 'disciplinary authority', while still providing an independent role for an oversight body in relation to the investigation of certain types of serious complaints, with a clear delineation of responsibility between the police and the oversight body.[24]

While examples were given of instances where internal investigations were not properly conducted, there are also many examples of the success of internal investigations. For example, the United Kingdom Home Office report I have mentioned found that about 88% of police officers who were dismissed from the police force were dismissed as a consequence of investigations arising out of an internal report.[25] In his independent review of the English and Welsh police disciplinary system, retired Major-General Chip Chapman CB found that many police Professional Standards Departments had demonstrated an ability to carry out internal investigations capable of achieving an appropriate outcome. He said that in 2013 no fewer than 58 officers were dismissed by the United Kingdom's Metropolitan Police Service and the independent oversight body was only involved in relation to the investigation of eight of those officers.[26]

One significant argument in favour of police investigations or 'self-regulation' is that the police have access to information, skills and expertise which an outside organisation would lack.[27] In a similar vein, in response to a report by the Home Affairs Committee, the United Kingdom Government argued against setting an 'arbitrary maximum limit' on the number of former police officers which the independent oversight body was allowed to employ, stating that the expertise of the investigators should be the first consideration.[28] It has also been suggested that rather than taking over entirely, the external oversight agency should encourage and enhance the accountability of police forces by recognising the potential of the police force to regulate itself and by supplementing that role through communication and analysis.[29]

20 Home Office (UK), *Improving police integrity: reforming the police complaints and disciplinary systems*, Cm 8976 (2014) 13.

21 Ibid 28.

22 Tim Prenzler, 'Stakeholder Perspectives on Police Complaints and Discipline: Towards a Civilian Control Model' (2004) 37(1) *Australian and New Zealand Journal of Criminology* 85, 89-90.

23 *Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against the Police* (2009) 4 CommDH 3.

24 Ibid 9.

25 Home Office (UK), above n 19, 27.

26 Chapman, above n 10, 34.

27 Andrew Goldsmith, 'Complaints against the police: a 'community policing' perspective', based upon portions of 'External Review and Self-Regulation: Police Accountability and the Dialectic of Complaints Procedures' in Andrew Goldsmith (ed), *Complaints against the Police: The Trend to External Review* (Clarendon Press, 1990) 205, 212.

28 United Kingdom, *The Government Response to the Eleventh Report from the Home Affairs Committee Session 2012-2013 HC 494 – The Independent Police Complaints Commission*, Cm 8598 (2013) 11.

29 Goldsmith, 'Complaints against the police: a 'community policing' perspective', above n 26, 214.

The reality is that neither internal regulation nor external accountability can provide complete control or guarantee complete integrity.[30] Perhaps because of that the various models of oversight across Australia do not fit fully into either the civilian control model or the minimal review model but have characteristics of both. For example, the majority of Australian oversight bodies have investigators who are former police officers because of the complex nature of the investigations which they undertake and the knowledge which former officers can bring to those investigations.[31] However, the roles of these agencies go beyond mere monitoring and many of them have the ability to conduct investigations into police conduct themselves.

It appears that practical considerations often dictate the involvement of police in dealing with police complaints. In his 2014 publication Chapman expressed the balance well, stating that:

> *[a]lthough an organisation should be allowed to conduct its own investigations and disciplinary outcomes, this is not an inalienable right, but must be based on fair and transparent investigations – and credible outcomes'.*[32]

There are also resource considerations. Any integrity system must be constructed in such a way that it can operate effectively within the confines of finite resources. An agency that has the exclusive jurisdiction to investigate all allegations of police misconduct would require significant resources. It is a fallacy to suggest that such resources could simply be transferred from the police to the oversight agency because many of the police investigations undertaken are carried out by officers who also carry out other policing duties.

It would be unrealistic to excise from police a group of experienced investigators, capable of contributing to core policing functions as well as investigating internal misconduct issues and remove them to a new agency that has the responsibility of investigating police.

On the other hand, the very involvement of police is antithetical to the civilian control model which advocates no involvement of police at all.

A totally independent investigation model, which required all misconduct investigations to be undertaken outside of SAPOL and without the involvement of police (whether seconded or otherwise), would require extensive resource allocations far beyond those contemplated under the existing integrity regime.

I have had the opportunity of observing the manner in which the police investigate misconduct within their own ranks. Those investigations have, in my opinion, generally been thorough and wide reaching. I have been impressed with the level of vigour with which internal misconduct investigations have been pursued. In some cases, I have formed the view that the level of rigour exceeds that which would attend an investigation of a member of the public. There are, I think, several reasons for this.

First, I think the existence of independent oversight acts as an incentive to properly and fully investigate alleged misconduct.

Secondly, there is an appreciation of the criticism associated with police investigating police, which may tend to act on the mind of the investigator to ensure that the investigation is beyond reproach.

Thirdly, and most importantly in my opinion, is the genuine desire of those charged with the investigation of misconduct within SAPOL to identify and expose those officers engaged in wrongdoing. I have observed this on a number of occasions.

For the reasons mentioned, the preferred view is to continue to have police involved in investigating police, subject of course to appropriate and rigorous safeguards in the form of a strong and independent oversight agency capable of overseeing, directing and intervening in police conduct matters.

30 Ibid 213.

31 Den Heyer and Beckley, above n 7, 138.

32 Chapman, above n 10, 35.

SPECIALIST POLICE OVERSIGHT

According to Prenzler, Australia is notable for a growing trend towards bringing all agencies engaged in public administration within the jurisdiction of an overarching oversight or anti-corruption agency.[33]

In an earlier publication Prenzler and Faulkner argued that there was a strong case to be made for a broader integrity agency, as the respective roles of the Ombudsman and Auditor-General were not sufficient to address the various misconduct and corruption issues that may arise within public administration. The authors argued that the introduction of a broader integrity body would free those more traditional bodies to focus on the narrow tasks that sit within their traditional scope.[34]

Some argue that police should have a higher level of accountability than other professions because of the unique role and power given to police and the suggested susceptibility to temptation to abuse that power for personal gain. Prenzler has responded by saying that 'this view is difficult to sustain in light of parallel processes of scandal and reform in many occupations, including the traditional self-regulating professions of law and medicine'.[35]

There are arguments in support of the notion that the investigation of police conduct is a specialised area which would therefore benefit from a dedicated oversight agency.[36] In its 2010 review of the Victorian integrity and anti-corruption system, the Victorian State Services Authority raised particular complexities associated with investigating police. It argued that police:

- know the system and potentially have early warning of interest in their activities;
- are skilled in investigation techniques and counter-surveillance;
- may have corrupt associates willing to cover for them;
- are not easily fazed by interview and are experienced in giving evidence;
- are readily assumed to be credible by jurors and tribunals; and
- can exert considerable influence over internal informants and investigators, particularly if they hold senior rank.[37]

However, it seems that these factors need not lead to the establishment of an entirely separate body. The issue of separate police oversight can be addressed through the separation of investigation of police misconduct within an integrity body as a 'special and difficult investigative area'.[38]

The Victorian review concluded that the experience of other jurisdictions suggested that the best approach is to have a single body with various areas of responsibility but with the capacity for different responses to different types of conduct.[39] The review recommended that there be a Director, Police Integrity who has additional powers in relation to police, but sitting within an overarching integrity agency.[40]

Victoria is only one example. Since the 1980s, the nature of police oversight in Australia has progressed from purely internal investigation to internal investigation with external oversight. Since 2000 there has been a distinct movement towards 'cross-public sector integrity commissions' incorporating the oversight of police.[41]

33 Prenzler, 'The evolution of police oversight in Australia', above n 14, 286.

34 Tim Prenzler and Nicholas Faulkner, 'Towards a Model Public Sector Integrity Commission' (2010) 69(3) *Australian Journal of Public Administration* 251, 259.

35 Prenzler, 'Stakeholder Perspectives on Police Complaints and Discipline', above n 22, 107.

36 Den Heyer and Beckley, above n 8, 136.

37 Commissioner Peter Allen and Special Commissioner Elizabeth Proust, 'Review of Victoria's Integrity and Anti-Corruption System' (Report, State Services Authority (Vic), 2010) 29.

38 Den Heyer and Beckley, above n 8, 136.

39 Allen and Proust, above n 37, 22.

40 Ibid 29.

41 Den Heyer and Beckley, above n 8, 137.

DEALING WITH POLICE CONDUCT — FORMAL AND INFORMAL APPROACHES

One topic which continues to be discussed is whether inappropriate police conduct should be addressed through a formal disciplinary process or by an informal managerial approach. The issue was extensively discussed in the 2003 report: 'A Review of Professional Standards in the Australian Federal Police' by the Hon. William Kenneth Fisher AO, QC ('the Fisher Review'). The Fisher Review noted that the traditional formal approach to addressing complaints about police developed as a result of the paramilitary origins of police but Fisher suggested that it is an approach that is no longer appropriate in contemporary policing.[42]

The Fisher Review proposed that full formal investigation be avoided for matters which can be dealt with at the managerial level. Fisher made a number of comments about the ineffectiveness of punitive measures and the desirability of focusing instead on remedial action, designed not to punish the undesirable behaviour but to improve it. Fisher suggested that a managerial method will have the additional benefit of developing managers and leaders as they will no longer be reliant on command and control principles. He also suggested that different leadership qualities, such as persuasion and influence, would be developed through the new scheme.[43]

There is with respect good sense in Mr Fisher's arguments. Matters involving less serious behaviour will be more appropriately dealt with through an informal internal process rather than through formal disciplinary investigation. However, not all allegations can be appropriately dealt with through informal managerial means. Conduct which is of a serious nature requires a formal investigation.

Professor Andrew Goldsmith has pointed out that the excessive formality of some accountability mechanisms, if applied to minor matters, can have an unjustifiable impact on both resources and police morale.[44] However, he also expressed concern about an informal system that may lend itself to premature resolution of legitimate complaints.[45] Of course this risk can be addressed by the introduction of external oversight for managerial resolution of complaints. This approach has the potential to be particularly effective if the overseeing body has full access to the system by which complaints are recorded and addressed, along with the power to direct the making of assessments and the conduct of investigations as well as the power, where appropriate, to investigate complaints independently.

In its 2014 report the United Kingdom Home Office found that the formal system for dealing with police conduct did not have a sufficient focus on improving the subject officer's performance.[46] The report noted that there was dissatisfaction within the police force in relation to the way in which minor complaints were addressed in that many complaints that could be dealt with by local resolution were dealt with by way of a formal misconduct process. The review said that such an approach 'leads to officers and staff focusing on defending themselves and leaves them unwilling to admit they had made a mistake to avoid implicating themselves in any misconduct action'.[47] Similar points were made in the Fisher Review.

Chapman said that balancing the focus between punitive and rehabilitative action consistently arose in all previous reports on police complaints systems across various jurisdictions.[48] Chapman's view was that more matters should be resolved locally, with a focus on swift resolution and learning.[49]

42 The Hon. William Kenneth Fisher AO, QC, 'A Review of Professional Standards in the Australian Federal Police' (Review, Australian Federal Police, 2003) 35.

43 Ibid 66.

44 Andrew Goldsmith, 'Informal Resolution of Police Complaints in Australia: Building Better Understanding or Mere Bureaucratic Convenience?' (2000) 17(1) *Law in Context* 34, 35.

45 Ibid 36.

46 Home Office (UK), above n 20, 28.

47 Ibid 14.

48 Chapman, above n 10, 5.

49 Ibid 31.

One of the arguments made by Chapman is that it is appropriate for this type of informal resolution to be recorded on the file of the subject officer 'to assist in future monitoring'.[50] This suggestion may be a contentious one. Some parties will argue that if something is to be recorded on an officer's file, a more formal approach is necessary and appropriate to permit the officer to formally contest the allegations if he or she does not accept them. Of course, there would be less need for a formal approach if it were made clear and understood the extent to which informal resolutions can be used in future decisions affecting the officer.

In any event, there is a strong trend towards managerial intervention in less serious cases which is considered to be in the best interests of all parties concerned.

THE ROLE FOR EXTERNAL OVERSIGHT

If it is accepted that there is a need for an independent oversight agency for police complaints and that it is not inappropriate to maintain a role for the police force itself at the very least in relation to matters which can be dealt with by a managerial approach, the precise role that an oversight agency should play in the process must be addressed.

Unsurprisingly, this issue is also the source of significant debate. Fisher concluded that the process of dealing with complaints about the AFP in relation to lower range matters was unnecessarily prolonged because of the level of external oversight being exercised (in that case by the Commonwealth Ombudsman). The suggestion made in the Fisher Review was that external oversight was not justified in the case of minor conduct.[51] The proposed approach was to have the oversight body's functions limited to (a) separating out more challenging cases by way of review and; (b) exercising an overriding jurisdiction to examine all cases on a reassurance basis.[52] The aim should be to concentrate the resources of the external oversight body on matters raising major concerns, rather than on lower level administrative issues.

Other jurisdictions have also addressed the level of involvement of the oversight agency. In Victoria, problems arose because investigations by various integrity bodies into the same matters were reaching inconsistent outcomes, leading to public confusion.[53]

Prenzler and Porter have pointed out that public confidence in police is likely to increase when oversight agencies are more directly involved in the management of more serious complaints. They have argued that if an oversight agency is limited to no more than audit or review of a police investigation, it causes greater frustration amongst complainants.[54] It is suggested that best practice is for a role to be played by oversight agencies in the investigation of more serious matters. The challenge remains, then, to identify what that role should be and when it should be activated.

I intend to explore two issues arising from the level of an oversight agency's involvement. The first is the way in which conduct is categorised and the impact of that categorisation on the involvement of the oversight agency. The second issue, following on from the first, is the potential for investing in an oversight agency an audit and intervention capability and the benefits of such a system.

50 Ibid.

51 Fisher, above n 42, 40.

52 Ibid 74.

53 Allen and Proust, above n 37, 15.

54 Prenzler and Porter, above n 11, 8.

RESPONDING TO INAPPROPRIATE CONDUCT

The Fisher Review concluded that treating all matters in a formal disciplinary manner, including those involving minor management issues, gives rise to a waste of resources and delay. The Fisher Review recommended separating conduct into categories depending on its seriousness, and having a different process for dealing with each category.

The recommendations flowing from the Fisher Review were largely based on the New South Wales system. That state used a 'Class and Kind Agreement' to draw a distinction between 'complaints' and 'local management issues'. The latter class was not to be dealt with under the more formal process as the issues were inherently administrative or managerial in nature. These types of matters included absence from duty, unsatisfactory sick reports, lateness, rudeness and similar.[55] For these lower level behaviours resolutions were focused on management. Matters of a more serious nature were treated as 'complaints' but there was still scope for them to be resolved by managerial means.

The categorisation of conduct recommended in the Fisher Review has been largely adopted in the *Australian Federal Police Act 1979* (Cth).

Such clear categorisation is not common across jurisdictions throughout Australia. While many of the jurisdictions draw distinctions between 'misconduct' and 'serious misconduct', this does not necessarily have a significant impact on how the conduct is addressed. What is common is that the oversight body only becomes actively involved in cases of serious misconduct (or equivalent), leaving the lower level conduct matters to the relevant police service, while retaining a monitoring or review capability. Other than New South Wales and the Commonwealth, the Western Australian system goes furthest towards categorisation, with a practice of categorising allegations by seriousness and dealing informally with lower level issues which do not require full investigation.

In the United Kingdom, the Home Affairs Committee proposed in its 2013 report that more cases should be investigated independently by the Independent Police Complaints Commission ('IPCC').[56] The report said:
'[s]ome kinds of complaint are simply not appropriate for Police Complaints Departments to investigate themselves. Cases involving serious corruption, such as tampering with evidence, should be automatically referred to the IPCC for independent investigation'.[57] The Government responded to this recommendation noting that the IPCC had published a new definition of 'serious corruption' and that police forces had been advised of the expectations in relation to referrals of such serious matters and the intention that the IPCC would investigate.[58]

Chapman has suggested a different approach. Chapman suggests that the question to be asked in determining whether the oversight agency should intervene ought to be based upon an assessment of whether the alleged conduct could lead to dismissal. If the answer is no, the response should be to focus on improvement.[59]

The total involvement of the oversight agency in all matters, no matter how minor, is not practicable. On the other hand, mere review is insufficient. An independent agency must have the power to carry out an investigation or to take over an investigation.

The jurisdictions differ in their approach to oversight. One approach which appears to have met with success in other jurisdictions is the power to audit and direct the manner in which police deal with less serious conduct.

55 Fisher, above n 42, 52.

56 Home Affairs Committee, *Independent Police Complaints Commission*, House of Commons Paper No 494, Session 2012-13 (2013) 35.

57 Ibid 37.

58 United Kingdom, above n 28, 7.

59 Chapman, above n 10, 19-20.

Auditing is an approach adopted in New South Wales and Victoria. The oversight agency is given real-time access to the police complaints management system, allowing that agency to review matters as it wishes and in some circumstances to step in and take over investigations as it considers appropriate. This power complements the agency's capacity to independently investigate more serious matters, such as those raising issues of corruption. It enables the oversight agency to have a level of oversight and control over all matters.

The oversight agency should be able to leave no footprint in the police system, meaning that police cannot ascertain which matters are being scrutinised at any particular point in time.

The purpose of such access is twofold. First, it allows the oversight agency to fulfil a quality assurance function and to monitor the manner in which police deal with complaints, intervening with direction or independent investigation where appropriate. Secondly, it enables trend analysis and data collection by the agency.

The second function is as important as the first. In an article published in 1990, Goldsmith expressed the view that 'it is just as important to consider the lessons gathered from complaints viewed in the aggregate as it is to deal with the problems raised by individual complaints'.[60] He suggested that a shift in focus towards data collection would allow policy reforms and systemic change and he advocated the establishment of mechanisms to facilitate collection and analysis of such information.[61]

The Commissioner for Human Rights in his 2009 opinion expressed the view that lessons can be learnt from every complaint, even one which does not lead to any individual action. He said that '[s]tatistical and empirical research and analysis of complaints is of fundamental importance to democratic and accountable policing'.[62] Similarly, Hopkins stated that investigations should have a dual purpose and in addition to the individual remedy should produce lessons which will assist the police force to reduce the chances of such circumstances occurring again.[63]

An audit system can be structured in a way that identifies a particular officer who exceeds a complaints threshold, and allows managerial intervention by the police force to deal with the officer's inappropriate behaviour.[64] The oversight agency can use such systems to detect and analyse trends in order to more accurately predict and target conduct issues within the police force.

An audit function of this kind has the added benefit of reducing the need for police to make reports to the oversight agency. The oversight agency can simply access the police complaints system and see for itself what complaints have been registered.

An audit capability provides a suitable option for the involvement of an oversight agency in more minor matters, without compromising the efficiency of the process or removing from police the primary responsibility for managing police behaviour.

THE COMPLAINANT'S ROLE

One of the five principles discussed by the Commissioner for Human Rights was that of complainant involvement. The Commissioner said that 'the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests'[65] and '[i]t is important that the victim involvement process is meaningful and effectively applied and not empty and rhetorical'.[66]

An effective complaints system should involve the complainant in the process so far as is appropriate. However, the extent to which the complainant is involved is itself a source of debate.

60 Goldsmith, 'Complaints against the police: a 'community policing' perspective', above n 27, 205.

61 Ibid 212.

62 *Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against the Police* (2009) 4 CommDH 15.

63 Hopkins, *An effective system for investigating complaints against police*, above n 15, 19.

64 Prenzler and Porter, above n 11, 3.

65 *Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against the Police* (2009) 4 CommDH 3.

66 Ibid 14.

The opportunities for complainant involvement vary across jurisdictions. Most systems will, at a minimum, require communication with the complainant throughout the process where possible. A failure to communicate with complainants is very likely to lead to complainant dissatisfaction and will affect public perception of the complaints process. In a 2011 survey conducted in New South Wales involving 493 legal practitioners with direct experience of the police complaints system, three-quarters of participants expressed dissatisfaction with the level of communication received throughout the complaint process. Dissatisfaction with either the outcome or the process was also recorded by three-quarters of participants.[67] Prenzler and Porter have noted that surveys of 'police-dominated systems' show that lack of communication is one of several key factors in high levels of complainant dissatisfaction.[68]

A complainant's role will depend upon whether formal disciplinary action or informal managerial intervention is the preferred course of action in any given circumstance. Goldsmith concluded in his 2000 article that complainants are generally more satisfied by informal resolution. He based his conclusion on an evaluation of informal resolution in Queensland. He commented that one of the differences between informal resolution and formal investigations is that complainants are often better informed throughout an informal process.[69] In the same article Goldsmith stated that experience across Australia and other Commonwealth countries like Canada and the United Kingdom suggests that people who complain often want something different from formal investigation, and that an informal resolution such as an apology is often more effective in meeting the complainant's expectations.[70]

In her 2009 study Hopkins argued that complainants should be 'central to an investigation process'.[71] She discussed the 'victim involvement' principle proposed by the Commissioner for Human Rights and detailed what that involvement should entail. She stated that complainants were in a strong position to 'assist and scrutinise' investigations because of their firsthand knowledge of what had occurred.[72] She suggested that for the principle of victim involvement to be satisfied, complainants should be given access to information about the investigation and regularly updated, and should be able to make suggestions on the progress of the investigation and provide additional information. She also proposed that complainants be allowed to respond to provisional findings and recommend further avenues of inquiry and be able to cross-examine witnesses and make submissions.[73]

Hopkins has proposed a very high level of involvement, going considerably beyond that afforded to victims in criminal proceedings. Hopkins's justification for such significant involvement is that it is necessary to counteract the complainant's natural fear, born from his or her allegation that there has been wrongdoing by the State and that there may be abuse within the investigation process.[74]

Hopkins argued that the role of the complainant in making the complaint is an essential service which benefits the State in its goal of preventing and punishing human rights abuses and that the complainant has a significant part to play in making sure that an investigation is carried out in such a way as to uncover the truth and to keep police accountable.[75]

The high level of complainant involvement proposed by Hopkins presents some practical difficulties. A complainant has a personal interest in the outcome of an investigation and for a complainant to have such a decisive role in the progress and direction of an investigation could create serious impediments to an objective, fair and efficient outcome.

Accordingly, I do not propose the level of involvement advocated by Hopkins. I will address the role to be played by complainants further in my proposals for reform.

67 Jane Goodman-Delahunty, Alan Beckley and Melissa Martin, 'Resolving or escalating disputes? Experiences of the NSW Police Force complaints process' (2014) 25 *ADLR* 79, 87.

68 Prenzler and Porter, above n 11, 4.

69 Goldsmith, 'Informal Resolution of Police Complaints in Australia', above n 44, 47.

70 Ibid 35, 49.

71 Hopkins, *An effective system for investigating complaints against police*, above n 15, 81.

72 Ibid.

73 Ibid 90, 95, 97.

74 Ibid 97.

75 Ibid 81.

PROPOSALS FOR REFORM

I turn now to my thoughts on the present system and my recommendations for reform.

COMPLAINTS AND REPORTS ABOUT POLICE

POLICE (COMPLAINTS AND DISCIPLINARY PROCEEDINGS) ACT 1985

As I have stated earlier in this report, the P (CDP) Act creates a complex and convoluted process for the resolution of complaints about police and the maintenance of discipline in the police force. Commenting specifically on delay within the system, the Acting Police Ombudsman said:

> *[t]he legislative scheme governing complaints against the police, The [sic] Police (Complaints and Disciplinary Proceedings) Act 1985 ("the Police Complaints Act") all but guarantees delay, complexity and confusion in receiving, assessing, investigating and resolving complaints against police.*[76]

The P (CDP) Act has been in place since 1985. A multitude of amendments have been made since that time, but not a complete revision. As noted by the State Coroner in his written submission, 'it is difficult to think of any other piece of legislation governing an aspect of the employment of a public employee such as a police officer that has not undergone at least two revisions in that time'.[77]

Mr Anthony Wainwright, who held the position of Police Complaints Authority between 1995 and 2009, referred to the P (CDP) Act as a patchwork quilt that is no longer fit for purpose.

I agree with that observation.

The complexity of the existing system is perhaps best represented by Diagram 3, which is a summary only of the existing police complaints system.

In my view, proper and meaningful change to the police complaints system, aimed at resolving unnecessary complexity, duplication and delay, can only be achieved by the repeal of the P (CDP) Act and the introduction of new legislation that provides a more streamlined and effective mechanism for the resolution of complaints and reports about police and the maintenance of discipline within the police force.

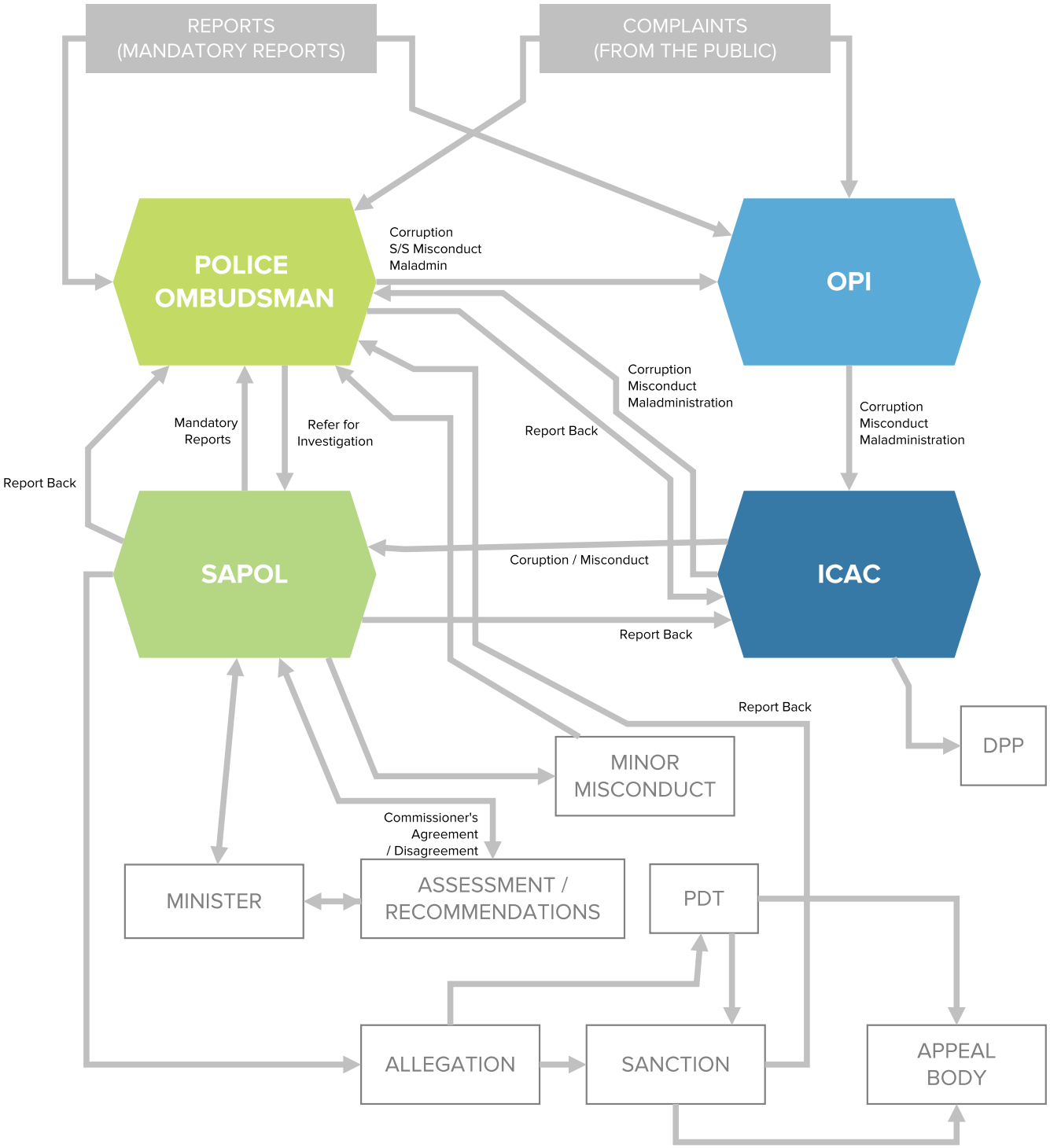
The new legislation should reflect the proposals in this report, while retaining the investigative powers and confidentiality requirements that exist under the present scheme. The new legislation should include overarching objectives that make it clear the scheme is designed for the effective and efficient resolution of complaints and reports about police and to assist in the proper and effective management of the police force.

RECOMMENDATION #1: **The *Police (Complaints and Disciplinary Proceedings) Act 1985* should be repealed and replaced by a new Police Complaints Act giving effect to the police complaints and disciplinary scheme proposed in this report.**

76 Acting Police Ombudsman, Written Submission, 2 April 2015.

77 State Coroner, Written Submission, 17 March 2015, 2.

DIAGRAM 3 — EXISTING POLICE COMPLAINTS SYSTEM



ABOLITION OF POLICE OMBUDSMAN

I have already said that there are too many agencies involved in the oversight and management of complaints about police. I have already explained the complicated interactions between the OPI, the ICAC, the Police Ombudsman and SAPOL brought about by the legislative scheme underpinning those agencies.

With the exception of the PIC in New South Wales, no other state or territory in Australia has retained an independent oversight body that deals only with police complaints and has no other functions. Oversight of police complaints has been largely subsumed into broad based anti-corruption agencies or existing Ombudsmen.

Professor Prenzler of the University of the Sunshine Coast said:

> *[e]ffective public sector integrity systems require diverse institutions with complimentary [sic] and overlapping responsibilities to ensure adequate coverage of misconduct risks. At the core of a system is an independent public sector integrity agency – an 'integrity commission' – with significant powers and resources to engage in investigations and prevention.*
>
> *The integrity commission should cover the whole public sector including police. While police are subject to particularly intense pressures and temptations towards misconduct, policing is by no means unique in regard to integrity risks and officers can feel unfairly treated through the operations of specialist police ombudsman type bodies. Vigilance in regard to police can be maintained by legislating a designated police unit within an integrity commission.*[78]

In its written submission, PASA states that the Police Ombudsman is now 'largely pointless'.[79]

The Ombudsman suggests consideration be given to abolishing the Police Ombudsman and incorporating the investigation of police misconduct into the ICAC.

The Acting Police Ombudsman proposes that the Police Ombudsman be brought into the ICAC. He said:

> *[u]nder any new scheme, the most efficient move may be to incorporate the POMB as part of the office of the ICAC. This would be hardly a radical move as, under the ICAC Act, the ICAC has, in any event, the ability to exercise the powers of the POMB, to refer matters to it for investigation and to issue directions, guidelines and recommendations following such a referral. The POMB could, in the same way as the OPI be directly responsible to the ICAC but at the same time have its own specific function. I envisage that the OPI and the POMB could directly complement each other.*[80]

With the introduction of the ICAC and the OPI and the capacity of the ICAC to oversee and investigate police, the need for a separate Police Ombudsman should now be addressed.

In my opinion, the office of the Police Ombudsman should be abolished. Indeed, if the P (CDP) Act were to be repealed then the office of the Police Ombudsman would be abolished.

If the office of the Police Ombudsman is abolished who should oversee the police?

The Ombudsman proposes that the ICAC is the most appropriate agency to deal with oversight of police. The Ombudsman said:

> *[i]n my view, the investigation of police misconduct has an anti-corruption 'flavour' to it as it relates to the ethics and honesty of law enforcement personnel and sits well within ICAC's core purpose.*[81]

78 Professor Tim Prenzler, Written Submission, 19 March 2015, 1.

79 Police Association of South Australia, Written Submission, 26 March 2015, 4.

80 Acting Police Ombudsman, Written Submission, 2 April 2015, 7.

81 South Australian Ombudsman, Written Submission, 25 March 2015, 1.

On the other hand, PASA said that it was:

> *uncomfortable with the Independent Commissioner Against Corruption Act insofar as it allows for the investigation of matters related purely to misconduct, when that misconduct is neither corrupt not tantamount to maladministration.*
>
> *These matters ought to be investigated, but we consider that to be the job of the South Australia Police, insofar as investigations might pertain to police officers. We make no submission in respect of other public officers.*
>
> *We were, and remain, uncomfortable with ICAC fulfilling this function. It is entirely proper for ICAC to play some oversight role but, in our proposed model, the ICAC ought not, in this area, be charged with direct responsibility.*

The role of providing independent oversight of police in relation to the resolution of complaints and reports should be invested either within the ICAC or in the OPI. This will have the effect of reducing the number of agencies involved.

The ICAC already has the capacity to oversee the manner in which matters of misconduct and maladministration concerning the police are dealt with. The ICAC can also investigate the conduct of police, either directly where the matter involves corruption in public administration, or by exercising the powers of the Police Ombudsman where the matter involves misconduct or maladministration in public administration. The OPI is empowered to receive and assess complaints and reports about public administration, including police. Under the proposals in this review, those functions would be expanded to empower the OPI to determine how a matter should be dealt with and to review the manner in which a public authority has dealt with a referred matter.

In my view, the responsibility for day to day oversight and audit of SAPOL's management of complaints and reports should rest with the OPI. The power to intervene and assume conduct of an investigation into misconduct or maladministration should reside with the ICAC.

RECOMMENDATION #2 **The Police Ombudsman should be abolished.**

RECOMMENDATION #3: **New police complaints legislation should invest the role of overseeing the management of complaints and reports about police in the OPI.**

I have formed this view after having considered the literature, written submissions and presentations made at the public hearings and having carefully assessed those competing views in light of my own observations over the past 20 months as the ICAC. In light of those considerations, I have formed the view that the following overarching requirements should be in place for the oversight and management of police conduct:

- The Police Commissioner should have primary responsibility for the assessment and resolution of complaints and reports about police;
- There should be an independent body tasked with overseeing the manner in which complaints and reports about police are assessed and dealt with;
- That independent body should be empowered to:
- require the police to provide full and unfettered access to a dedicated complaints management system, and any other systems utilised by police to assess and investigate complaints and reports;
- assess matters in lieu of the Police Commissioner;
- after consultation issue a direction to police about the assessment of a matter; and
- after consultation issue a direction to police about the investigation of a matter.

- There should also be the capacity for an independent body to investigate, separately from SAPOL, any complaint or report about police that raises an issue of corruption, misconduct or maladministration in public administration;
- SAPOL should be able to resolve most complaints and reports at a local management level, without the need for formal investigation;
- An independent body should be empowered to audit and comment upon the imposition of disciplinary sanctions by the Police Commissioner in matters of proven misconduct (without identifying individuals the subject of sanction); and
- An independent body should assist in the identification of trends and areas of concern within policing and assist SAPOL in the delivery of targeted training and intervention.

I will deal with each of these requirements in turn.

ASSESSMENT OF COMPLAINTS AND REPORTS ABOUT POLICE

At present, a member of the public can make a complaint about police directly to police, to the Police Ombudsman or to the OPI. Where a complaint is made directly to police, the Police Ombudsman must be notified. Where a complaint is made directly to the Police Ombudsman, the Police Commissioner must be notified. Where the complaint raises a potential issue of corruption or serious or systemic misconduct or maladministration in public administration, the Police Ombudsman must report the matter to the OPI. Where the OPI receives a complaint about police, the matter is assessed and the ICAC determines whether to investigate the matter or refer it to the Police Ombudsman or the Police Commissioner.

Where a report is made to the Police Commissioner in accordance with section 38 of the Police Act, the Police Commissioner is obliged to notify the Police Ombudsman of the report, although historically the Police Commissioner and the Police Ombudsman have taken the view that such reports fall outside of the jurisdiction of the Police Ombudsman. Again, if the report raises a potential issue of corruption in public administration, or serious or system misconduct or maladministration in public administration, the matter must be reported to the OPI.

As can be seen, the process for the receipt and assessment of complaints and reports is complex. One complaint or report might result in separate assessments conducted by three different agencies. The scheme requires the agencies to report to each other at a number of levels. Different agencies may take different views as to what action should be taken.

Delay inevitably ensues and sometimes confusion occurs.

The process must be streamlined. A member of the public should be able to complain about police to the OPI or directly to the police. The existing obligation on police to report misconduct to the Police Commissioner should remain. However, that requirement should be made more flexible by permitting the officer to discharge his or her reporting obligation by making the report to the OPI instead of the Police Commissioner, where that is the officer's preference. A public officer (other than a police officer) should continue to report matters concerning police to the OPI.

However, the scheme should be structured to avoid duplication in assessment and unnecessary notifications.

Such consequences can be avoided by investing in one agency the primary responsibility for the assessment of complaints and reports about police and requiring the other receiving agency to refer, with due expediency, complaints and reports received.

There are two options. First, require that all complaints and reports about police be assessed by the OPI. Alternatively, invest that function within SAPOL. The function should not be shared or duplicated.

In my opinion, the responsibility for assessing matters should rest with SAPOL, but be subject to audit and direction by the OPI.

I have observed, first hand, the process of assessment undertaken by the IIS and I have been impressed by the process undertaken. The timely intervention to correct unacceptable behaviour is key to effective management. By investing in SAPOL the obligation to assess complaints and reports, the capacity for SAPOL to intervene and act in relation to the conduct of its own officers is enhanced.

I am satisfied that the police can properly assess a complaint or report to determine the most appropriate action to be taken. In order to do so, the statutory requirement that the Police Commissioner constitute the IIS should continue.

RECOMMENDATION #4: **SAPOL should have the primary responsibility for the assessment of complaints and reports about police.**

Nevertheless, the process must be subject to scrutiny because the proposal is for police to assess the conduct of police.

First, certain complaints and reports should only be assessed by the OPI. A complaint or report about the conduct of a member of the IIS or the conduct of a police officer of or above the rank of Superintendent must be assessed by the OPI. Doing so removes any perceived or actual conflict that might arise where the matter involves a member of the IIS or an officer of higher rank than the Officer in Charge of IIS. Further, the OPI should be empowered to assess a matter where a complainant or reporter satisfies the OPI that the nature and circumstances of the complaint or report justify an assessment by the OPI instead of by SAPOL.

Only in those circumstances would a complaint or report be assessed by the OPI. In all other cases (the vast majority), the complaint or report would be assessed by SAPOL. Complaints and reports originally received by the OPI would be triaged and referred directly to SAPOL. Complaints and reports received by SAPOL would not need to be reported to anyone, but only if the next suggestion is agreed.

Secondly, the OPI must be given full and unfettered access to the database system in which SAPOL records and manages complaints and reports about police and the investigation and resolution of those complaints and reports. At present, SAPOL uses a professional standards software system that is also used by the Western Australia Police, Northern Territory Police and Tasmania Police. I have seen the system in operation within SAPOL. The system is only available to staff within the Ethical and Professional Standards Branch of SAPOL. A user with unrestricted access to the system can monitor the way in which matters are assessed, investigated and resolved.

Unrestricted access to that system must be given to the OPI. In turn, the OPI would have the responsibility of monitoring and auditing assessments, investigations and the resolution of complaints and reports about police. Unrestricted access renders the requirement to report matters to the OPI unnecessary, because the OPI will have access to and oversight of everything directly through the system.

However, the capacity to monitor SAPOL's management of complaints and reports is, of itself, insufficient to ensure proper and robust independent oversight. The OPI must be empowered to intervene where, in its opinion, SAPOL is not dealing with a matter appropriately.

Accordingly, the OPI should be empowered to issue a direction to SAPOL in relation to an assessment or investigation. That direction should be final and not subject to a formal disagreement mechanism. The final decision must stop with the independent overseer. However, such a direction should only be issued after consultation with SAPOL. There may be good reason for SAPOL adopting a particular course of action that may not be immediately apparent by reference to the system. A process of consultation might also absolve the need to issue a direction. However, the power to issue a direction is, in my view, a key tenet of the process of independent oversight. It is critical to ensuring public confidence in the management of complaints and reports about police.

Thirdly, there should be the power for an independent body to intervene and assume conduct of an investigation into alleged misconduct or maladministration within police. While I have suggested that SAPOL retain the primary responsibility for the investigation of alleged breaches of discipline, it is critical that an independent body retain the authority to either carry out an investigation or intervene and take over an investigation. The existing scheme empowers both the Police Ombudsman and the ICAC to investigate such matters.

I have recommended that the Police Ombudsman should be abolished and that the OPI assume the responsibility for oversight of SAPOL's management of complaints and reports about police. Of course, the OPI does not have investigators. The ICAC has a team of investigators and lawyers equipped to conduct investigations into corruption, misconduct or maladministration in public administration.

In my opinion, the ICAC should continue to have the power to investigate misconduct or maladministration within SAPOL. Matters of a very serious or systemic nature would be brought to the ICAC's attention by the OPI at which point the ICAC would determine whether it is appropriate in all of the circumstances to either conduct the investigation or to intervene in an existing SAPOL investigation to assume conduct of it.

I do not envisage this power would be exercised often but only where necessary. It is an important power to have in order for there to be an alternative mechanism for the investigation of misconduct or maladministration within SAPOL where the circumstances are such that the matter should be investigated independently. It will reassure the public that such matters are capable of being, and will be, investigated independently of police.

To ensure consistency in investigations, the powers given to the ICAC to undertake such investigations should be the same as those available to investigators within SAPOL who are tasked to investigate misconduct. This would preserve the existing arrangement in the ICAC Act whereby I can investigate police misconduct or maladministration, albeit by exercising the powers of the Police Ombudsman.

Such intervention would arise where the circumstances were such that it was appropriate that a body other than SAPOL investigate the matter.

I have done so on occasion where I have considered it appropriate in all of the circumstances to do so. It is not a common event. Nevertheless, it is a power that should remain.

In my opinion, this scheme will improve efficiency, resolve existing duplication of effort, clarify roles and responsibilities as between agencies and enhance the level of oversight given to complaints and reports about police, irrespective of who made the complaint or report, or to whom the report was made.

I have already considered the debate regarding the role of police investigating police and have expressed my views.

In my opinion, the factors operating against the scheme whereby police are responsible for the investigation of police can be cured by the oversight model that I have proposed in this report.

RECOMMENDATION #5: **The ICAC should be empowered to investigate, or to assume the conduct of an investigation of, misconduct or maladministration in public administration, using the same powers as those available to SAPOL investigators tasked with investigating misconduct.**

RECOMMENDATION #6: **The OPI should be empowered to assess complaints and reports where:**

1. **the conduct complained of involves a member of the Internal Investigation Section; or**
2. **the conduct complained of involves an officer of or above the rank of Superintendent; or**
3. **in all of the circumstances the OPI considers it appropriate to assess the matter.**

RECOMMENDATION #7: **The OPI should be given full and unfettered access to the police complaints management system used by SAPOL and to any other system used for the purposes of assisting in the assessment of a complaint or report about police.**

RECOMMENDATION #8: **The OPI should be able to audit and review the manner in which SAPOL deals with complaints and reports about police.**

RECOMMENDATION #9: **The OPI should be empowered to issue a direction to SAPOL in relation to the assessment of a complaint or report, after consulting with SAPOL on the matter.**

RECOMMENDATION #10: **SAPOL should continue to have the primary responsibility for the investigation and resolution of complaints and reports about police.**

RECOMMENDATION #11: **The OPI should be empowered to issue a direction to SAPOL in relation to an investigation of a complaint or report, after consulting with SAPOL on the matter.**

RESOLUTION OF COMPLAINTS AND REPORTS ABOUT POLICE

I have already canvassed the current options open to SAPOL and to the Police Ombudsman to resolve complaints and reports. The mechanisms should change. The resolution of matters involving low level conduct issues should be dealt with by providing a less formal and therefore more efficient method of resolution. More serious allegations of misconduct should be addressed with the formality that presently exists. The oversight body should be empowered to issue directions in relation to all matters, but it should have a particular focus on overseeing the investigation and resolution of more serious allegations. An oversight body should be able to intervene and investigate a matter where it is considered appropriate to do so.

I turn now to deal in more detail with the precise mechanisms that I propose to resolve complaints and reports about police.

Management Resolution

The existing system for the resolution of low level matters is far too formal, inflexible and inefficient. The majority of complaints and reports relate to conduct that involves poor behaviour, poor service delivery or minor management issues. Those matters should be capable of being resolved quickly, in order to correct errant behaviour, educate the particular officer and to inform a complainant.

In my opinion, these matters should be resolved at the local level, so as to ensure that local managers take full responsibility for the conduct of their staff, and to ensure that local managers have broad knowledge of complaints and reports made in their area of responsibility. Such expectation is not inconsistent with expectations in other work environments.

I will call this process ‘management resolution’.

The various jurisdictions to which I have referred have different methods for determining whether a matter should be the subject of a full misconduct investigation or whether the matter is capable of resolution through less formal means.

In recommending the appropriate process, I have considered the literature and drawn particularly from the police complaints system that applies in the AFP and in the United Kingdom.

Conduct involving poor behaviour, customer service, service delivery and minor management issues or low level unsatisfactory performance should be capable of speedy resolution. Such resolution should harmonise with performance management processes in place within SAPOL.

The test to determine whether or not the conduct alleged in a complaint or report should be dealt with by way of management resolution should involve a consideration of the consequences of the conduct if accepted or established. In other words, management resolution should be the appropriate mechanism for dealing with conduct that, even if proved, would not warrant termination, suspension, demotion or other serious consequences.

Most complaints and reports allege conduct that would not result in such an outcome. Such matters should be dealt with managerially.

Management resolution should not involve a formal investigation. At most, an investigation should only extend so far as is necessary to achieve the primary objective of management resolution, being to correct behaviour, educate and inform.

Importantly, for management resolution to be accepted as a mechanism to educate and inform, and not to punish, there must be a limitation on how management resolution outcomes can be used.

Under my proposal, the outcomes of management resolutions will be recorded on the SAPOL complaints management system, but the outcomes will not be available for consideration in relation to a merits process. For example, the issue of a medal, promotion or award will not be influenced by the outcome of a management resolution unless the officer has not corrected his or her behaviour and/or continues to behave in a manner that is inconsistent with the conduct expected of a police officer.

Accordingly, where an officer's conduct represents a pattern of unsatisfactory performance or conduct that has previously been the subject of management resolution on three or more occasions in the previous 2 years **and** the officer cannot satisfy the Police Commissioner that the management resolution outcome should not be taken into consideration for the purposes of a merits process, then the conduct that has given rise to the management resolution can be considered in that process. This would include the unsatisfactory performance mechanism already provided for in section 46 of the Police Act.

This process, in my view, meets an appropriate balance between fairness for the officer concerned and an appropriate system to deal with, and to discourage repetition of, conduct that does not meet the standard expected of a police officer. Where such unsatisfactory behaviour persists, the Police Commissioner can deal with the matter to the point of terminating the officer's employment utilising section 46 of the Police Act.

The process for management resolution should rest with SAPOL. It should be flexible. The primary objective for management resolution should be to correct behaviour, educate and inform. Management resolution should not be considered as a punishment but a management tool to assist SAPOL to manage and improve police.

Where there has been a complaint, the complainant must be involved. One of the most common causes of dissatisfaction amongst complainants is that they do not feel that their complaint is treated seriously and that they are not kept informed as to the action taken as a result of their complaint. Accordingly, a fundamental requirement in the management resolution process is that the complainant is fully informed of the steps taken to deal with his or her complaint. That means that the complainant should be advised at the outset if the matter is to be addressed by way of managerial resolution of that process. Complainants should not be allowed to have expectations that cannot be realised. That is bound to lead to complainant dissatisfaction.

Under existing legislation, a complaint may be resolved by conciliation. The ability to resolve a complaint or report by way of conciliation should remain, but rather than a separate mechanism, it should be an available option within the management resolution process, thereby acting as a catalyst to achieving both complainant satisfaction and the primary objective of correcting behaviour and educating the police officer.

RECOMMENDATION #12: **The new Police Complaints Act should provide for a process of management resolution of complaints and reports in accordance with the terms set out in this report.**

Breach of Discipline

Formal investigation of misconduct should be preserved for serious allegations where the nature of the conduct could, if proved, warrant termination, suspension, demotion or other serious consequences. If the result mentioned is a possible consequence if the complaint or report were proved the complaint or report must be addressed in a manner consistent with its gravity. That requires a careful and thorough investigation with, if necessary, a formal hearing process. However, it must always be remembered that what is being investigated is alleged misconduct, not a crime.

RECOMMENDATION #13: **The new Police Complaints Act should provide for the investigation of breaches of discipline in accordance with the terms set out in this report.**

Because it is not a consideration of criminal conduct the statutory mechanism for dealing with serious misconduct should not import words ordinarily preserved for the criminal law. For example, under the current statutory scheme an officer is 'charged' with a breach of discipline. The charge is recorded on a 'complaint' which is filed in the PDT. The officer may plead 'guilty' or 'not-guilty' to the charge.

I propose that the language that is to be used would be consistent with language generally used in a disciplinary process. That is, allegations will be made, rather than charges laid. The allegations and their particulars would be recorded on a notice, not a complaint. The officer the subject of the allegations would admit or deny the allegations, rather than plead guilty or not-guilty to the charges.

Where an officer admits the allegations, then the matter would proceed to the imposition of sanction. Where the officer denies the allegations, the allegations must be determined in light of the investigation undertaken and having regard to the gravity of the allegations. If the allegations are proved, the matter would proceed to the imposition of sanction.

In the case of allegations that are denied, the question is: who should determine the allegations? In the event that the allegations are admitted or proved the question is: who should impose the sanction?

Determination of Allegations and Imposition of Sanction

Under the present system, where a police officer pleads not guilty to a charge of breach of discipline, the matter is heard and determined by the PDT, constituted by a magistrate. Where the PDT finds the officer guilty of a breach of discipline, or where the officer pleads guilty to the charge, the matter is referred to the Police Commissioner for the imposition of sanction.

The range of sanctions that can be imposed by the Police Commissioner are provided for in section 40 of the Police Act.

An officer can appeal the findings of the PDT or the sanction imposed by the Police Commissioner to the Administrative and Disciplinary Division of the District Court.[82]

82 *Police (Complaints and Disciplinary Proceedings) Act 1985* (SA) s 46.

In his written submission, the Acting Police Ombudsman proposes that the PDT be replaced by a differently constituted tribunal operating within the South Australian Civil and Administrative Tribunal ('SACAT'). He proposed that that Tribunal be responsible for the determination of allegations and the imposition of sanction. He said:

> *[t]he system whereby the police Commissioner imposes a disciplinary sanction should be scrapped along with the PDT. I am aware of previous arguments for the existence of a specialist tribunal, such as the PDT, to hear charges against the police. The argument is that the police are a "special" case, in that they face unique circumstances and pressures. The argument is that the police need a tribunal which will be aware of those "special" if not unique circumstances and make judgments which take those factors into account. In my view the police are no more "special" than doctors, nurses, dentists, psychologists and lawyers, who face all kinds of different pressures in practising their professions, but who are all accountable to a disciplinary tribunal. Such tribunals commonly have the ultimate power to "strike off" the person before it if the conduct charged is proved on the balance of probabilities.*
>
> *I propose that the PDT should be replaced with a differently constituted tribunal ("the Police Tribunal") operating within the South Australian Civil and Administrative Tribunal (the 'SACAT') and exercising the original jurisdiction of the SACAT.*
>
> *The Police Tribunal would be made up of three members – a person nominated by the police Commissioner, a legal practitioner and a lay member. A tribunal made up in this way would be similar to the make up of tribunals which are set up to hear disciplinary proceedings against doctors, nurses, dentists, psychologists etc. in that the tribunal will have a member of the same profession as the respondent to the proceedings, along with a lay member and a person with legal expertise (such as a regularly appointed SACAT member).*
>
> *The Police Tribunal would hear a charge whether the charge is admitted or contested and having assessed its seriousness (taking into account the experience of a police officer, a legal practitioner and a member of the public) would then impose a disciplinary sanction.*

PASA opposes the abolition of the PDT. In its written submission, which it repeated during public hearings, PASA said:

> *[w]hen a police officer faces significant penalties – including potential termination, suspension, demotion and other long-term financial penalties – the assurance of a fair evidentiary hearing before a properly specialized independent magistrate is a system which should without question remain.*

PASA annexed to its written submission a document prepared by Marie Shaw QC. In that document, Ms Shaw raises a number of reasons in support of maintaining the status quo, and sets out why, in her view, the SACAT is not an appropriate venue for the determination of allegations of misconduct against police officers. Ms Shaw said:

> *[t]he first point of difference between the PDT and other existing administrative bodies is that the PDT is not a body in respect of which citizens are a party or where rights of citizens are sought to be asserted. Rather, its role is to adjudicate upon complaints that come before it under the Police (Complaints and Disciplinary Proceedings) Act 1985 ("the Act") and to determine whether a police officer has breached the Act or the Police Act 1998. This means that many of the concerns that are said to be the reason for the absorption of the bodies into the new SACAT do not apply to the PDT.*

That is, the PDT is not a body in respect of which accessibility of special needs impacting on accessibility are relevant. In that respect, quite properly, any and every complaint against police is the subject of investigation and may or may not result in the need for a hearing. In the same way, there is no issue about cost effectiveness or procedural complexities. Police officers are well trained in the processes and are not prejudiced in that respect. Another citizen who needs to grapple with the process does not control the case against a police officer.

Indeed, such is the importance of allegations against police in so far as the potential impact on a career is concerned, and such is the range of complaints that can be made, it must be prudent to maintain a serious approach to the conduct of proceedings. There is no issue of a need for greater flexibility about the way the PDT conducts its business. Police officers are regarded as professional witnesses and by occupation, are required to act with due formality adhering to a hierarchical structure at all times such that a level of informality is simply not appropriate. Their role is too serious. Any allegation and its impact on their career and the standing of police must remain a matter of utmost seriousness.

In so far as the goal of the establishment of the new SACAT is to address the inconsistency of structure and process that currently exists amongst administrative bodies, this does not apply to police and the PDT. Disciplinary proceedings against police are simply not comparable to the function of any other administrative body.

I asked the Courts Administration Authority to provide me some statistics on the number of matters brought before the PDT since 2011. I received the following statistics:

Lodgements	2011	2012	2013	2014
Number of Complaints Filed	56	71	29	20
Number of Appeals to District Court	2	0	1	0

Finalisations	2011	2012	2013	2014
Number of Guilty Pleas	16	20	19	10
Number of Matters Withdrawn	37	46	19	18
Number of Trials	2	2	3	0

As can be seen, in the four years between 2011 and 2014 the PDT tried only seven complaints. In 2011 and 2012 there were substantially more complaints filed in the PDT than in 2013 and 2014. In both those years more than twice as many matters were withdrawn than were the subject of a guilty plea. In 2013 and 2014 with reduced filings there was a commensurate reduction in matters withdrawn.

SAPOL has indicated that, in its view, these changes are attributable to a change in approach to the assessment and adjudication of matters which now has more emphasis on diverting matters into the Minor Misconduct Informal Inquiry pathway where it is appropriate to do so. SAPOL has advised me that this change of focus is supported by its own statistics that indicate an upward trend in the number of informal inquiries undertaken since 2012.

Two things may be deduced from these statistics. First, the number of matters that ultimately go to trial in the PDT is small. Secondly, there has been a significant decrease in the filings in the PDT in the last two years.

It is my understanding that delays in the resolution of disciplinary matters are generally not the product of the PDT process, but the process leading up to the institution of proceedings in the PDT.

With all of these considerations in mind, I am of the view that a change to the process and forum for hearing allegations of breaches of discipline should only be recommended if good reasons exist. Similarly, taking the power to impose sanctions from the Police Commissioner and giving it to another person or body should only be considered where there is good reason.

I have considered this matter in detail and my views have changed during the course of these reviews.

In the end I am not minded to recommend a change to the status quo without continuing to monitor the manner in which the present system works. Over the course of three years after these recommendations become law the PDT should be monitored to determine whether its processes and procedures, including reliance on the rules of evidence, are best suited for the resolution of complaints and reports of the kind that would be within its jurisdiction.

I accept that the PDT, as it is presently constructed, operates effectively. There does not seem to be significant delay created by the processes adopted by the PDT. The delay appears to be in the steps leading to the laying of charges in the PDT.

While I still have some reservations about the need for a full hearing of allegations of misconduct in which the rules of evidence apply, I accept that there is some force in PASA's submission on the topic. Police can be subject to investigation using extensive powers under the P (CDP) Act, including the power to require an officer to answer all questions and the power to discipline an officer who chooses to exercise his or her right to claim the privilege against self-incrimination. The nature of policing invites complaints. False complaints are made by persons who wish to disguise or minimise their own criminality. That unfortunately is often an inevitable consequence of a police officer doing his or her duty.

Initially I was attracted to bringing police disciplinary matters within the SACAT. The SACAT has, in part, been established to centralise the resolution of disciplinary matters across a range of disciplines. It makes economic sense to bring individual disciplinary tribunals, including the PDT, within the SACAT, albeit tailored in a way that retains the confidentiality of hearings and ensures that those presiding over the hearings have sufficient expertise and legal acumen to provide a fair and impartial hearing. However, the submissions I have received and my observations of the system in operation have not suggested to me that such a move is presently necessary.

Accordingly, subject to changes in language to which I have referred, I propose that the jurisdiction for the hearing of allegations of breaches of discipline be retained by the PDT, but that further consideration be given to the transition of disciplinary hearings and appeals to the SACAT.

RECOMMENDATION #14: **Those parts of the *Police (Complaints and Disciplinary Proceedings) Act 1985* that deal with the process for hearing contested allegations of a breach of discipline should be included in the new Police Complaints Act, subject to such modifications as have been proposed in this report and as necessary to ensure consistency with these recommendations.**

Having considered all of the information provided during the course of these reviews, and in light of my observations as the ICAC since September 2013, I do not consider there is any good reason to divest the Police Commissioner of the power to impose sanctions upon his or her own staff. Indeed in my opinion there is good reason to continue to provide the Police Commissioner with that power.

The Police Commissioner is the chief executive of the police force. Section 6 of the Police Act provides that the Police Commissioner is responsible for the control and management of SAPOL. In order to discharge that responsibility, the Police Commissioner must have the power to take such action as he or she considers necessary in order to maintain discipline and control. Divesting the Police Commissioner of the power to impose a sanction following a finding of misconduct is antithetical to the responsibility imposed upon the Commissioner under section 6 of the Police Act.

However, the existing system for the resolution of complaints and reports about police provides no mechanism for the oversight of the sanctions imposed. The Police Ombudsman has no part to play in overseeing the Police Commissioner's exercise of the power to impose sanctions, save that the Police Ombudsman is notified of the outcome.

There should be a mechanism by which an independent body can scrutinise the sanctions imposed by the Police Commissioner, but in a way that does not directly impinge upon the Commissioner's discretion in exercising that power.

Accordingly, I propose that the ICAC be empowered to conduct an audit of all sanctions imposed by the Police Commissioner on a yearly basis, and report to both Houses of Parliament in relation to that audit.

That power will achieve a number of objectives. First, it will give the public confidence that an independent body is reviewing and forming a view on the appropriateness of disciplinary sanctions imposed upon police officers. Secondly, it will provide some transparency, in that the report would provide an insight into the types of matters that resulted in sanction and the nature of the sanctions imposed, but without identifying the officer(s) involved. Thirdly, it will act as an incentive to ensure the propriety of the process is maintained. Fourthly, it is likely to lead to consistency in sanctions because it will be known that the sanctions will be considered by an independent body. Fifthly and importantly it will provide Parliament with information about the sanctions imposed on police officers by the Police Commissioner.

Finally, these objectives will be achieved while preserving for the Police Commissioner, as the person responsible for the control and management of the police force, the sole decision making power in relation to sanction.

RECOMMENDATION #15: **The ICAC should be empowered to audit, on a yearly basis, disciplinary sanctions imposed by the Police Commissioner and to provide a report to both Houses of Parliament regarding that audit.**

TREND ANALYSIS AND TRAINING

A key requirement of a police integrity system is the capacity to obtain information through complaints and reports and analyse that information and make use of it if necessary to consider changes within policing generally or police complaints or reports particularly. The use to be made of that information should extend beyond the resolution of an individual complaint or report.

Complaints and reports are an invaluable source of data which can be used to identify trends, weaknesses in procedure or training, or locations of consistent misbehaviour. The information can be used to direct proactive intervention, training recommendations and specific areas of audit focus. The value of having that information cannot be underestimated.

The OPI should be empowered to make use of statistical data obtained through complaints and reports to identify and act on trends and issues arising in particular complaints or reports, or in a number of complaints or reports, including the power to make recommendations to SAPOL concerning training, changes in policy or procedure or other proactive interventions. This power would contribute to and complement the ICAC's education function. Similarly, the OPI should be empowered to identify to the ICAC issues of specific concern arising from such analysis, which might ultimately result in a report being tabled in both Houses of Parliament in accordance with section 42 of the ICAC Act.

RECOMMENDATION #16: **The OPI should be empowered to make use of statistical data obtained through complaints and reports to identify and act on trends and issues arising in particular complaints or reports, or in a number of complaints or reports, and to make recommendations to SAPOL concerning training, changes in policy or procedure or other proactive interventions.**

RECOMMENDATION #17: **The OPI should be empowered to identify to the ICAC issues of specific concern arising from the analysis proposed in Recommendation #16, which might ultimately result in a report being provided to both Houses of Parliament in accordance with section 42 of the ICAC Act.**

COMPLAINANT INVOLVEMENT

Agencies should look upon complaints as a valuable source of information about performance which can be used to identify poor, inappropriate or unacceptable behaviour. The information can be used for training or education. In an intelligence led environment, all complaints (even those where no action is taken) can assist in identifying trends, enabling proactive intervention and de-escalation of the issues that might invite unacceptable behaviour.

Of course, complaints will not be received unless complainants are willing to come forward.

Complainants must be empowered to make complaints through an accessible and effective complaints system and because they must be satisfied that their complaints are being treated seriously they must be engaged wherever practicable in the resolution process and kept informed at all stages.

Community confidence in the system will be enhanced where these objectives are met.

It is inevitable that some complainants will be dissatisfied with any action taken. Some will be dissatisfied because a decision is made not to take action in relation to their complaint. Others will be dissatisfied with SAPOL dealing with their complaint by management resolution. No system will be effective in meeting the expectations of every complainant. But a system that treats all complaints seriously and keeps the complainant informed as to the action taken (or not taken) and the reasons, is more likely to result in higher levels of complainant satisfaction.

In exceptional circumstances, the degree to which a complainant is involved in the process may be enhanced by permitting the complainant to observe the disciplinary process.

Julie Wilson discussed her personal experiences with the police complaints system when she appeared before me at the public hearings. Ms Wilson's son, Christopher Wilson, died on 28 February 2004 after being shot the previous day. A person is now serving a period of imprisonment after pleading guilty to the murder. Tragically, Ms Wilson's other son, Mark, took his own life in 2012.

Disciplinary action was brought against at least one officer in relation to events leading up to Christopher Wilson's murder. In her submission to me, Ms Wilson spoke of the frustration she encountered in not being permitted to attend and hear the proceedings before the PDT, despite being nominated to attend by the then Police Complaints Authority in accordance with the P (CDP) Act.

In my opinion, there may be occasion, probably not often, where a complainant should be permitted to observe the disciplinary process in action. Such occasion might include where the conduct complained of has allegedly resulted in death or serious injury and where the complainant cannot offer direct evidence and, therefore, not be directly involved in the disciplinary process. In those circumstances, the OPI should be able to recommend to the PDT that the complainant be permitted to observe the disciplinary proceedings, but the PDT would always retain the discretion to exclude the complainant if satisfied that it is appropriate to do so.

RECOMMENDATION #18: **The new Police Complaints Act should maximise the engagement of complainants by:**

1. **maximising accessibility to the complaints process by ensuring complaints can be made in a variety of ways;**
2. **ensuring systems are in place to assist a complainant to make a complaint;**
3. **conciliating complaints that are to be resolved through management resolution where possible; and**
4. **in all cases ensuring a complainant is kept informed of the way in which his or her complaint is dealt with.**

RECOMMENDATION #19: **The OPI should be empowered to nominate a complainant to attend during disciplinary proceedings before the Police Disciplinary Tribunal and for the Police Disciplinary Tribunal to permit that complainant to observe those proceedings unless satisfied that it is not appropriate to do so.**

FREEDOM OF INFORMATION AND AUDIT RESPONSIBILITIES

The Police Ombudsman is the 'relevant review authority' for determinations made by a police officer or the Minister responsible for the administration of SAPOL.[83] In other words, the Police Ombudsman is the external reviewer of determinations made in relation to Freedom of Information ('FOI') requests to SAPOL. Since 2010-2011, the Police Ombudsman has received, on average, 26 applications for external review each year. In the same period, the Police Ombudsman completed, on average, 17 reviews per year.

The Ombudsman is the 'relevant review authority' for the external review of FOI determinations made by all other agencies, including local government and universities. Since 2010-2011, the Ombudsman has received, on average, 150 applications for external review. In the same period, it completed, on average, 152 reviews per year.

In his submission to the reviews, the Ombudsman said that his office could easily take over responsibility for external reviews of SAPOL FOI decisions.

The Ombudsman has obtained considerable expertise in the conduct of external reviews of FOI determinations made by government agencies. Although some might suggest that there are considerations that are particular to SAPOL in FOI matters, all FOI decisions must be made within the parameters of the FOI Act. The FOI Act does not treat SAPOL any differently from any other agency. The Ombudsman has expertise in FOI reviews. It could build the particular knowledge it might need in order to properly review SAPOL FOI determinations.

It seems logical that the Ombudsman be made the external reviewer for all FOI determinations, including those made by SAPOL or the Minister responsible for the administration of SAPOL. Both the Police Commissioner and Acting Police Ombudsman are not opposed to the suggested transfer of responsibility.

RECOMMENDATION #20: **Section 39(1) of the *Freedom of Information Act 1991* should be amended to make the South Australian Ombudsman the external reviewer of all Freedom of Information determinations, including SAPOL Freedom of Information determinations.**

83 *Freedom of Information Act 1991* (SA) s 39(1).

The Police Ombudsman fulfils the role of auditor in relation to the following:

1. *Criminal Law (Forensic Procedures) Act 2007* – Section 57 provides that the Police Ombudsman must conduct an annual audit to monitor compliance with this Act.

2. *Listening and Surveillance Devices Act 1972* – The Police Ombudsman is the SAPOL 'review agency' for the purposes of this Act. Section 6D provides that the Police Ombudsman must, at least once in each six month period, inspect the records of SAPOL to determine compliance with relevant sections of that Act and provide a report to the Minister.

3. *Telecommunications (Interception) Act 2012* - The Police Ombudsman is the SAPOL 'review agency' for the purposes of this Act. Section 5 provides that the Police Ombudsman must, at least once in each six month period, inspect the records of SAPOL to ascertain the extent of compliance with section 3 of that Act and provide a report to the Attorney-General.

In my opinion, the role of auditing SAPOL's compliance with the above legislation should not sit with an agency that has responsibility for the oversight of the management of complaints and reports about police. The roles are fundamentally different. Nor should that auditing role sit with an agency that has, as one of its core functions, the investigation of corruption within SAPOL and the power to investigate such matters by way of a joint investigation with SAPOL. This is particularly the case where that agency has the same powers under the *Listening and Surveillance Devices Act and the Telecommunications (Interception) Act*.

The auditing roles are, in my view, best carried out by someone independent who is legally qualified. Under both the *Listening and Surveillance Devices Act* and the *Telecommunications (Interception) Act*, the ICAC is also subject to six monthly audits. However, in the case of the ICAC, the audits are carried out by a person appointed to the position of 'review agency' by the Governor. At present, that person is the Honourable Kevin Duggan AM QC, a former justice of the Supreme Court of South Australia. It would be appropriate to have the same person carry out the same audits of all the agencies which exercise the same powers.

RECOMMENDATION #21: **The following legislation should be amended to provide that the relevant review and audit functions will be carried out by a suitably qualified person appointed by the Governor:**

1. ***Criminal Law (Forensic Procedures) Act 2007*;**
2. ***Listening and Surveillance Devices Act 1972*; and**
3. ***Telecommunications (Interception) Act 2012*.**

COMPLAINTS AND REPORTS ABOUT PUBLIC ADMINISTRATION

A ONE-STOP-SHOP

You have asked me also to consider whether the making of complaints and reports to the Police Ombudsman, the Ombudsman and the OPI can be consolidated into a one-stop-shop.

I have given this anxious consideration. In the end, while it is possible to make a single agency the only place for the receipt of complaints and reports about public administration, it is not an outcome that I recommend.

A number of submissions have raised the difficulties that might be occasioned by consolidating the complaint and report process into one office. Those difficulties have been expressed in the submission of the Public Law and Policy Research Unit of the University of Adelaide. The authors said:

> *[w]e accept that it would be ideal to have a central body to receive complaints and reports about public administration. This could provide the public with a highly visible point of entry into the system, as well as providing likely efficiency benefits. However, we recognise that each of the bodies that handle complaints (ICAC, the Ombudsman and the Police Ombudsman) has a distinct role and ought to continue to handle the matters that fall within their jurisdiction. Furthermore, even if OPI were made the central body for receiving complaints, members of the public are likely to continue to make complaints to the other bodies. The Ombudsman in particular has a well-deserved, long-standing reputation as a first point of contact for complaints about government conduct. It may be difficult to communicate to members of the public the message that the OPI now performs that role.*
>
> *We foresee two kinds of problems that would arise if OPI were made the only agency that receives complaints, and yet members of the public continued to bring complaints to those agencies.*
>
> *First, people who had genuine complaints about public administration might be deterred from pursuing those complaints. The Discussion Paper notes that OPI was originally intended to implement a 'no wrong number, no wrong door' approach to receiving complaints. As this approach recognises, making a complaint can be an intimidating and confusing process. If a person who makes a complaint to the Ombudsman (for example) is simply told they have complained to the wrong agency and must instead approach OPI, the person may be discouraged from pursuing the complaint at all. This would undermine the entire accountability scheme.*
>
> *Secondly, if a person makes a complaint to the one of the complaints bodies that falls squarely within that body's jurisdiction, that body should be able to receive and investigate that complaint immediately. If, for example, a person complains to the Ombudsman about an administrative act that does involve a member of SAPOL or any suggestion of corruption, it seems unnecessary for the Ombudsman to refuse to receive the complaint but instead to suggest that the complaint be made to the OPI. The complaint would almost inevitably be referred back to the Ombudsman by the OPI. This 'bounce-back' situation would create the kind of delay, duplication and inefficiency this review aims to reduce.*

While it is rarely the case that a complaint would 'bounce back' to the Ombudsman, the remainder of the University of Adelaide submission is persuasive. It is a submission that has, in many respects, been echoed by the Ombudsman.

In the 2013-2014 financial year, the Ombudsman received 10,995 approaches from members of the public. While 68% of those approaches were about matters that fell outside the Ombudsman's jurisdiction, the numbers indicate that many South Australians will contact the Ombudsman with grievances. The Ombudsman deals with most of those matters by referring the caller to an appropriate agency, providing information or advice to a caller or, where the matter is within the Ombudsman's jurisdiction, determining whether to investigate the matter in accordance with the Ombudsman Act. It would not be appropriate to change a scheme that appears to be well understood and well used by the community particularly where difficulties in the present system can be addressed in other ways.

Accordingly, I do not consider it appropriate for the OPI to become the one-stop-shop for the receipt of complaints and reports about public administration, to the exclusion of other existing avenues of complaint.

But that is not the end of the matter.

The Ombudsman has submitted that his office should become the central body for the receipt and assessment of complaints about misconduct and maladministration in public administration. In his written submission the Ombudsman said:

> *[the Ombudsman's office] already has well developed processes and the expertise for both the receipt and assessment of complaints, including early resolution. It is a role already widely accepted by the public. It would only require a relatively straightforward amendment to the Ombudsman Act so as to encompass the broader definitions of maladministration and misconduct currently contained in the ICAC Act. With those amendments, Ombudsman SA would be able to receive and assess the full range of complaints about public administration without major resourcing implications.*
>
> *In the model that I propose, I envisage that OPI would continue to operate to receive complaints about corruption and police misconduct.*

I do not agree with that submission.

First, it calls upon a complainant to distinguish between a matter involving corruption on the one hand and misconduct or maladministration on the other. Experience shows that complainants are often not sufficiently aware of the legal definitions of corruption, misconduct and maladministration in public administration and the nuances that might tend towards the conduct being of one particular type or another. Such delineation between the OPI receiving complaints about corruption and the Ombudsman receiving complaints about misconduct and maladministration would likely result in an increase in cross referrals between the OPI and the Ombudsman. That process would exacerbate the very duplication in assessment and delay that this review seeks to resolve.

Secondly, it misconceives by understating the width of my statutory functions. While my office is styled the Independent Commissioner Against Corruption, the investigation of corruption is not my only statutory function. My other functions include assisting inquiry agencies and public authorities to identify and deal with misconduct and maladministration in public administration; evaluating the practices, policies and procedures of inquiry agencies and public authorities with a view to advancing comprehensive and effective systems for preventing or minimising corruption, misconduct and misadministration in public administration; and conducting or facilitating the conduct of educational programs designed to prevent or minimise corruption, misconduct and maladministration in public administration.

My statutory functions extend well beyond the investigation of corruption in public administration. There is good reason for my office to be empowered to carry out the width of functions given to it, and for those functions to extend beyond matters involving corruption in public administration.

The line between corruption, misconduct and maladministration in public administration is not always clear. Some matters that have come to my attention have raised all three issues. Having a broad understanding of instances of serious or systemic misconduct or maladministration can assist in identifying poor integrity management and the potential for more serious conduct, including corruption, to arise. The knowledge acquired within my office with regards to corruption, misconduct and maladministration assists me in discharging my education and evaluation functions. Indeed, in a number of cases I have decided to investigate a matter where it raises a potential issue of corruption in public administration and to exercise the powers of an inquiry agency to investigate issues of misconduct and/or maladministration in public administration arising out of the same events.

On occasions a matter that has been assessed as raising a potential issue of misconduct and/or maladministration in public administration which has been referred to an inquiry agency or public authority, has been returned because investigation has revealed more serious allegations that raise a potential issue of corruption in public administration. There are clear links between notions of corruption in public administration on the one hand and misconduct and maladministration in public administration on the other.

The ICAC was established to strengthen public administration and to prevent and minimise corruption, misconduct and maladministration in public administration. It makes little sense to preserve those functions but at the same time separate the bodies responsible for the receipt and assessment of matters involving corruption in public administration on the one hand and misconduct or maladministration in public administration on the other hand.

Historically the Ombudsman's function has not been to investigate misconduct unless that misconduct could be categorised as an administrative act. The Ombudsman does not have experience in the investigation of misconduct, although when the ICAC Act was enacted the *Local Government Act 1999* was amended to give the Ombudsman a limited jurisdiction into the conduct of members of local council.

For these reasons I oppose the proposal that the Ombudsman's office be the central body for the receipt and assessment of complaints about misconduct and maladministration in public administration.

In the end, I do not think a one-stop-shop could be effectively created. While there will remain some duplication as between the Ombudsman and the OPI, I do not consider that such duplication is a significant cause for concern. Between 2 September 2013 and 30 April 2015 (a period of 19 months), the Ombudsman reported 25 matters to the OPI in accordance with the Directions and Guidelines. This equates to 1.3 per month. In that same period, I referred 47 matters to the Ombudsman for investigation. That equates to 2.5 per month. Those statistics suggest that any duplication that does arise as between the Ombudsman and the OPI is not significant enough to warrant change in the absence of some other cogent reason.

In my view, the other measures proposed in this report will, if implemented, achieve the desired improvements in the legislative scheme.

Accordingly, I do not propose that the OPI, or any other agency, be made the one-stop-shop for the receipt and assessment of complaints and reports about public administration, to the exclusion of others. To do so would create the difficulties outlined by the University of Adelaide and would likely increase the volume of reports and referrals, resulting in unnecessary delay. Agencies, including the Ombudsman and the OPI, should continue to assist every complainant to ensure that his or her complaint is dealt with appropriately.

INQUIRY AGENCIES

The ICAC Act prescribes a group of agencies as 'inquiry agencies'. Inquiry agencies are defined to be the Ombudsman, the Police Ombudsman, the CPSE or a person declared by regulation to be an inquiry agency. No persons have been so declared.

I can refer matters to an inquiry agency and I can determine whether I am satisfied with the way in which an inquiry agency has dealt with a referral.

I can also exercise the powers of an inquiry agency in relation to a matter assessed as raising a potential issue of misconduct or maladministration in public administration. Where I exercise the powers of the Ombudsman in relation to a matter, I have the powers of a Royal Commission by virtue of section 19 of the Ombudsman Act.

If my other recommendations in this report are adopted, there will be no need for the concept of inquiry agencies under the ICAC Act. From a practical point of view, if the recommendations in this report are adopted I will be able to investigate misconduct and maladministration in public administration without the need to exercise the powers of an inquiry agency; there will be no Police Ombudsman; and the OPI (or I) will be able to refer a matter to the CPSE as an appropriate public authority. The Ombudsman would become the only entity that would operate differently from other public authorities with respect to referrals, and this could be dealt with by statutory provisions that deal expressly with such referrals. The concept of inquiry agencies under the ICAC Act would be rendered unnecessary under the new scheme and the concept should therefore be excised from the ICAC Act.

RECOMMENDATION #22: **Reference to 'Inquiry Agencies' should be removed from the ICAC Act and replaced with statutory provisions dealing expressly with referrals to public authorities and referrals to the Ombudsman.**

OFFICE FOR PUBLIC INTEGRITY

In 2010, the Attorney-General, the Honourable John Rau MP, published a discussion paper entitled 'An Integrated Model: A review of the Public Integrity Institutions in South Australia and an integrated model for the future'. Two recommendations were the establishment of a Public Integrity Office (now known as the Office for Public Integrity) and a Commissioner for Public Integrity (now known as the Independent Commissioner Against Corruption).

It was proposed that the Public Integrity Office would:

> *handle complaints, with a 'no wrong number, no wrong door' approach. There would be a central notification point to which all complaints may be directed.*

It was also proposed that the Public Integrity Office would be empowered to refer complaints to an appropriate agency.

In the second reading speech to the *Independent Commissioner Against Corruption Bill 2012*, the Minister acting for the Attorney-General said:

> *[f]urther the OPI will not be able to resolve complaints or reports about public administration. The OPI will instead act as a clearing house so to speak, referring complaints and reports to existing agencies and authorities for action (where appropriate).*[84]

In its present form the ICAC Act does not empower the OPI with the capability of referring complaints and reports as suggested.

The OPI is limited in its functions to receiving and assessing complaints and reports about public administration. That assessment must be conducted in accordance with section 23 of the ICAC Act. Having assessed a matter, the OPI must make a recommendation to me as to whether and by whom complaints and reports should be investigated.[85] I am not bound by the recommendation.[86]

The present scheme does not allow the OPI to determine the action to be taken. For every complaint or report, that decision rests with me.

84 South Australia, *Parliamentary Debates*, House of Assembly, 2 May 2012, 1357 (The Hon. Tom Kenyon MP).

85 *Independent Commissioner Against Corruption Act 2012* (SA) s 17(c).

86 Ibid s 18(2).

Consideration should be given to amending the ICAC Act to give effect to the original intention that the OPI be a clearinghouse for complaints and reports. Subject to a requirement that matters raising a potential issue of corruption in public administration (and other matters as directed by the ICAC) are brought to the ICAC's attention, the OPI should be empowered to assess and refer complaints and reports about public administration for investigation as appropriate. The OPI should also be empowered to issue directions to the public authority in relation to a referral, including a requirement that the public authority provide a report to the OPI in relation to the manner in which the referral was dealt with.

RECOMMENDATION #23: **The ICAC Act should be amended to empower the OPI to assess and refer matters to a public authority (with directions) or to the Ombudsman.**

REFERRALS TO PUBLIC AUTHORITIES AND THE SOUTH AUSTRALIAN OMBUDSMAN

I have learnt that the public authority responsible for the public officer may not always be the appropriate authority to which a matter should be referred for investigation. For example, there has been occasion where the authority that would have been best placed to investigate a matter would have been SafeWork SA rather than the public authority in which the relevant conduct occurred. There have been other occasions where, in my view, a public authority other than the public authority in which the conduct occurred is in a better position to investigate and resolve the matter. The ICAC Act, as presently drafted, does not permit the flexibility to refer a matter to the most appropriate public authority. Section 24(2) of the ICAC Act provides:

> *[i]f a matter is assessed as raising a potential issue of misconduct or maladministration in public administration, the matter must be dealt with in 1 or more of the following ways:*
>
> *...*
>
> *(b) the matter may be referred to the public authority concerned and, if the Commissioner considers it appropriate, the Commissioner may give directions or guidance to the authority in respect of the matter.*

(my underlining added)

Because of that provision, where I do determine to refer a matter to a public authority (as opposed to an inquiry agency), I must refer the matter to the public authority concerned. I take that language to require me to refer the matter to the public authority responsible for the public officer, as provided for in Schedule 1 of the ICAC Act.

It would be better if the OPI and I were empowered to refer a matter to the most appropriate public authority, even if that public authority is not the public authority responsible for the public officer, the public authority in which the conduct occurred or the public authority whose practices, policies and procedures have resulted in an irregular and unauthorised use of public money or substantial mismanagement of public resources.

RECOMMENDATION #24: **Section 24(2) of the ICAC Act should be amended to permit the referral of a matter assessed as raising a potential issue of misconduct or maladministration in public administration to the most appropriate public authority as determined by the OPI or the ICAC.**

The Ombudsman is an inquiry agency for the purposes of the ICAC Act. I may refer a matter assessed as raising a potential issue of misconduct or maladministration in public administration to the Ombudsman and I may issue directions or guidance with that referral.[87]

87 Ibid ss 24(2)(a), 37(3).

In addition to being able to issue directions or guidance to the Ombudsman in relation to a referral, I must review and assess the manner in which the Ombudsman has dealt with a referral.[88] Where I am dissatisfied, I can express that dissatisfaction ultimately by way of a report tabled in both Houses of Parliament.[89]

The two Ombudsmen in office since the ICAC Act commenced have raised misgivings about those provisions of the ICAC Act that empower me to oversee the manner in which the Ombudsman deals with referrals. The current Ombudsman says that his office has been dealing with complaints about administrative acts for over 40 years and is directly accountable to the Parliament. He says that oversight by me is completely unnecessary and only adds complexity and delay.[90] Similar views were raised by the former Ombudsman.

On my analysis it appears that South Australia is the only jurisdiction in which the Ombudsman is subject to direct oversight by another administrative body in respect of the way in which the Ombudsman deals with matters referred for investigation.

There remains good reason to continue to refer matters to the Ombudsman. The Ombudsman has particular expertise in matters involving, for example, local government. The Ombudsman's jurisdiction in that regard was enlarged by the amendments to the *Local Government Act 1999* on 1 September 2013 to which I have referred. The Ombudsman also has expertise in dealing with the administrative acts of agencies within the Ombudsman's jurisdiction. The ability to refer matters that the Ombudsman has the expertise to deal with should be maintained.

While I consider it appropriate and necessary to continue to oversee the manner in which public authorities deal with referrals, I tend to agree with the Ombudsman that continued oversight of the manner in which the Ombudsman deals with referrals is unnecessary. I have already expressed this view to the Crime and Public Integrity Policy Committee.

In the nearly two years since my office commenced, I have had the opportunity to observe the manner in which the Ombudsman's office operates and the manner in which matters referred have been addressed. I have not seen anything in that time to suggest that continued oversight of the Ombudsman's investigations is warranted.

To avoid any uncertainty about the manner in which referred matters are to be dealt with by the Ombudsman, the ICAC Act should be amended to provide that a matter referred under that Act is deemed to be a complaint under the Ombudsman Act. The Ombudsman would thereby be given jurisdiction to deal with the matter exclusively under the Ombudsman Act.

However, I should remain empowered to examine the practices, policies and procedures of the Ombudsman under section 40 of the ICAC Act.

RECOMMENDATION #25: **The ICAC Act should be amended to remove the power to direct or provide oversight of matters referred to the Ombudsman.**

RECOMMENDATION #26: **The ICAC Act should be amended to provide that a matter referred to the Ombudsman under the ICAC Act is deemed to be a complaint under the *Ombudsman Act 1972*.**

88 Ibid s 37(7).

89 Ibid ss 37(7)-(9)

90 South Australian Ombudsman, above n 81, 3.

INVESTIGATION OF MISCONDUCT AND/OR MALADMINISTRATION

The ICAC Act assumes that matters raising a potential issue of misconduct or maladministration in public administration will be referred to an inquiry agency or a public authority for investigation. However, the ICAC Act does allow me to investigate such matters. The ICAC Act is silent as to when I can decide to investigate misconduct or maladministration as opposed to referring the matter elsewhere for investigation. In practical terms, I have decided to investigate such matters where:

- I am also investigating alleged corruption that is linked to the matter;
- it involves very serious allegations;
- the inquiry agency or public authority has, for a variety of reasons, requested that I conduct the investigation; or
- the circumstances are such that I consider it inappropriate that the public authority investigate the matter.

Where I do decide to investigate a matter of misconduct or maladministration in public administration, I cannot use the investigative powers given to me under the ICAC Act. Those powers are preserved for corruption investigations.

In order to investigate misconduct or maladministration in public administration, I must exercise the powers of an inquiry agency (ie the Ombudsman, the Police Ombudsman or the CPSE). I may only do so after first seeking the views of the inquiry agency as to the exercise of its powers. Having sought the inquiry agency's views, and having decided to exercise the powers of the agency, I have all of the powers of that agency and am bound by any statutory provisions governing the exercise of those powers (subject to such modifications as may be prescribed, or as may be necessary for the purpose).[91]

In my opinion, it is appropriate that the ICAC Act continues to operate on the assumption that matters of misconduct and/or maladministration will be referred elsewhere for investigation. However, I should continue to have the power to investigate misconduct and/or maladministration where I consider it is appropriate to do so and in the kind of circumstances that I have mentioned.

The mechanism by which I conduct such investigations should be simplified, to reduce complexity and confusion occasioned by my exercising another agency's powers.

At present, I may investigate misconduct and/or maladministration in public administration by exercising the powers under the Ombudsman Act. Section 19 of the Ombudsman Act provides that:

> *[f]or the purposes of an investigation the Ombudsman has the powers of a commission as defined in the Royal Commissions Act 1917 and that Act applies as if –*
>
> *(a) the Ombudsman were a commission as so defined; and*
>
> *(b) the subject matter of the investigation were set out in a commission of inquiry issued by the Governor under that Act.*

Accordingly, where I exercise the powers of the Ombudsman to investigate misconduct and/or maladministration in public administration I have the powers of a Royal Commission.

In my opinion, the ICAC Act should be amended to enable me to investigate misconduct and/or maladministration in public administration using the powers of a Royal Commission. A provision in the ICAC Act could be inserted in similar form to section 19 of the Ombudsman Act.

In short, the power to investigate would be retained, the powers of investigation would be retained, but the process would be simpler and more efficient.

91 See *Independent Commissioner Against Corruption Act 2012* (SA) s 36A.

RECOMMENDATION #27: **The ICAC Act should be amended to provide that the ICAC may investigate potential misconduct and/or maladministration and may do so utilising the powers under the *Royal Commissions Act 1917*.**

To ensure that information and evidence obtained during the course of such an investigation can be provided to a public authority for potential disciplinary action, section 36 of the ICAC Act should be amended to make that provision operate whether the investigation undertaken relates to corruption, misconduct or maladministration in public administration.

RECOMMENDATION #28: **Section 36 of the ICAC Act should be amended to have effect whether the investigation relates to corruption in public administration or misconduct and/or maladministration in public administration.**

PUBLICATION OF REPORTS

Section 42 of the ICAC Act provides that:

> *(1) The Commissioner may prepare a report setting out –*
>
> *(a) recommendations, formulated in the course of the performance of the Commissioner's functions, for the amendment or repeal of a law; or*
>
> *(b) other matters arising in the course of the performance of the Commissioner's functions (but not identifying or about a particular matter subject to assessment, investigation or referral under this Act) that the Commissioner considers to be in the public interest to disclose.*
>
> *(2) A copy of the report must be provided to the Attorney-General, the President of the Legislative Council and the Speaker of the House of Assembly.*
>
> *(3) The President of the Legislative Council and the Speaker of the House of Assembly must, on the first sitting day after 28 days (or such shorter number of days as the Attorney-General approves) have passed after receiving a report, lay it before their respective Houses.*
>
> (my underlining added)

The power given to me to make a report to Parliament is quite significantly curtailed by the words contained within sub-section (1). Effectively, I am precluded from reporting to Parliament (and thereby making public) a report addressing matters that have arisen in the discharge of my function of the assessment, investigation or referral of corruption, misconduct and/or maladministration in public administration, although in the case of misconduct and/or maladministration in public administration, I can publish a report under the Ombudsman Act where I exercise the powers of the Ombudsman.

I have already stated publicly that, in my opinion, there are sound reasons for the investigation of corruption, misconduct and/or maladministration to be conducted in private. Experience in the first 18 months of operation show that investigations, if conducted publicly, would likely have been hampered.

The investigation of crime has almost always been undertaken in private. Police do not routinely advise the public of who they are investigating until those investigations have been finalised and a prosecution is launched. Where there is insufficient evidence to continue with an investigation, the subject may never know that he or she was being investigated.

Similarly, investigation of corruption in public administration is, because of the definition of corruption under the ICAC Act, a criminal investigation. Those investigations are carried out with a view to determining whether there is sufficient evidence to warrant a criminal prosecution and, if so, the evidence is provided to the Director of Public Prosecutions for consideration of criminal charges.

It makes sense that such criminal investigations are undertaken in private. A criminal investigation conducted any other way has the potential to prejudice a fair trial, result in the destruction of evidence and hamper the cooperation of witnesses.

Public scrutiny of the conduct of public officers alleged to have engaged in corruption in public administration will occur when the matter is dealt with by the courts.

I may also make a public statement on such investigations where I am satisfied that it is appropriate to do so in the public interest, having had regard to the criteria set out in section 25 of the ICAC Act.

However, the assessment, investigation or referral of a particular matter, or a group of matters, may give rise to issues that should properly be brought to Parliament's attention. I should be able to report to Parliament about such matters. At present, I could only do so in the vaguest of terms in order not to impinge upon the prohibition within section 42.

Similarly, matters of serious misconduct or maladministration that I refer or investigate utilising the powers of an inquiry agency may raise issues that I think should be brought to the attention of Parliament. I could only make such a report where I exercised the powers of an inquiry agency whose empowering Act includes a report making power and the preconditions to the making of that report were satisfied. Section 42 prohibits me from reporting to Parliament on particular matters, even in circumstances where I think it is a serious matter and that it is in the public interest that it be brought to Parliament's attention.

In my opinion, section 42 of the ICAC Act should be amended to remove the restriction on reporting to Parliament about particular matters the subject of assessment, investigation or referral.

If necessary, statutory safeguards extending beyond a public interest test could be identified within section 42 to create preconditions to the reporting about particular matters to Parliament. That would, of course, be a matter for Parliament.

RECOMMENDATION #29: **Section 42 of the ICAC Act should be amended to permit a report to be made to Parliament about a particular matter the subject of assessment, investigation or referral, subject to such preconditions to the exercise of that power as Parliament considers appropriate.**

CONCLUSION

In February 2015 I published a discussion paper regarding these reviews. In that discussion paper I said that:

> *[i]n my view, the reviews present an opportunity to consider the legislative schemes in light of the collective experience of their operation and to propose reforms aimed at making the schemes more efficient, effective, simple and clear.*

I believe the framework proposed in this report will achieve that objective.

Of course, the recommendations proposed in this report are merely the starting point. Should they be accepted, considerable work will be required to produce the detailed legislation to give effect to the proposals. The transition to the new arrangements will not be without complexity. Public officers and the public alike will need to be informed of the changes and their benefits.

My staff and I stand willing to assist in that work.