

If calling please ask for:
Michael Grant

Our Reference:
Your Reference:

2 April 2015

The Honourable Bruce Lander QC
Independent Commissioner Against Corruption.

Re: Review of Legislative Schemes as described in the Discussion Paper of February 2015.

Dear Mr Lander,

thank you for the opportunity to make submissions as regards this most important review. I will confine my submissions to the operations of the Police Ombudsman and the operation of the legislation which impacts that operation. I will address the issues in the same order set out in page 12 of the Discussion Paper.

1. Are there too many agencies with responsibility for the receipt, assessment, investigation and review of complaints and reports to police?

There should be only one agency with the responsibility for the receipt and assessment of complaints and then the referral of that complaint for investigation. This responsibility is currently shared by the Office for Public Integrity¹ ("the OPI") the Police Ombudsman² ("the POMB") and SA Police³ ("SAPOL").

It is clear that the involvement of three agencies has led to delays in the assessment, referral, investigation and resolution of complaints to a greater extent than previously had been the case. I note however that delays are not due only to this factor. The legislative scheme governing complaints against the police, *The 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 the police.

In addition, the Independent Commissioner Against Corruption ("the ICAC") and the POMB operate under Acts which to a considerable extent overlap, as both deal with issues of misconduct in public office and maladministration. With the ICAC and the POMB both having jurisdiction to investigate and resolve complaints against the police, there is an inevitable confusion and duplication of effort and a loss of efficiency generally.

The present system, involving three agencies in addition to SAPOL, is not desirable. As a first step, a single agency should be responsible for the initial receipt and assessment of a complaint from whomever and wherever it emanates. If what is required is a "one stop shop" where a complainant may be assured that he or she will not be told to go elsewhere, then the OPI is the obvious agency that is already set up to receive any complaint or report whether it

¹ S 17 of the *ICAC Act*

² S 16 of the *Police Complaints Act*

³ S 16 and S 18 of the *Police Complaints Act*

be about public administration, corruption or lesser instances of misconduct and maladministration.

The rule should be that any complaint against the police is to be made to the OPI. I envisage that under such a system, SAPOL would refer any complaint against the police directly to the OPI and the POMB would do likewise.

Such a system would eliminate the "double handling" of police complaints as one authority would have the responsibility for the receipt and initial assessment. It would also reduce any confusion by the public regarding the ongoing management of police complaints.

2. What role should each agency play with respect to the oversight and management of police?

Section 6 of the *Police Act* 1988 provides that, subject to that Act, the Commissioner of Police is responsible for the control and management of SA Police. I do not suggest that this situation should be changed in any radical way.

I outline in further detail below as to how the police complaints system can be made more efficient. In that proposed system, the police Commissioner would have the initial responsibility for the investigation and resolution of a complaint (following the referral by the OPI) of conduct that is categorised as "minor."

The POMB would have oversight of the investigation of a minor complaint only in a case where the complainant is dissatisfied with the proposed resolution of the complaint by the police and who then exercises a right of appeal to the POMB.

In the case of a complaint which is other than minor, the OPI would refer it to the ICAC who would decide whether the ICAC should investigate or whether it should be referred to the POMB. The organisation to which the complaint was referred would oversee the investigation by the police.

3. Should there be a reconsideration of the manner in which alleged inappropriate conduct is categorised? Should the role of an oversight agency depend upon the way conduct is categorised?

In my view, a complaint that could be categorised as requiring "managerial" intervention to cure it should be treated differently from other types of complaint. I am contemplating matters such as poor service and otherwise the incompetent carrying out of police duties as opposed to clear and deliberate breaches of the code of conduct. In deciding how to categorise the conduct, it might be helpful to pose the question "If the conduct could be proved, would it be appropriate to bring disciplinary proceedings against anyone?" If the answer is no then the complaint may be categorised as being in the "managerial" category.

To assist in categorising what is a "managerial" issue, guidelines could be issued by an appropriate agency and the decision would be made having regard to them.

A further way of categorising a complaint is to be found in clause 6 of Schedule 3 of the *Police Reform Act* 2002 (UK). In my view it is worth exploring. Under the UK system, a complaint may be sent for "local" resolution (by a police authority) if:

"(i) ...the conduct complained of (even if it were proved) would not justify the bringing of any criminal proceedings and

(ii) ...any disciplinary proceedings the bringing of which would be justified in respect of the conduct (even if it were proved) would be unlikely to result in dismissal, a

requirement to resign or retire, a reduction in rank or other demotion or the imposition of a fine.”

This general approach could be adopted with specific changes to suit our jurisdiction and the legislative scheme in place (which may have specific provisions as to the disciplinary sanctions that may be imposed.)

If the conduct complained of is in the first category of “managerial” then the police Commissioner, who has the control and management of the police force, would be left to deal with the complaint. I would envisage that there would be no need for an oversight agency to “oversee” the management of such a complaint in normal circumstances. I would envisage however that an oversight agency would have the power to audit such complaints and, in specific cases, to intervene if it was believed to be warranted.

If the complaint is in the second category, then the ultimate oversight of the complaint will be with the outside oversight agency but such oversight will not involve constant monitoring and direction. I address this further in **5** and **6** below.

The third category of complaint is one to which the answer “yes” is given to the question whether criminal proceedings are justified if the behaviour could be proven, or to the question of whether the more serious of the sanctions available would be justified if the behaviour could be proven. This category of behaviour will be the subject of oversight by the relevant agency from the beginning of the process.

With regard to the second and third categorisations, an appropriate agency could issue guidelines to assist with the categorisation.

4. How can the police complaints system be made more efficient?

The first step in making the police complaints system more efficient is to repeal the *Police Complaints Act* in its entirety. The features of this Act which invite inefficiency include:

- the convoluted and complicated system of complaints investigation
- the lack of independence of the POMB (in the sense that findings and recommendations are subject to dispute by the police Commissioner and disputes must be resolved by the Minister - and some inquiries require the consent or input from the police Commissioner)
- the unsatisfactory system of dealing with charges upon completion of an investigation

My submissions in 1-3 above inclusive are also aimed at making the complaints system more efficient.

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

I have referred above to the need to repeal the current Act. Its replacement should not provide for the current level of police involvement in the findings and recommendation stage or in the disciplinary proceedings stage.

The POMB, as the oversight agency, has no real independence. In effect, the Act enables the police to be a major and significant player in how complaints will be ultimately resolved. While I do not doubt that the SA Police deserve their good reputation and standing in the eyes of the public, it is not desirable that they continue to play the role they do in complaints resolution. Indeed, it is in the best interests of the police if the complaints system is, and is

seen to be, as independent as it reasonably can be from police influence. There are two major ways the police may exert influence on the process.

First, the police are encouraged by the present Act to disagree with the findings and the recommendations of the oversight agency. In my experience thus far, the disagreements do not seem to emanate from the Commissioner of police himself - indeed I doubt whether he is even aware that they are occurring. The disagreements emanate from those whom he delegates. The frequency of disagreement has been considerable. In fairness, two of the disagreements I have encountered persuaded me to review the initial recommendations made. However, the general tenor of disagreement has been to debate the findings and recommendations in a somewhat partisan manner.

Secondly, the police have total control of the disciplinary sanction that will be imposed. In this regard, the police Commissioner (more frequently his delegate) has, from the point of view of the oversight agency, unfettered discretion with respect to 'punishment'. The Commissioner can ignore any indication from the Police Disciplinary Tribunal as to its view of the seriousness of the behaviour. Only the person the subject of the disciplinary proceedings may appeal from the decision of the police Commissioner or his delegate as regards the sanction imposed. I have a concern that some of the "punishments" imposed following charges of a breach of regulation indicate that there has been a failure to understand the purpose of disciplinary proceedings - that being the need to protect the public and maintain proper professional standards.⁴

Upon the oversight agency making a recommendation (after taking any police submissions into account) the relevant legislation should provide that it must be implemented. I add that, in the case of a recommended criminal charge, the oversight agency would make such a recommendation only after the receipt of an opinion from the Director of Public Prosecutions as to the likelihood of success based on the available evidence.

At 6 below I address the issue of which body should be responsible for hearing charges against the police, regardless of whether the charge is admitted or not.

6. How can the existing system for the receipt, assessment, investigation and resolution of complaints and reports about police be made more simple?

As adverted to above, I envisage the repeal of the current Act in its entirety. In my view, the system in operation in the United Kingdom has some features which could usefully be adopted here.

I do not intend to go into fine detail, but only to provide a basic sketch as follows:

- there would be one agency to receive complaints and make an initial assessment - that being the OPI
- following assessment, complaints that relate to a "managerial" issue would be, generally, entirely the responsibility of the police Commissioner as the manager of SAPOL to be dealt with in a non- adversarial way and with no view to charging anyone with a disciplinary breach
- complaints other than "managerial", but classed as "minor", would, following assessment, be sent for inquiry by the police Commissioner, who would be responsible for resolving the complaint to the satisfaction of the complainant. If the complainant

⁴ See the para headed "The Purpose of Disciplinary Proceedings" at 6 below and the reference to the case of *Craig v Medical Board of South Australia* (2001) 79 SASR 545 at [41]

remained dissatisfied, then, in defined circumstances, the complainant would be able to lodge an appeal with the oversight agency, which would then review the file and if necessary take control of further investigation.

- the most serious complaints would at the outset be sent by the OPI to the oversight agency which would direct and control any investigation either through in-house investigators or through the Internal Investigation Section of SAPOL
- the oversight agency would have the option, of its own motion, to intervene in any investigation or inquiry regardless of the category into which it fell, including complaints classed as "managerial", and would have unfettered audit capabilities
- the oversight agency would have the option of conducting an investigation of its own motion without any need to consult with the police Commissioner.

Hearings and the imposition of a disciplinary sanction.

Under the current system, the Police Disciplinary Tribunal ("the PDT") has no real impact in any matter where a police officer pleads guilty to the charges laid. In that event, a sanction is imposed by the police Commissioner or a delegate. If a police officer contests a charge, no matter how minor, then the PDT (comprised of a magistrate) must hear the charge. The PDT is bound by the rules of evidence, and must conduct the hearing in the same way as criminal proceedings are conducted in a Magistrates Court, no matter how serious, or otherwise, the charge may be.

The Police Association commonly fund the defence of their members in these proceedings. Costs are awarded. Even non serious matters can take a long time to resolve. In my experience there can be considerable delays between the hearing and the delivery of judgment. If the charge is proved, the PDT does not impose any sanction. It can only indicate to the police Commissioner its view of the degree of seriousness of the conduct found proved.⁵ The police Commissioner is not bound to adopt the view of the PDT.

The 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.⁶

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

⁵ S 36(5) of the Police Complaints Act.

⁶. As per section 33 of the *South Australian Civil and Administrative Tribunal Act 2013*

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.

Appeals against that decision could be brought in the usual fashion to the SACAT in its review jurisdiction.⁷ The right of appeal would not be confined to the respondent to the disciplinary hearing. The complainant would have that right as well as would the oversight agency if the oversight agency is not the complainant. In my opinion, legislating to provide that the SACAT has the jurisdiction to hear and determine disciplinary proceedings involving the police is likely to inspire public confidence in the police complaints system.

Finally, I would recommend that in the conduct of the proceedings, both in the original and in the review jurisdiction of the SACAT, the police should not be permitted to appear as counsel, as they currently do before the PDT. An independent body, such as the Crown Solicitor, should prosecute the disciplinary proceedings in the original and review jurisdiction of the SACAT. In my opinion this would further enhance the public perception of the independence and impartiality of disciplinary proceedings involving police officers.

The purpose of disciplinary proceedings.

In my view, *the Police Complaints Act* brings the wrong focus to bear on the issue of police misconduct. S 39(4) of the Act refers to the “imposition of punishment” on the officer concerned on the finding that he or she is “guilty” of a disciplinary breach (my emphasis). That is to equate disciplinary breaches with the commission of a criminal offence. In my view this is a flawed approach.

In *Craig v Medical Board of South Australia*⁸ Doyle CJ (Martin and Williams JJ agreeing) said that the purpose of disciplinary proceedings:

“...is to protect the public, not to punish a practitioner in the sense in which punishment is administered pursuant to the criminal law. A disciplinary tribunal protects the public by making orders which will prevent persons who are unfit to practise from practising, or by making orders which will secure the maintenance of proper professional standards. A disciplinary tribunal will also consider the protection of the public and of the relevant profession, by making orders which will assure the public that appropriate standards are being maintained within the relevant profession.” (my emphasis)

In my view, the current system of permitting the police Commissioner to deal (exclusively) with “punishment” for disciplinary breaches does not ensure that the protection of the public (and of the police force itself) is kept firmly in view as the ultimate goal of disciplinary proceedings. There is a danger that permitting the police Commissioner to be the sole judge of the disciplinary sanction increases the likelihood that irrelevant considerations unconnected with the goal of disciplinary proceedings will intrude, albeit in a subtle way. I would argue that to allow a tribunal, rather than the police Commissioner, to impose a disciplinary sanction is not to unduly interfere with the police Commissioner’s role as the manager and controller of the police force.

⁷ As per section 34 of the *South Australian Civil and Administrative Tribunal Act 2013*

⁸ *Craig v Medical Board of South Australia* (2001) 79 SASR 545 at [41]

As regards the PDT, the requirement that it conduct its proceedings in the same way as if it was hearing the charge of a criminal offence on complaint is not conducive to maintaining a focus on the purpose of disciplinary proceedings.

I would submit that a properly constituted disciplinary tribunal within the SACAT is the body most likely to fully understand the purpose of disciplinary proceedings and to inspire public confidence that its oversight of police behaviour will be conducive to the maintenance of the high standards required of the members of our police force.

7. What amendments to the existing scheme might reduce delays presently being experienced at a variety of points in the process?

I do not support amendments to the existing legislative scheme as a practical solution. The better course is to repeal all of the existing legislation which is concerned with the receipt, investigation and resolution of complaints against the police.

The augmentation of the role of the POMB by the ICAC and the OPI and the oversight of the POMB by the ICAC has led to some complication and delay, but this is recognised by the ICAC in the discussion paper.

8. Resourcing

The resources of this office have been of concern to the POMB for a considerable period. A better and more efficient system of complaints management may well address at least some of the perceived resourcing issues.

Under 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.⁹ 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 the other.

Incorporating the POMB within the office of the ICAC would have the additional advantage of having the expertise of ICAC investigators, at the option of the ICAC, available to the POMB as part of the same organisational structure.

Police complaints are numerous and carry with them a heavy workload. If the OPI is to be the "one stop shop" for the receipt and the assessment of complaints, then the OPI will be well served by the existing staff in the POMB who have acquired a particular expertise over many years in the intake and assessment of complaints against the police. Such a valuable human resource should be exploited within any new legislative system and the experience gathered over many years not be wasted.

⁹ See Part 4 Subdivision 3 of the *ICAC Act*

9. In Conclusion.

Thank you again for the opportunity to provide submissions on this important matter. I indicate that I would be pleased to be given the opportunity to present at the public hearing.

Yours faithfully

A handwritten signature in blue ink, appearing to read "M. Grant", with a large circular flourish on the left side.

Michael Grant

Acting Police Ombudsman