

Submission by AD Wainwright to the ICAC Review of Legislative Schemes

Introduction

The Police (Complaints & Disciplinary Proceedings) Act 1985 ('PCDP Act') has been in force for nearly 30 years. I held the office of Police Complaints Authority (then so entitled) under the PCDP Act from March 1995 until December 2009. The statutory office is now entitled Police Ombudsman ('PO') and the office the 'OPO'. I will so describe them hereafter.

I make this submission in the hope of assisting this review to achieve workable solutions which give due recognition to the objectives of both the PCDP Act and the Independent Commissioner Against Corruption Act 2012 ('ICAC Act'). For the purpose of this submission I assume that funding will not be increased and that the review aims to best achieve the objectives of both pieces of legislation within that constraint.

In order to make this submission I have familiarised myself with both pieces of legislation as well as the discussion paper. I am aware, albeit apocryphally, of some of the difficulties which have arisen in the administration of the PCDP Act since my retirement. I am conscious that the premature resignation of my successor in the statutory office may deprive this review of the benefit of her views. Be that as it may, the views I express here are my own.

Before addressing some of the specific issues which have prompted this review, I would take a step back and look, first, at the objectives of the PCDP Act and the context within which it operated when first enacted. The context within which the PCDP Act operates now, 30 years on, is vastly different from the context when it was enacted.

The PCDP Act - objectives

The objectives of the PCDP Act are not readily discerned from the Act itself. The long title merely describes some of the mechanisms created by the Act. Reference to the report of the Grieve Committee, whose report preceded the legislation, and to Hansard suggests that the primary objective was to provide (for the first time in SA) a measure of independent oversight of complaints about police and their outcome.

It is clear from these sources, I believe, that the oversight jurisdiction of the (then) PCA was to be invoked by the making of a complaint to the PCA by a member of the public or a police officer. In my view the primary objective of the PCDP Act, then and now, is to provide a system of external oversight for those who wish to have such oversight.

The PCDP Act - context - SAPOL

One of the key linkages in the PCDP Act is that between the OPO and SAPOL. Without wishing to labour history unduly, it is clear that SAPOL has changed enormously and is now a very different organisation than it was in 1985 when the PCDP Act was introduced.

In 1975 SAPOL had not been included within the (newly created) jurisdiction of the Ombudsman and I would suggest that, in 1985, its attitude to external oversight was best described as reluctantly accepting the inevitable. The PCDP Act still reflects that tension as well as reflecting, quite properly, the convention that the Commissioner of Police is not generally subject to direction in operational matters.

In 1985 the corporate response of SAPOL to complaints of misconduct might fairly be described as aiming to minimise and contain them. Complaints were adjudicated against the grounds for discipline in the regulations, the standard of proof for a breach being the criminal standard, beyond reasonable doubt. No adverse finding was equated with there being no problem.

In the intervening 30 years SAPOL has become much more professional in this area. Complaints (which, in my view, will inevitably arise) are now properly evaluated and addressed with the learnings from that process being used to address the issues which give rise to the complaints. Importantly, much effort has gone into empowering and requiring line managers and individual officers to identify, and address at source, misconduct and procedural deficiencies. Notably, the criminal proceedings recently announced by ICAC originated from the complaint of a police whistle-blower, an improbable scenario in past times.

The PCDP Act - context - the ICAC Act

The enactment of the ICAC Act changed significantly the context in which the PCDP Act operates. This review requires me to consider that change and the way in which the objectives of both Acts sit together and might best be harmonised. The primary objects of the ICAC Act are set out in section 3 which provides:-

3—Primary objects

(1) The primary objects of this Act are -

(a) to establish the Independent Commissioner Against Corruption with functions designed to further—

(i) the identification and investigation of corruption in public administration; and

(ii) the prevention or minimisation of corruption, misconduct and maladministration in public administration, including through referral of potential issues, education and evaluation of practices, policies and procedures; and

(b) to establish the Office for Public Integrity to manage complaints about public administration with a view to -

(i) the identification of corruption, misconduct and maladministration in public administration; and

(ii) ensuring that complaints about public administration are dealt with by the most appropriate person or body; and

(c) to achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person's reputation (recognising that the balance may be weighted differently in relation to corruption in public administration as compared to misconduct or maladministration in public administration).

(2) While the Commissioner may perform functions under this Act in relation to any potential issue of corruption, misconduct or maladministration in public administration, it is intended that the primary object of the Commissioner be—

(a) to investigate serious or systemic corruption in public administration; and

(b) to refer serious or systemic misconduct or maladministration in public administration to the relevant body, giving directions or guidance to the body or exercising the powers of the body as the Commissioner considers appropriate.

At the risk of detracting from those objects by paraphrasing them, it seems to me that the primary concerns of the ICAC Act are to address serious or systemic corruption, to prevent or minimise corruption, misconduct and maladministration in public administration and to manage complaints about public administration. The Act envisages that others will, in most cases, deal with those complaints.

Issues raised by this review

While I have not overlooked the specific questions posed in the discussion paper, I would prefer to approach the issues they raise from the perspective of the police complaints system, suggesting ways in which it might be simplified and which also meet the objects of the ICAC Act. I will adopt a sequential approach and begin with the complaint.

Complaints and multiple entry points.

The present legislative arrangements maximise the opportunity for making a complaint which may be made to SAPOL, the OPO and to OPI. In practice this is supplemented by police placing a complaint form into the property of a person taken into custody, whether or not they have expressed a desire to complain. My experience is that complainants will avail themselves of all or any of these options.

In my view this approach is correct. From a public policy perspective, it is better to capture the complaint and address it than to risk not having it. If there is an issue it can be dealt with and, if not, a clear account of the matter will have been obtained so that the matter can be properly explained when it is raised with the complainant's MP or other representative. Multiple entry points maximise the likelihood of capturing a complaint.

Complaints made to SAPOL by police officers who do not wish to invoke the jurisdiction of the OPO.

A police officer who wishes to invoke the jurisdiction of the OPO is able to do so by complaining to the OPO.

It was my view that a police officer who on her/his own account wished, or was bound, to report misconduct internally within SA Police ('SAPOL') did not thereby invoke the jurisdiction of the OPO. The PCDP Act enables such an officer to make the same complaint to the OPO **if they so choose** and, clearly, such a complaint invokes the oversight jurisdiction. I understand that the contrary opinion is now held and that all internal complaints are believed to fall under the PCDP Act.

It makes very little sense, in my view, to provide oversight for somebody who does not wish to have it. It merely diverts valuable resources from the task of providing oversight for those who **do** want it and contributes to the present difficulties in the OPO. If the PCDP Act achieves that result, it should be amended.

Managing the overlap.

The issue, I think, is how to provide ICAC with the complaints it wishes to address and, while so doing, expedite the handling of the remainder of the complaints by OPO or SAPOL. It is common ground that complaints should be finalised both satisfactorily and in the shortest time possible. While there will often be a tension between these two objects, it is desirable to streamline the process as far as possible.

While I am not familiar with the present practice, I would suggest the following principles:-

Complaints which, **on their face**, allege corruption (or any other type of conduct ICAC wishes to deal with itself) should be referred to OPI at the outset.

Complaints which, **while being handled by SAPOL or OPO**, disclose corruption (or any other type of conduct ICAC wishes to deal with itself) should be referred to OPI at the time of disclosure.

The remainder of complaints should be retained by, or referred directly to, OPO or SAPOL to be dealt with under the PCDP Act. In most cases these complaints are unlikely to require further oversight by ICAC and could simply be referred to OPO or SAPOL to be dealt with.

Should these arrangements miscarry, the existence of ICAC now provides an avenue of review for a complainant who remains concerned that a complaint has not been properly addressed by either SAPOL or OPO.

In my experience the vast majority of complaints dealt with by OPO are unlikely to be of any interest or concern to OPI and should require no further direction. I consider now how best to handle those complaints.

Handling complaints by SAPOL and OPO.

The striking feature of the PCDP Act when compared to the Ombudsman Act (with which it has much in common) is the ability of the PO to give directions and to make recommendations binding on the Commissioner of Police ('COP'). That ability is variously constrained by requirements to consult and obtain agreement.

I suggest that the origin of that structure reflects the state of affairs as they were in 1985 and the constraints I have previously described. My own experience is that a simple request and conversation was always able to achieve a meeting of minds. In nearly 15 years in office, I never sought a ministerial direction, nor did I need to do so.

The only significant need for formality occurred in cases which had been fully investigated and which required assessment by the PO and/or the making of recommendations. In cases of disagreement by the COP, the PCDP Act requires the PO and the COP to confer in order to reach agreement on the proper recommendation. The rationale for the process is that COP is obliged to implement a recommendation once it has been agreed. I concur in the observation (discussion paper, page 10) that this process can give rise to the perception that the independence of PO is undermined.

Need for change.

The PCDP Act is a patchwork quilt and is no longer fit for purpose. The time has come to devise a system which is so fit and which supports the reality that the primary responsibility for its own corporate integrity lies with SAPOL.

I suggest redesigning the police complaints process along the lines of the Ombudsman Act. The ultimate step under that Act is to make recommendations to an agency and to report to Parliament the manner in which the agency has or has not carried them into effect.

Outline of redesigned PCDP Act.

I now outline the key features of a redesigned PCDP Act. My suggestions relate only to those matters where ICAC has not been notified or given directions :-

Each party, SAPOL and OPO, would notify the other of their receipt of a complaint and the manner in which they proposed that it be dealt with.

Minor complaints would follow generally the present procedure in the PCDP Act. SAPOL would deal with them and notify the complainant of the outcome of the process. If the complainant was dissatisfied with the outcome or the way in which SAPOL had dealt with the matter they would be at liberty to seek a review by OPO.

The categories of conduct able to be dealt with in this way would, as hitherto, be agreed between COP and PO and tabled in Parliament. The decision is, ultimately, one of political judgment.

Complaints other than minor complaints would be investigated by SAPOL. SAPOL and PO could, and each would upon request from the other, discuss the scope, manner and direction of the investigation as necessary, likewise they could discuss any action taken, or to be taken, in consequence of the investigation.

At the conclusion of the process, COP would report to PO the outcome of the investigation (providing to the PO for that purpose the investigation file) and any action taken, or to be taken, in consequence of the investigation.

PO would respond to that report and could make such recommendations relating to the investigation and its conclusions as s/he thought it necessary.

If recommendations were made, COP would be obliged to report to PO what action he had taken to implement them. If no action was taken, the report would be accompanied by a report explaining why no action was taken. It would then be open for the PO to report the outcome to Parliament.

PO would be at liberty to discuss the progress of the matter with the complainant at any time and would be required to notify the complainant of his response to the COP, recommendations s/he had made and any subsequent developments.

Other matters impacting on the efficiency of the police complaints system.

OPO is presently required by statute to audit SAPOL's compliance with the statutory requirements relating to telephone interceptions, listening and surveillance devices and DNA sampling. These functions stand apart from its core function of oversight and detract from its capacity to exercise that function. I wonder whether the audit functions, relevant as they are to the integrity of systems, might not sit better with OPI.

OPO is also responsible for conducting External Reviews of SAPOL determinations under the Freedom of Information Act. It is a distinct advantage in so doing to be familiar with SAPOL practices and procedures. I think this function should remain with OPO.

Questions raised for consideration in this review and not already addressed.

What role (if any) should an oversight agency have in the making of findings about police conduct and the imposition of penalty for misconduct? (page 12, question 5).

The PCDP Act clearly envisages that the making of findings, properly so called, in relation to criminal or disciplinary charges will be made by a court or the Police Disciplinary Tribunal (PDT) and penalty imposed by the court of the COP.

Section 32 of the PCDP Act requires the PO, at the conclusion of an investigation, to

provide to the COP his or her assessment of the conduct of an officer and to make recommendations which may include charging for an offence or a breach of discipline. In effect it requires the PO to express an opinion upon which the recommendation is predicated. In that sense, and in that sense only, does the PO make 'findings'.

It seems to me inevitable that, in making a meaningful recommendation to the COP, the PO will have formed a view on the evidence obtained during the investigation and will need to explain his or her reasons for having formed that view.

Section 36(4) of the PCDP Act makes it clear that, where the recommendation is to charge, particulars of the recommendation only (without further comment) are to be provided to the complainant and to the officer concerned. It is unclear whether, once the charge has been finalised, the PO is required or permitted to provide his or her reasons for having made that recommendation.

The PO performs an administrative role, not the judicial role of a court or the PDT. In my view the PCDP Act properly preserves that distinction.

The difficulty arising from this aspect of the legislative scheme, particularly where a matter goes to a closed hearing in the PDT, is that the PO is unable to give the complainant or the officer any adequate explanation of his or her reasons for having recommended that course. This has the potential to throw the integrity of the oversight process itself into question.

Conclusion

I make this submission in the hope that it will be of assistance to the review. I have no personal desire to present at the hearing. I am happy to do so upon request.

Anthony D Wainwright

26 March 2015