

Reference number: A2014/00181

The Hon. Bruce Lander QC  
Independent Commissioner Against Corruption

Dear Mr Lander

I refer to your letter of 13 February 2015 and to your Review of Legislative Schemes Discussion Paper dated February 2015. I provide my submissions in relation to the questions posed in the Paper and advise that I would like to be heard at a public meeting that you intend to hold in late April.

### **Oversight and Management of Police Complaints**

As the Ombudsman for South Australia, I do not agree with the Police Ombudsman's arrangement of having complaints about police misconduct investigated by police officers. As a matter of principle, an independent complaint handling agency needs to have the ability to independently investigate complaints and have full control of the findings and conclusions. I understand that the absence of investigators within Police Ombudsman is partly by design and largely in response to inadequate funding. The lack of resources may well be the result of Police Ombudsman's office being too small due to a very limited jurisdiction leading to an inability to achieve an 'economy of scale'. In this respect, heed should be given to the Productivity Commission's Report into Access to Justice Arrangements dated 5 September 2014, particularly recommendation 9.3 at p50:

'Recommendation 9.3

The Australian, State and Territory Governments should consider whether certain high-cost, low-volume complaint services could be more efficiently and effectively incorporated into another body rather than as stand-alone services.'

One solution to the resourcing issue and lack of in-house investigators would be to abolish the Police Ombudsman's office and incorporate the investigation of police misconduct investigations into ICAC's functions. My research of arrangements interstate reveals that there is no other separate Police Ombudsman: all states (apart from Victoria) give either the Ombudsman alone or the Ombudsman and the relevant anti-corruption body jurisdiction over police complaints. Victoria requires such complaints to be dealt with by the IBAC, not the Ombudsman. In my view, 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.

Consistent with good complaint handling principles, it would still be appropriate for SA Police in most instances to deal with officer misconduct in accordance with its internal complaint handling process but ICAC should be the authority to which complaints may be escalated with the expectation that they would be investigated independently by ICAC's own investigators. I am also of the view, that once a complaint is being dealt with by ICAC, the Commissioner of Police should be subject to the ICAC's findings and recommendations and not have a power of veto. Any control that the Commissioner has over an ICAC investigation and outcome will undermine both the independence of the investigation and public confidence in the process.

Under section 39(1)(b) of the *Freedom of Information Act 1991*, the Police Ombudsman is responsible for conducting external reviews of FOI decisions of SA Police. In my view, there is no strong argument for this to continue. An FOI decision is an administrative one and not a misconduct matter. Ombudsman SA has responsibility for external reviews of FOI decisions by all other agencies including local government and universities and could just as easily conduct external reviews of SA Police FOI decisions. Similarly, a complaint about SA Police administrative error or maladministration could be dealt with by Ombudsman SA in the same way that the Office deals with these issues in respect of all other agencies.

## Complaints and Reports about Public Administration

### 1. Should the OPI be the central body for the receipt and assessment of complaints and reports about public administration?

My predecessor, Richard Bingham, expressed his view in the 2013/2014 Ombudsman SA Annual Report that the 'OPI should be a 'one stop shop' for taking complaints for the public'. I do not share that view. As the 2013/2014 Annual Report records, Ombudsman SA received 10,995 approaches last year from members of the public. 68% of these were 'out of jurisdiction' contacts which were dealt with by referring the caller to an appropriate agency or other body, or by providing information or advice to the caller. These were either responded to at the time of intake or referred within 24 hours. These statistics indicate that Ombudsman SA is seen as a 'first port of call' for many thousands of South Australians. From the total of 10,995 approaches, 3090 were dealt with by the Office as complaints.

It would be interesting to compare the volume of approaches received by my Office with those received by OPI. My understanding is that it receives about 1/5 of the approaches that my Office does. This is in spite of the obligation that all public officers, public authorities and inquiry agencies have to report corruption, serious misconduct and maladministration to OPI and in spite of the tireless work that ICAC has done in promoting awareness of his Office.

I consider it unlikely that the Ombudsman brand would be bypassed by many complainants if OPI were to become the designated 'first port of call'. In other words, large numbers of people would likely still contact my Office.

I also have reservations about the desirability of directing the public to contact an agency which does not have a complaint handling reputation or complaint handling expertise. From its inception, OPI has been responsible to ICAC and is thus associated in the public mind with ICAC and ICAC's mandate to fight corruption and have criminal conduct prosecuted. By contrast, the Ombudsman has enjoyed a 43 year presence in this State as an independent Office and is well established as a complaint handling authority that investigates the administrative actions of public bodies. The Office has built up a reputation for being the arbiter of fairness in regard to complaints about administrative decision making and I believe it is in the public interest for that reputation to be maintained and strengthened.

Whilst some observers see the receipt and assessment processes as the one function, I consider they are different and discrete. In Ombudsman SA, my Assessment Officers have the task of responding to approaches once they have been identified as within my jurisdiction or likely to be within my jurisdiction. That judgement call can, by itself, take some time and requires knowledge of agency functions and processes. Assessment work requires a full appreciation of the requirements of the Ombudsman Act and often involves a level of informal investigation. This can occur in collaboration with an Investigating Officer, a Senior Solicitor or with the Deputy Ombudsman or me. Assessment Officers also conciliate and independently resolve many matters. The nature of the work therefore requires Assessment Officers to have a practical understanding of the administrative processes and legal requirements of government, local government and other statutory authorities such as the universities. Through the assessment process I keep track of trends and spikes in

complaints made against agencies. The assessment process also collates the information that I need for determining whether to proceed to the preliminary investigation stage or launch an own initiative investigation or audit.

In this way, the assessment process is an integral part of the functioning of my Office. OPI is not set up to perform this type of work but, in any event, it needs to be done within my office for it to be useful to me. My Office would not be able to function properly without it.

It follows that I do not think it would be effective for OPI to be the central body for receiving complaints about public administration for the following reasons:

Firstly, it would diminish my Office's capacity to be an effective complaint handling agency. Secondly, if OPI only receives complaints and does not have the assessment function that supports early resolution it will not reduce the double handling that occurs now and it will not provide a service that is useful to the public. Thirdly, I believe that acceptance of OPI as the body that receives all complaints about public administration will take a long time to establish in the public consciousness because OPI is strongly associated with anti-corruption rather than administrative error and the Ombudsman brand is so well established in South Australia. I question whether the effort to educate the public to direct their complaints to OPI in place of the Ombudsman would be a worthwhile use of resources.

I argue that Ombudsman SA is better placed to be the central body for the receipt and assessment of complaints about public administration. It 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.

## **2. What role should ICAC play in relation to the oversight of inquiry agencies?**

As submitted above, I am of the view that the Police Ombudsman's office should be abolished, which would leave only Ombudsman SA and the Commissioner for Public Sector Employment as inquiry agencies. ICAC should continue to have the function of receiving and dealing with reports of corruption relating to these agencies. However, in my view ICAC should not have any oversight of our complaint handling and investigation functions relating to maladministration and misconduct of public officers.

I firmly believe that the primary reason for ICAC's existence is to stamp out corruption in public administration. I do not see the need for ICAC to oversee our dealing with complaints about administrative decisions or public officer misconduct. They are two very different types of matters that require completely different approaches. ICAC is primarily a law enforcement body. The Ombudsman is the arbiter and formulator of administrative fairness. Administrative improvement is our business. My Office has been dealing with complaints about administrative acts for over 40 years and my accountability is directly to the Parliament. As I see it, ICAC's oversight of my Office is completely unnecessary. It does not add any value to what I do just as it probably does not add value to ICAC's core function of detecting and investigating corruption. It only creates more work for us both and because our respective legislation sets us up to do different things with a different end point in view,

we can be at cross purposes at times which results in some additional correspondence between us. The Commissioner for Public Employment may have a different view on this point, but I note that she is subject to the direction of the Minister and in my view that is an appropriate line of accountability given the public sector is the area of her functions and she is only dealing with misconduct that is not criminal in nature.

I also note that, on receipt of a complaint, it is not always clear whether the allegation is in fact one comprising administrative error (pursuant to the Ombudsman Act), misconduct or maladministration. There is considerable overlap between these error types. During the course of an investigation, it may become apparent that, for example, an allegation of misconduct is in fact best dealt with as an administrative error. I am of the view that the legislation currently allows me flexibility in terms of how I deal with such matters. However, there is no doubt confusion amongst the public and government agencies as to how matters are dealt with and which authority should be approached. Further, I note that the ICAC has the power to refer matters to this Office under section 24(3) of the ICAC Act if they are assessed as 'raising other issues'. I suggest that these 'other issues' would include complaints about actions that do not come within the ICAC Act definitions of misconduct and maladministration but may come under the Ombudsman Act definition of 'administrative act'. However, referrals to my Office under section 24(3) of the ICAC Act have rarely occurred, and I query whether this may be because the OPI is not overly familiar with the Ombudsman Act jurisdiction and matters that should appropriately be referred to my Office have either been dismissed or referred elsewhere.

My considered opinion is that complaints comprising administrative error, misconduct or maladministration should be dealt with in their entirety by my Office, which should be able to receive all such complaints directly from the complainants. In addition, if OPI receives complaints of this nature and identifies that they have no potential criminal element, it should simply transfer the matter to my Office to deal with in accordance with the Ombudsman Act (or to the Commissioner for Public Sector Employment in the case of misconduct by public sector employees), and OPI and ICAC need have no further interest in the matter. This will allow ICAC to focus on corruption and criminal conduct in public administration as it should. I acknowledge that to implement this view will require significant amendment to the ICAC Act.

**3. What systemic changes can be adopted to reduce duplication and improve efficiencies in the receipt, assessment and resolution of complaints and reports about public administration?**

The key to reducing duplication and improve efficiencies is legislative change to narrow ICAC's focus to criminal conduct and corruption in public administration and bolster Ombudsman SA's involvement in administrative improvement.

If my proposed model is not adopted, I consider that some legislative change is required in any event to avoid possible legal challenge to the manner in which the Ombudsman and ICAC are currently interpreting the legislation. In particular, I consider clarity should be provided in the legislation to ensure:

- the Ombudsman is able to make findings of misconduct or maladministration under the Ombudsman Act
- the Ombudsman is able to make a finding under the current section 25(1) of the Ombudsman Act on receipt of a referral under section 24(2) of the ICAC Act from the Commissioner

- the Ombudsman is able to end an investigation under section 17(2)(d) of the Ombudsman Act on receipt of a referral under section 24(2) of the ICAC Act from the Commissioner
- the Ombudsman is able to make recommendations under the Ombudsman Act / Local Government Act as a result of an investigation conducted on referral under section 24(2) of the ICAC Act from the Commissioner
- other procedures under the Ombudsman Act and Local Government Act follow as a result of an investigation conducted on referral under section 24(2) of the ICAC Act from the Commissioner (for example that the relevant Minister is informed of a finding of error).

In the absence of legislative change, we may be able to improve efficiencies by:

- Regular sharing of data, such as providing each other with a daily report of incoming reports or complaints;
- Developing a procedure for case conferencing to discuss particular referrals and investigations;
- ICAC and Ombudsman SA agreeing on the criteria by which matters are assessed as appropriate for Ombudsman SA to receive on referral from ICAC;
- Developing a common website for lodgement of on line complaints.

I welcome any questions you may have in relation to my submission.

Yours sincerely

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