

Independent Commissioner Against Corruption.

Commissioner Lander

I am pleased to provide this submission on behalf of the South Australia Police (SAPOL) in response to the Independent Commissioner Against Corruption (ICAC) 'Review of Legislative Schemes' Discussion Paper. This submission is provided in furtherance to the valuable interaction that has already taken place between SAPOL and ICAC concerning the broad and complex topic of legislative schemes and associated issues.

I request that all previous relevant interaction and advice provided from SAPOL be considered to inform this current process of review.

I also accept the offer for SAPOL to make a submission at any public hearing into the future if this assists.

Implementation of Office for Public Integrity (OPI) and ICAC in 2013 was always going to present challenges and essentially alter the landscape in South Australia in relation to integrity and corruption investigations. The commitment by all parties to address those challenges has been well intentioned and appropriately focused. This review is evidence of that continued commitment.

Notwithstanding the extent of cooperation, it is clear that the current framework concerning assessment, allocation, oversight and management of police related complaints in particular remains problematically complex and duplicitous.

Although as highlighted in the discussion paper, OPI and ICAC were intended to augment the roles of the Ombudsman, the PO and the Commissioner for Public Sector Employment it is apparent that certain procedural issues have resulted in duplication of effort and as a result there has been an unintended impact on the efficient operations of the office of the PO which has in turn flowed onto SAPOL. In practical terms this translates to notable delays in bringing matters to an appropriate and timely outcome.

There is little doubt that the current arrangements between agencies need to change.

That change process should focus on clarifying roles and functions, streamlining of the assessment/allocation process relating to police complaints and ensuring that relevant legislation supports any change that is made or in the least supports that which is retained.

It is immediately apparent that the many issues outlined in the discussion paper are of relevance to SAPOL and ultimately very important to the community of South Australia. This process of review provides opportunity to discover and consider reform options and is supported and welcomed.

The broad nature of this response will most likely serve to confirm that which has already been made known to you in our previous interaction. I anticipate that this paper will therefore serve as the catalyst for more detailed exploration and discussion. I look forward to assisting in that process.

SAPOL framework

As identified in the discussion paper SAPOL has a high level of community satisfaction relating to ethics and honesty. This achievement is a direct result of the professionalism and attitude demonstrated by SAPOL members.

The organisational commitment to ensuring the highest of standards is supported by a comprehensive internal complaints and disciplinary framework. SAPOL is committed to the development and implementation of best practice for the management of behaviour, conduct and or work performance issues identified as a result of an investigation into complaints and reports against SAPOL employees.

Organisationally SAPOL has an Ethical and Professional Standards Branch (EPSB) which assumes overall responsibility for managing the disciplinary framework utilised by SAPOL. EPSB coordinates the investigation, adjudication and prosecution of matters involving complaints against employees and internal SAPOL conduct investigations.

EPSB includes the Internal Investigation Section (IIS) which provides a state wide response to the requirements of the *Police (Complaints and Disciplinary Proceedings) Act, 1985* (PC&DPA) and internal conduct investigations involving suspected criminal offences and breaches of the *Code of Conduct* prescribed in the *Police Regulations, 1999*. IIS investigators are required to investigate as directed by the PO whom independently assesses each investigation and makes recommendations to my office.

Additionally, SAPOL operates an Anti-Corruption Branch (ACB) which has a primary role to ensure allegations of corruption in public administration referred to SAPOL by the ICAC are appropriately investigated. The investigations are not restricted to allegations of corruption in SAPOL and the remit extends across matters of all public administration. Notably, prior to commencement of ICAC the ACB was governed by a ministerial direction that mandated its operations. ACB was only permitted to investigate criminal matters that constituted corruption as provided in a very narrow definition.

Police Complaints and Mandatory Reports

Within the current Legislative framework complaints about police conduct can be made direct to the PO, OPI or to any member of SAPOL. Any complaint made direct to a member of SAPOL must in turn be provided to the PO.

It is the PO's responsibility to investigate complaints to which the Act applies. Those are matters of which a complaint is made about the conduct of a designated officer.

At this point it is important to acknowledge the independent role of the PO which is a legislated independent agency to oversight the investigation of police complaints. Such a mechanism has existed in South Australia since 1987 and has generally served the South Australian community well.

It is the case currently, that IIS staff will await direction from the PO about a police complaint. More recently, in some cases the timeframe for this advice has extended beyond what would be an acceptable delay and I understand that on occasions the delay has been attributed to demands placed upon the PO office by OPI and/or other work place demands by the PO office. I also understand that central to such delay is the 'assessment process' undertaken by OPI. On this issue I have previously expressed my concerns about the role of the OPI making very comprehensive assessments of some matters before determining to refer them for investigation or enquiry.

There are of course numerous other apparent reasons for delay within the overall framework including administrative and reporting requirements and most likely resourcing as identified in the discussion paper.

I request that you consider the particular issue of 'assessment by OPI' as part of the review.

In any case, a complementary scheme also operates which involves reports of suspected breaches of the *Code of Conduct* (Police Act) which are made by police officers to me. Between the agencies such reports are referred to as 'Mandatory Reports'.

In 2012, when the ICAC Bill was introduced an amendment was made to the Police Act which obliged me to advise the Police Ombudsman of the details of those Mandatory Reports.

For sake of clarity breaches of the *Code of Conduct* can range from the very minor to the very serious including such things as speaking inappropriately to another officer or failing to maintain care for property and similar. These Mandatory Reports are fundamentally internal disciplinary matters which should be dealt with swiftly and in most cases in a manner that encourages behavioural change and education to the workforce.

It is common ground between the PO and SAPOL that a complaint in the context of complaints against police or other government agencies is an expression of a grievance. The person expressing the grievance brings it to the attention of a relevant person or agency with the expectation that it will be considered or addressed in some way.

To the contrary, a police officer or police cadet has a mandated statutory obligation when he or she reasonably suspects a breach of the *Code of Conduct* to report such suspicion to the Police Commissioner. It does not matter whether an officer has a grievance or not, as they have a positive obligation to report such matters to the Commissioner.

It would seem logical that if the Police Act places a positive obligation on police officers to make reports of their suspicions to the Police Commissioner, then the Police Commissioner should be entitled to deal with such disciplinary matters in a manner in which he or she deems appropriate. This is how Section 38(2) of the Police Act is framed in that subject to the Police Ombudsman exercising any other power, the Commissioner may cause the matter to be investigated. In other words, it is a matter for the Commissioner how such matters are dealt with.

From a practical perspective, on a daily basis, each Mandatory Report is assessed by IIS. Part of that assessment determines if the matter should be reported to the ICAC, and also determines if the matter could potentially involve a complaint about the conduct of a police officer by a person with a particular grievance (usually a member of the public). Where there is any doubt, a decision is made to await the direction of the PO before proceeding with internal action. Regardless of the assessment every report is referred on a daily basis to the PO.

For example it can sometimes be the case that a police officer will make a Mandatory Report about the behaviour of another police officer towards a member of the public. In those circumstances it is not uncommon for the PO, having been notified of the Mandatory Report by SAPOL to make contact with the member of the public involved and ascertain if the member of the public wishes to make a complaint about the conduct.

Where the member of the public does not wish to make a complaint, the PO refers the matter back to the Police Commissioner to deal with as he/she deems appropriate. If the member of the public does wish to make a complaint, the PO can then register the complaint and direct the Police Commissioner as to how the matter is to be investigated. The PO will then retain oversight of the investigation and make a written assessment which is provided to the complainant.

In certain circumstances where a suspected breach of the *Code of Conduct* is evident IIS staff make decisions and commence action immediately to investigate or resolve these matters in any case. A responsibility of the PO is to advise OPI of any reports which are considered to be serious or systemic misconduct, or are reports of maladministration. This is another outcome of the PO receipt of Mandatory Reports from SAPOL.

The extent of external oversight concerning assessment of Mandatory Reports has potential to create significant delays in actioning an appropriate response and unnecessarily complicates the efficient operation of SAPOL as an organisation.

As indicated within the discussion paper, time delay in bringing matters to conclusion is a significant issue of concern. Such delays impact on the community through loss of confidence in the system and impact on SAPOL members as they await the outcome of investigations.

In any case, as described, this reporting process now occurs, however in the majority of instances where a police officer is reporting to me about a suspected breach of the *Code of Conduct*, it is not a matter which falls within the *jurisdiction* of the PO.

There are some occasions where there is overlap, and mechanisms exist between our agencies to identify those circumstances.

Any system that imposes an obligation on the PO (or any other agency) to oversight every Mandatory Report of police misconduct would be onerous and counterproductive to the responsibility of the Police Commissioner to effectively manage police employees. For more serious matters, the external oversight already exists through ICAC.

Nonetheless, it is a point of agreement with the PO that in most instances, a Mandatory Report made to me remains my responsibility to deal with.

The resources of the PO office (or any other external oversight agency so appointed to undertake such a function) are far better utilised in assessing and overseeing the investigations of complaints made about the conduct of designated officers, rather than having to deal with matters of internal discipline.

I would be deeply concerned about any system which required the PO or another office to make an 'assessment' of every Mandatory Report before my officers could act.

I am strongly of the view that there are matters of internal breaches of the *Code of Conduct* which should remain within my determination to manage.

I request that you consider this position as part of the review.

Police Ombudsman

The current framework and interoperability of agencies is influenced by a suite of legislation, most relevantly the ICAC Act, Police Act and the PC&DPA. I request that you consider the impact of the ICAC Act on the PO's function as part of the review.

The existence of an entity such as the PO is vitally important to the effective assessment of complaints (from a member of the public) which are received.

It is apparent that within the current framework the office the PO has developed a practical and operational understanding of the practices and procedures under which SAPOL operate.

This naturally assists in the assessment of complaints received.

The heightened level of awareness comes about not only from the day to day operation of the PO but SAPOL has also provided opportunity for the PO to view operational training sessions, deliver PO specific training to recruits and promotional courses, and engage meaningfully with SAPOL staff on many of the complex matters surrounding police complaints.

The independence of the PO is and remains however an important factor.

I ask that in the process of review you consider the role of the PO as an independent oversight body with specific responsibilities towards police conduct in this State. In my submission, irrespective of whatever disciplinary framework exists or is developed in the future, it remains vitally important that total independence and a *specialist capability* of the oversight body is maintained.

As an example, if the OPI was to assume the responsibility for receiving and assessing all police related complaints, and the current level of assessment currently undertaken by OPI was to be applied to all such complaints, I would envisage that the entire system would most likely become more inefficient.

I provide this opinion based on that which occurs currently when pursuant to section 23 of the ICAC Act, OPI undertakes assessment process of all complaints and reports. The interpretation of "assessment" has been an ongoing point of discussion between SAPOL and ICAC.

In practical terms it has become the practice of OPI to undertake comprehensive assessments of every report received before determining whether it is corruption/maladministration/misconduct. The consequence of this is twofold, firstly it requires SAPOL to collect and collate a large amount of information and pass it onto the OPI and secondly it delays the assessment process and therefore the ability of SAPOL to commence and investigation by often up to several months.

Further the assessment process apparently conducted by OPI is often so comprehensive that it appears to more align to a preliminary investigation rather than an initial assessment. While this may, on some occasions result in a report being filed, often it results in duplication of work for SAPOL and unnecessary time delays

I request that you consider the process of 'assessment' by OPI and or any other entity and the impact of that process on the ultimate administration of Justice.

Defining Corruption

I have previously outlined my concerns regarding the very broad definitions of corruption within the current ICAC Act which effectively captures any suspected statutory offence no matter how minor. There is also a reporting requirement for misconduct.

The primary objects of the Act outline that the primary object of the (ICAC) Commissioner is:

- *To investigate serious or systemic corruption in public administration and*
- *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.*

The very broad definition of corruption under the Act and the narrow level of reporting initially required for misconduct matters, may have resulted in the focus of OPI/ICAC having a lower threshold than perhaps was intended by Parliament

Whilst there has been some shift by your office in the need to report low level misconduct matters, I maintain my concern about the duplicitous role of the OPI/ICAC and PO and the inevitable inefficiency this creates.

SAPOL consider the definition of corruption which previously existed under the ACB Ministerial Directions would provide far greater focus and clarity for the operations of OPI/ICAC:

- (a) conduct of a public official involving a breach or neglect of duty or abuse of office engaged in as a result of a bribe or threat or to gain any financial or other advantage or for any dishonest or improper purpose;*
- (b) conduct of a public official or any other person involving the soliciting, offering, taking or giving of a bribe or any financial or other advantage, or the making of any threat, to induce a breach or neglect of duty or abuse of office on the part of a public official;*
- (c) conduct of a public official or any other person involving a conspiracy or attempt to engage in conduct of a kind referred to in paragraph (a) or (b), where that conduct constitutes or involves, or might constitute or involve, a criminal offence.*

Perhaps for some Government agencies who may not have the established level of mandated reporting systems or independent oversight bodies such as SAPOL has, this higher level of reporting is required. However, I ask you to consider in your review the current impact of the actual legislated definition of corruption.

I suggest the review may like to consider how the office the PO may operate if the definition of corruption did not capture every suspected statutory offence, and the reports/complaints of police misconduct (other than those that meet a higher threshold of corruption) were a matter for the PO.

A change to the definition may also significantly impact on the current or future level of resources required within OPI/ICAC.

Sanctions applied to Police Officers

Section 40 of the Police Act allows for the Police Commissioner to determine punishment where a person admits a breach of the Code or commits an offence. This occurs once the matter has been determined in the Police Disciplinary Tribunal or the Criminal Courts. There are a range of other sanctions which enable less serious breaches of misconduct to be dealt with in a more efficient and effective manner. This includes the minor misconduct process, and the managerial support process. For complaint matters, the PO makes recommendations to me as to how substantiated matters should be dealt with. For Mandatory Reports, the approach is a matter for the Police Commissioner.

The Police Disciplinary Tribunal is an important feature of the police complaints and disciplinary process however it is not always the most effective way to deal with misconduct or rectify errant behaviour in a timely manner.

I ask that during your review you take into account the important role that the PO plays in making recommendations to me about how substantiated allegations are dealt with, and additionally my discretion in relation to Mandatory Reports of misconduct and any sanction which should be applied.

Thankyou for the opportunity to provide my views.

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