



REVIEW OF LEGISLATIVE SCHEMES

APPENDIX 2 — TRANSCRIPT OF PUBLIC HEARINGS

ICAC

OPEN HEARING

BEFORE THE HON. BRUCE LANDER QC
INDEPENDENT COMMISSIONER AGAINST CORRUPTION

MR. M. RICHES Counsel Assisting

Courtroom 3
Level 7, Riverside Centre Building
North Terrace, Adelaide

THURSDAY, 23 APRIL 2015 at 9:50am

THE COMMISSIONER:

Since my appointment as the Independent Commissioner Against Corruption in September 2013 my office and the Office for Public Integrity have carried out the functions given by the Independent Commissioner Against Corruption Act which are essentially: to receive and assess complaints and reports about public administration; to identify and investigate corruption in public administration or to refer it for investigation; to assist agencies to deal with misconduct and maladministration in public administration; to evaluate the practices, policies and procedures of agencies and authorities; and to conduct or facilitate the conduct of educational programs targeting corruption, misconduct or maladministration in public administration.

On 30 October 2014, the Deputy Premier and Attorney General, the Honourable Rau MP wrote to me and 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, the Police (Complaints and Disciplinary Proceedings) Act and the Independent Commissioner Against Corruption Act and the making of complaints and reports to the Police Ombudsman, the Ombudsman and the OPI, with a particular focus on whether or not the complaint report processes to those offices can be consolidated into one office. The Attorney General also requested that I consider exercising my legislative power to evaluate the practices, policies and procedures of the Police Ombudsman. When I appeared before the Crime and Public Integrity Policy Committee on 31 October 2014, I announced that I would be conducting the reviews and evaluation as requested by the Attorney General. I also announced that I would conduct the reviews and evaluation by way of a public inquiry, as I am empowered to do under the ICAC Act. For the purposes of this review I published a discussion paper in February of this year in which I stated that the public are entitled to expect there to be an efficient and effective mechanism for the making of complaints and reports about any aspect of public administration including about police. At the moment there is, in my opinion, unnecessary duplication, complexity, confusion and delay.

These public hearings form an important part of the reviews that I am undertaking. They

represent an opportunity for key parties to comment on the present system, how that system works, the difficulties with the system and most importantly how the system can be changed for the better. It is important that the dialogue occur in a public forum so as to ensure that all points of view are aired and that everyone, including the public, understands the existing difficulties within the system and how those difficulties might be addressed. I will in due course publish a final report which will be made public. I anticipate that that report will include recommendations for change. I hope to publish my final report in June or July this year. I have appointed Mr. Michael Riches, who is sitting at the bar table, as counsel assisting me with these reviews. Mr. Riches will make an opening statement which I invite him to do now.

MR. RICHES:

Thank you, Commissioner.

My opening statement will be in four parts. First, I will make some introductory remarks which will include a brief summary of the work that has been undertaken thus far in the reviews. Secondly, I will give a brief overview of the integrity system as it presently exists. Thirdly, I will briefly summarise some of the key written submissions that have been received. And finally, I will address the issues that are, in my opinion, of particular importance in these reviews.

Commissioner, your office and the Office for Public Integrity, which I will refer to from herein as the OPI, have been in operation now for some 18 months. The introduction of those offices has substantially altered the scheme for the oversight of integrity issues in public administration. The legislative reviews now being undertaken present an opportunity to review the scheme as a whole in order to identify shortcomings and to propose changes that will strengthen and enhance the existing system.

Commissioner, in your discussion paper, published in February of this year, you said that it is

critical there be in place an integrity system that is accessible, efficient, effective and simple. In my submission, the existing system for the receipt, assessment and resolution of complaints and reports about public administration falls short of that expectation. The system as it is presently constructed is overly complex, invites duplication of effort, creates considerable delay and can be confusing, both for those who wish to use the system and to those who have to administer it. I will expand upon these issues later when I summarise some of the written submissions that have been received in these reviews.

For the moment I wish to briefly outline the course these reviews have taken so far. Commissioner, since announcing the reviews in October last year, consideration has been given to the public integrity schemes and police complaints schemes that operate in every other Australian state and in the Commonwealth, in New Zealand and in the United Kingdom. Commissioner, you have held 17 teleconferences with representatives of integrity agencies around Australia and in New Zealand and you have personally visited six agencies in New South Wales and Victoria. You have met personally with the Police Commissioner, the South Australian Ombudsman, the former Police Ombudsman, the current Acting Police Ombudsman, the Police Association and other interested parties.

In parallel, an extensive literature review has been undertaken to identify best practice, critiques of existing systems, proposals for reform in other jurisdictions and aspects of other systems that lead to best outcomes for the police service and the public at large.

Commissioner, you have received 21 written submissions, including submissions from the Ombudsman, Acting Police Ombudsman, Police Commissioner, Police Association, Aboriginal Legal Rights Movement, the State Coroner, Professor Timothy Prenzler from the University of the Sunshine Coast, the Environmental Defenders Office and the Public Law and Policy Unit of the University of Adelaide. A number of members of the public, who have had direct experiences with the integrity system, have also provided submissions. These public hearings are the next step in the review process.

Can I turn now to the integrity system in South Australia as it presently exists? In broad terms, complaints about public administration can be made to the OPI, the State Ombudsman or directly to the agency involved. Complaints about police conduct can be made directly to the Police, to the Police Ombudsman or to the OPI. Within the public sector the Commissioner for Public Sector Employment may also receive complaints about alleged misconduct. There are, of course, other agencies that might receive complaints about public officers, such as the Commissioner for Equal Opportunity or the Health and Community Services Complaints Commissioner. However, I will restrict my remarks to the scheme involving the OPI, the South Australian Ombudsman, the Police Ombudsman and the Commissioner for Public Sector Employment.

I will start with the South Australian Ombudsman. The South Australian Ombudsman was first established in 1972 and was the second office of its kind in Australia. Since then there have been six ombudsmen appointed under 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.

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.

With the commencement of your office and the OPI, in September of 2013, the Ombudsman must now also investigate matters raising a potential issue of misconduct or maladministration in public administration as referred by you.

According to the Ombudsman's most recent annual report his office received 3,090 complaints and 116 requests for external review under the FOI Act 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. According to the most recent budget papers the Ombudsman's office comprises 18 full-time equivalent positions. They include the Ombudsman, Deputy Ombudsman, legal officers, investigators and support staff.

The office of the Commissioner for Public Sector Employment is established by section 13 of the Public Sector Act. The Commissioner has a range of functions, including to advance the objects of the Public Sector Act, to issue the public sector Code of Conduct and public sector employment determinations and to investigate or assist in the investigation of matters in connection with public sector employee conduct or discipline as required or on the Commissioner's own initiative.

I am advised by the Office for the Public Sector that, generally speaking, investigations are not undertaken by the Commissioner for Public Sector Employment, even though the Commissioner has a number of powers given to it under section 18 of the Public Sector Act. As I understand it, where the Commissioner for Public Sector Employment 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 Commissioner for Public Sector Employment will contract an investigator to carry out an investigation. The Commissioner for Public Sector Employment does not have dedicated investigation staff.

Can I turn now to the system for the oversight of police? Given that it is a particular focus of these reviews, I will provide a more expansive overview of that system. The Police Ombudsman is a separate office established under the Police (Complaints and Disciplinary Proceedings) Act. Commissioner, I will refer to that Act as the "Police Complaints Act".

Until December 2012, the Police Ombudsman was 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, as it is now known, is responsible for the receipt of complaints about the conduct of members of SA Police and the action taken in relation to those complaints. The scheme under which the Police Ombudsman operates is complex. The Police Complaints Act has, since its commencement, been amended by 14 amending Acts. Indeed, the legislative history to the Police Complaints Act, which identifies all of the amendments, is in itself 14 pages long. While the Police Complaints Act empowers the Police Ombudsman to conduct its own investigations, the Act is geared heavily towards external oversight of internal investigation. In other words, the Act operates on the presumption that in most cases the police will be responsible for the investigation of a complaint about police conduct. Indeed, section 13 of the Police Complaints Act requires the Commissioner of Police to constitute within the Police Force a separate section to carry out investigations under the Police Complaints Act. That section within police is known as the Internal Investigation Section, or IIS.

Under the Police Complaints Act complaints about police can be made directly to the Police Ombudsman or to SAPOL. Where a complaint is made to SA Police, the complaint must, subject to an exception, be sent to the IIS for investigation and the Police Ombudsman must be notified of the complaint and furnished with particulars. Conversely, where a complaint is made to the Police Ombudsman, the Police Commissioner must be notified of the complaint and 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. I have already said that the presumption in the Police Complaints Act is that the complaint will be referred to the IIS for investigation. However, there are exceptions.

First, the Police Ombudsman may determine not to entertain a complaint for one of a number of reasons contemplated in the Act, such as the complaint being trivial, frivolous, vexatious, or

that further investigation of the complaint is unnecessary or unjustifiable.

Alternatively, 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. Minor misconduct is, in turn, categorised by way of an agreement reached between the Police Ombudsman and the Police Commissioner as to the kinds of conduct that constitute minor misconduct. That agreement must be tabled in both Houses of Parliament. I have been provided with a copy of an agreement signed by the then Police Ombudsman on the 28th August 2014 and the Police Commissioner on the 9th of September 2014. However, I have been advised that that agreement has never been tabled in both Houses of Parliament as is required under the Police Complaints Act. There is, however, an agreement entered into between the Police Commissioner and the then Police Complaints Authority in 2002 which was tabled in both Houses of Parliament. Subject to some minor changes the agreements are very much the same. I understand that the 2002 agreement will continue to be relied upon while work is carried out to prepare a new agreement that will be referred to the Minister for tabling in accordance with the legislation.

Putting that issue to one side, neither the existing agreement nor the 2002 agreement is published on either the Police Ombudsman's website or the SAPOL website.

The 2002 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. Exceptions include “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.

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 Police Complaints Act

and the Police Act. While the process is termed an “informal inquiry” the process has, in my opinion, many of the hallmarks of a formal disciplinary process. For example, the officer the subject of the allegations 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 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.

A member 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 process 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, can affirm or quash any findings or determinations, or make a determination that should have been made in the first instance. Commissioner, as I have already said, this is a process that is designed only to deal with minor misconduct.

There are other options for dealing with a complaint. 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 an attempt to conciliate a matter. If the Police Ombudsman is satisfied that the matter has been resolved by conciliation, the Ombudsman may determine that the matter not be investigated.

The Police Ombudsman can investigate a matter 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 to investigate the matter on his or her own initiative, 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 Police Complaints 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 determination.

The Police Ombudsman is empowered under the Police Complaints Act to investigate a matter personally, whether that matter arises by virtue of a complaint or 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 either the Police Commissioner agrees or the Police Commissioner has been given a period of five working days to comment on the determination, in which case the Police Ombudsman has to take into account any comments made from the Police Commissioner within that period.

The Police Ombudsman is given a range of powers to investigate matters. However, as I understand it, the Police Ombudsman rarely investigates matters personally. Indeed, I understand that the Police Ombudsman does not have, and has not had for some time, investigators on staff.

I have already said that the Police Complaints Act is geared towards the investigation of complaints by the IIS. In reality, most, if not 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 Police Complaints 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 him or her or a close relative. But any such refusal may 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, again, 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.

When the IIS has completed an investigation, a 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 the recommendation as to whether action should be taken and what action should be taken, if any. 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 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 the recommendations. Ultimately, 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, a body created by the Police Complaints Act and constituted by a Magistrate appointed by the Governor.

Where proceedings are commenced, the Police Commissioner is obliged to indicate to the Tribunal the categories of punishment that the Police Commissioner considers would, on the facts then known, most likely be appropriate if the Tribunal finds the officer guilty of a breach of discipline. There are three such categories defined in the Police Complaints Act. Category A includes termination or suspension of the officer's appointment or reduction of 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.

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

There is another aspect to the police disciplinary system that I have not addressed, but it 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 of Conduct 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 SA Police 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 him or herself, cause the matter to be investigated. Historically, both SAPOL and the Police Ombudsman 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 subsection that requires the Police Commissioner to provide to the Police Ombudsman details of each report as soon as practicable after it has been made. Nevertheless, as I understand it, the then Police Ombudsman and SAPOL continued to express the view that mandatory reports fell outside of the jurisdiction of the Police Ombudsman. Commissioner, putting aside legal argument as to the correct interpretation of the existing legislation, the matter raises the broader question of whether the manner in which such internal reports are dealt with should be the subject of some external oversight. I will address this matter again when I summarise some of the written submissions that have been received so far.

The Police Ombudsman has other functions. Pursuant to the Freedom of Information Act, the Police Ombudsman acts as the external reviewer of decisions made in relation to FOI applications to police. 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.

The Office of the Police Ombudsman presently comprises ten staff, some of whom are part-time employees. This includes the Acting Police Ombudsman, lawyers and support staff. As I alluded to earlier, the office does not employ its own investigators.

I turn now to two offices that, since their commencement, have significantly altered the integrity system. They are the OPI, and your office, Commissioner, the office of the

Independent Commissioner Against Corruption. The OPI commenced operations on the 2nd of September 2013. It is an office created by section 17 of the ICAC Act, and has the statutory functions of: receiving and assessing complaints about public administration from members of the public; receiving and assessing reports about corruption, misconduct and maladministration in public administration from inquiry agencies, public authorities and public officers; to make recommendations as to whether and by whom complaints and reports should be investigated; and to perform other functions as assigned by you.

The OPI is responsible to you for the performance of its functions. According to the second reading speech to the ICAC Bill the OPI was intended to, I quote: “act as a clearing house so to speak, referring complaints and reports to existing agencies and authorities for action (where appropriate)”.

However, 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 you as to how the complaint or report is to be dealt with. It then falls to you 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 on a complaint or report.

The OPI is obliged to assess a matter in accordance with the categories specified in 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 or as raising some other issue or such that there is – that no action need be taken. As I have already said, it is then a matter for you, Commissioner, as to what action is taken.

However, the options available are constrained by the assessment made and by the pathways prescribed in the ICAC Act. Where a matter is assessed as raising a potential issue of corruption in public administration you can determine to investigate the matter yourself or you can refer it to a law enforcement agency such as SAPOL or, if the matter involves a police

officer or special constable, to the Police Ombudsman.

The definition of corruption in public administration is, in itself, curious. Unlike integrity agencies in other states, the South Australian legislation confines corruption to criminal offences. 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, for example abuse of public office, or bribery of a public official, but the definition is extended to include any offence committed by a public officer while acting in his or her capacity as a public officer. Commissioner, that definition can lead to some curious examples. I will just give one. A public sector employee who is drink driving while undertaking public duties commits an offence captured by the definition of corruption. There are, of course, many other examples.

Some have criticised the breadth of the definition of corruption and the flow on effect that that broad definition has on the obligation to report matters to the OPI.

If a matter is assessed as raising a potential issue of misconduct or maladministration in public administration, you can refer the matter to an inquiry agency or a public authority. Alternatively, you can exercise the powers of an inquiry agency and investigate the matter yourself. An inquiry agency is defined in the ICAC Act to be the South Australian Ombudsman, the Police Ombudsman or the Commissioner for Public Sector Employment. No other agencies have been prescribed by regulation to be inquiry agencies.

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

Finally, you can determine to take no action. You 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 you do refer a matter of misconduct or maladministration to an inquiry agency or public authority you may issue directions or guidance with that referral. If you are 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 you can express that dissatisfaction with the agency or authority initially, then the relevant Minister, then ultimately by way of a report tabled in both Houses of Parliament.

Commissioner, you have also been given other statutory functions, including 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.

Your office and the OPI commenced operations on the 2nd of September 2013. Between the 2nd of September 2013 and the 31st of March this year, the OPI has received 1,591 complaints and reports, comprising 791 complaints and 800 reports. Of the matters that had been assessed as at 31st of March of this year, 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.

The OPI presently employs ten staff. Your office comprises 30 staff, including 11 investigators plus legal officers, forensic and intelligence analysts and support staff.

Commissioner, the ICAC Act has the practical effect of creating a new office for the receipt and assessment of complaints and reports about public administration, in addition to those

agencies that still exist to receive such complaints and reports. Inquiry agencies, public authorities and public officers have an obligation to report corruption and serious or systemic misconduct or maladministration in public administration, in accordance with directions and guidelines that you have published in accordance with section 20 of the ICAC Act. Those reporting obligations have not replaced other obligations such as those contained within the Police Act and those contained in the Code of Ethics for the South Australian Public Sector.

In order to carry out assessments, the OPI will occasionally seek information from inquiry agencies and public authorities about the circumstances alleged in a complaint or report. This is done in order to best ensure an appropriate assessment is made. However, that process is not without some criticism, as I will describe later.

The ICAC Act has the further practical effect of enabling you to see the manner in which an inquiry agency or public authority deals with a matter of misconduct or maladministration that you have referred to it for investigation. As I have said, you are empowered to issue directions and guidance in relation to a referral and you can be dissatisfied with the manner in which the inquiry agency or public authority has dealt with the matter. That dissatisfaction can ultimately be expressed by way of a report tabled in both Houses of Parliament. Some have expressed concern about your capacity to oversee agencies whose core business is the resolution of complaints about public administration.

Commissioner, can I turn now to briefly go through some of the written submissions that have been received in these reviews? Commissioner, there have been 21 written submissions received for the purposes of the legislative reviews. Most of these submissions will be published soon after the conclusion of these public hearings. Some of the submissions have been provided on a confidential basis and others have addressed matters that fall outside the scope of the legislative reviews and in those circumstances, they won't be published. I will only address some of the written submissions that have been received. I do not intend to canvass every issue raised in those submissions. Rather, I will summarise some of the issues

raised in the submissions which will likely be the subject of further discussion during the course of these public hearings.

You will hear from the State Ombudsman this afternoon. In his written submission the Ombudsman says that he does not agree with the Police Ombudsman's arrangement of having complaints about police misconduct investigated by police. As a matter of principle the Ombudsman says that an independent complaint-handling agency needs to have the ability to independently investigate complaints and have full control of the findings and conclusions.

The Ombudsman suggests that one solution might be to abolish the Office of the Police Ombudsman and incorporate the investigation of police misconduct into the ICAC's functions. The Ombudsman says that, in his view, the investigation of police misconduct has an anticorruption flavour to it as it relates to the ethics and honesty of law enforcement personnel and sits well within the ICAC's core purpose.

On the topic of a one-stop-shop for the receipt of complaints about public administration, the Ombudsman says it would not be effective for the OPI to be the central body for receiving complaints, because it would diminish the Ombudsman's capacity to be an effective complaint-handling agency.

The Ombudsman suggests that his office is better placed to be the central body for the receipt and assessment of complaints about public administration. The Ombudsman proposes a model that would incorporate into the Ombudsman Act the definitions of misconduct and maladministration, as it is presently provided in the ICAC Act, thus enabling the Ombudsman to be the repository of complaints about such matters and leaving the OPI to deal with matters related to corruption and police misconduct.

Finally, the Ombudsman says that the ICAC should not have any oversight of its complaint handling and investigation functions relating to maladministration and misconduct. Indeed,

the Ombudsman says, in his view, the ICAC's oversight of his office is completely unnecessary and does no more than create additional work for both agencies.

I turn now to the written submission of the Acting Police Ombudsman. As you are aware, the Acting Police Ombudsman commenced on the 2nd of March this year, following the resignation of the former Police Ombudsman. In his written submission the Acting Police Ombudsman says that there should only be one agency with the responsibility for the receipt and assessment of complaints and then the referral of that complaint for investigation. As the Acting Police Ombudsman points out, the responsibility is currently shared between three agencies. We are speaking of course in relation to the police complaints system.

The Acting Police Ombudsman says, and I quote:

“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 police, the Police (Complaints and Disciplinary Proceedings) Act, all but guarantees delay, complexity and confusion in receiving, assessing, investigating and resolving complaints against police”.

The Acting Police Ombudsman proposes the repeal of the existing Police Complaints Act in its entirety. He says that the existing system invites inefficiency in the convoluted and complicated systems of complaints investigation, the lack of independence of the Police Ombudsman and the unsatisfactory system of dealing with charges upon completion of an investigation. A new system would include a new way of categorising conduct in a way that diverts complaints that raise managerial issues (such as poor service delivery) out of the disciplinary system to be dealt with by the Police Commissioner entirely. More serious matters would fall within a structured disciplinary system with oversight by an external body.

The Acting Police Ombudsman also proposes that all complaints about police be sent to the

OPI, even if they are first received by the Police Ombudsman or the police themselves. That way, the OPI would be the sole authority responsible for the initial assessment of all matters, thereby eliminating double handing and reducing confusion.

Beyond the assessment of complaints, the Acting Police Ombudsman proposes that the Commissioner of Police maintain responsibility for the investigation of complaints of conduct categorised as minor and that the Police Ombudsman would only have oversight of such an investigation if the complainant is dissatisfied with the proposed resolution of the complaint and who then exercises the right of appeal to the Police Ombudsman. In the case of complaints about conduct not considered minor, the Acting Police Ombudsman suggests that such matters be referred to the ICAC to determine whether to investigate the matter yourself or to refer the matter to the Police Ombudsman.

Where an officer is charged with a breach of discipline, the Acting Police Ombudsman proposes the abolition of the Police Disciplinary Tribunal and replacing the Tribunal with a Tribunal operating within the South Australian Civil and Administrative Tribunal and made up of a panel of three members. The Acting Police Ombudsman rejects the suggestion that police are a special case, and says that police are no more special than doctors, nurses, dentists, psychologists and lawyers who face all kinds of different pressures in the practice of their profession.

In the Acting Police Ombudsman's view a properly constituted tribunal would determine the charge and the sanction. The Acting Police Ombudsman also suggests that police should not appear as counsel in disciplinary matters, as they presently do in proceedings in the Police Disciplinary Tribunal. Rather, the Acting Police Ombudsman proposes that an independent body such as the Crown Solicitor should prosecute such matters.

Finally, the Acting Police Ombudsman suggests that under any new scheme the most efficient move would be to bring the Police Ombudsman within the office of the ICAC. He says this

would not be a radical move, as under the existing system the ICAC can exercise the powers of the Police Ombudsman and can issue directions and guidance to the Police Ombudsman in relation to referrals. The Acting Police Ombudsman says that incorporating the Police Ombudsman within the office of the ICAC would have the additional advantage of having the expertise of ICAC investigators available as part of the same organisational structure.

Can I turn now to the submission of the Police Commissioner?

In relation to the existing system, the Police Commissioner says that the unintended consequences of the introduction of the ICAC and the OPI has resulted in duplication of effort and in notable delays. He says that the current arrangements need to change. That change should focus on clarifying roles and functions, streamlining of assessments and allocation of police complaints and ensuring that relevant legislation supports any change that is made or at least supports that which is retained.

The Police Commissioner has specifically called for consideration of the process of assessments of complaints by the OPI, and delays that can be caused by the making of very comprehensive assessments of some matters before determining to refer them for investigation or inquiry. The Police Commissioner has stated that he is strongly of the view that mandatory reports made to the Police Commissioner by a member of SA Police, and in accordance with the Police Act, should be left to the Police Commissioner to deal with. He says that the extent of oversight concerning the assessment of mandatory reports has the potential to create significant delays in actioning an appropriate response and unnecessarily complicates the efficient operation of SAPOL as an organisation.

The Police Commissioner supports the independence of the Police Ombudsman. He says that, irrespective of the disciplinary framework adopted, it is vitally important that the independence and specialist capability of the oversight body is maintained.

The Police Commissioner also proposes a reconsideration of the definition of corruption, given its breadth in terms of criminal offences captured by that definition.

I turn now to the written submission of the Police Association who state that while change is encouraged in respect of certain aspects of the system, there are parts of the system that operate successfully, such as the Police Disciplinary Tribunal. The Police Association says that since their creation the OPI and the ICAC have themselves contributed significantly to both duplication and to complexity. It is concerned about the capacity of the ICAC to investigate misconduct that is neither corruption nor maladministration. While it is proper for the ICAC to maintain some oversight role, the Police Association suggests that the ICAC ought not be charged with direct responsibility for the investigation of misconduct. The Police Association suggests that the Office of the Police Ombudsman is now largely pointless. Complaints made to the Police Ombudsman are investigated by police and acting on a recommendation of the Police Ombudsman remains a matter of discretion for the Police Commissioner. To that end, the Police Association proposes a model that would see all complaints made to the OPI which would then refer matters of corruption or maladministration to the ICAC and all misconduct matters to SAPOL. The Police Association advocates the continued existence of the Police Disciplinary Tribunal. It says, and I quote: “When a police officer faces significant penalties, including potential termination, suspension, demotion or other long-term financial penalties, the assurance of a fair evidentiary hearing before a properly specialised independent Magistrate is the system which should without question remain”.

Similarly, the Police Association says that there should be no role for an oversight agency to determine a penalty and that this should remain squarely a matter for the Commissioner of Police.

The State Coroner has expressed his concern about the existing secrecy provisions under the Police Complaints Act, and from his perspective how those secrecy provisions affect his capacity to carry out a coronial inquest in a fulsome and timely manner. The State Coroner also

expresses his concern about the time taken to finalise disciplinary matters and the impact that that has on the conduct of coronial inquests.

Finally, I wish to summarise the written submissions of Professor Timothy Prenzler, of the University of the Sunshine Coast. Professor Prenzler has written extensively on the topic of oversight of police and in 2012 co-authored a book entitled “Police Integrity Management in Australia – Global Lessons for Combating Police Misconduct”. Professor Prenzler is of the opinion that an integrity commission should cover the whole of the public sector, including police. He says that, and I quote: “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 a specialist Police Ombudsman-type body. Vigilance in regard to police can be maintained by legislating a designated police unit within an integrity commission”.

Professor Prenzler also advocates the investigation of all, if not most, complaints by an independent body with low-level matters being investigated by other agencies subject to negotiation with the complainant. He also supports the creation of a disciplinary matrix on the public record so that citizens can see how misconduct offences align with sanctions.

Commissioner, you have received a number of other written submissions. These submissions raise issues such as delay, complexity and lack of transparency as particular concerns. Concerns have also been expressed about making the OPI a one-stop-shop to the exclusion of other avenues of complaint and the effect that such a scheme might have on accessibility to members of the public.

I turn now to the last part of my opening statement. In my opinion, there are a number of issues of concern that appear to be of central relevance to these reviews.

First is the time taken to resolve a complaint or report about public administration. Delay has

been raised as an issue at each step of the complaint process, including assessment, investigation and action. In the context of complaints about police, the former Police Ombudsman said in her most recent annual report, I quote: “the situation is now so dire that it is anticipated that in some circumstances complainants will be advised that it may be a further 12 months before their complaint will be processed”.

A number of written submissions raise delay, and in my submission it’s a significant issue that will require resolution.

Secondly, there is duplication. Since the commencement of the ICAC and the OPI, the legislative scheme now not only invites but requires duplication in effort. The multiple pathways to complaint, combined with sometimes multiple mandatory reporting obligations, results in more than one agency considering the same complaint or report. For example, under the police complaints system both the OPI and the Police Ombudsman may make an assessment of the same conduct. On occasion, those assessments can result in inconsistent determinations. The reviews will need to consider how best to minimise duplication, while still ensuring appropriate oversight and review of the management of complaints and reports about public administration.

Thirdly, there is the issue of the number of oversight agencies and their respective roles. Some advocate the streamlining of the police complaints system by the abolition of the Police Ombudsman, while others propose that the ICAC no longer have oversight over conduct of investigations by inquiry agencies. There are, of course, a number of different views. In my submission these hearings represent an opportunity for key agencies to identify how, in their view, each agency can be best placed to contribute to an effective and efficient integrity system.

Insofar as your review of the legislative scheme regarding the oversight of management – and management of complaints about police is concerned there are additional issues. What role

should the Police Commissioner play in relation to the oversight of management of the conduct of police and what role should an independent oversight body play? Should the police investigate themselves? Should the making of findings regarding misconduct be left to the Police Commissioner or should an external agency have a role to play? Should the Police Commissioner continue to have an exclusive role to play in terms of disciplinary sanction, or should an independent oversight body have a greater role to play in terms of those binding determinations?

There are, of course, a number of other issues that I haven't expressly addressed. I have merely raised what I consider are the most pertinent issues, but I do not suggest that they are the only ones. However, in my submission, it is these core issues that I have identified that will require resolution in order to propose a system that, as you said in your discussion paper, is effective, efficient, fair and simple.

And Commissioner, unless I can be of any further assistance, that concludes my opening statement.

THE COMMISSIONER:

Thank you. Thank you, Mr. Riches, for a clear and comprehensive review of what is undoubtedly a very complex legislative scheme.

As I understand it, Mr. Riches, you have made arrangements for the Ombudsman to speak to his submission at noon today.

MR. RICHES:

12 o'clock, yes.

THE COMMISSIONER:

Yes. I don't think I'll accelerate that in case – even though the Ombudsman is in the hearing

room at the moment – because it may be that some people have made arrangements to be here when he makes his submissions.

So, what I propose to do is to adjourn until 12 o'clock for that purpose. And then we will – I think you have also made arrangements for a member of the public, who I understand has been a complainant through the system, to make submissions at 3 o'clock.

MR. RICHES:

Yes, Commissioner.

THE COMMISSIONER:

Thank you. Alright, well thank you very much for your assistance. I'll resume again at midday.

ADJOURNED 10:57am

ICAC

OPEN HEARING

BEFORE THE HON. BRUCE LANDER QC
INDEPENDENT COMMISSIONER AGAINST CORRUPTION

MR. M. RICHES Counsel Assisting

Courtroom 3
Level 7, Riverside Centre Building
North Terrace, Adelaide

THURSDAY, 23 APRIL 2015 at 12:00pm

Witnesses:

LINES, WAYNE, Ombudsman SA

STRICKLAND, EMILY, Deputy Ombudsman

THE COMMISSIONER:

Good afternoon, Mr. Lines.

MR. LINES:

Good afternoon, sir.

THE COMMISSIONER:

Ms Strickland. Thank you very much for attending this afternoon. And I'm keen to hear whatever you want to say in relation to the matters into which I am inquiring.

MR. LINES:

Thank you, Commissioner. You have before you my written submission from the 25th of March.

THE COMMISSIONER:

Yes, thank you.

MR. LINES:

And in addition to that, this morning I provided through Mr. Riches a schedule of the legislative provisions that I would recommend be amended in some form to assist with reducing duplication and increase efficiencies. I can speak to that at a later time within my submission this morning.

THE COMMISSIONER:

Right.

MR. LINES:

Mr. Riches provided a brief summary of my written submission –

THE COMMISSIONER:

Yes.

MR. LINES:

– and because you have it before you in any event, I don't intend to labour over it in detail.

THE COMMISSIONER:

Yes.

MR. LINES:

I do want to elaborate on a few points.

THE COMMISSIONER:

Of course.

MR. LINES:

In regard to the question of oversight and management of police complaints, my main contention there is that the police should not be ultimately responsible for investigating themselves in regard to serious misconduct complaints. That's a statement of principle rather than any commentary on the quality of the work that the Police Ombudsman's office does, but the issue of the independence of the Police Ombudsman's office in relation to their functions under the Police (Complaints and Disciplinary Proceedings) Act has been an issue of long standing and that is noted by the Police Ombudsman in her, the former Police Ombudsman's final Annual Report.

And my submission is that it may now be time for a new approach to be taken whereby the serious misconduct complaints are handled completely independently of the police. If you look at the Annual Report of the Police Ombudsman, you will see that at every level of involvement of the office, it's the police that have been doing the work, whether it's

conciliation, informal investigation, preliminary investigation or full investigation. And the Police Ombudsman's role has been predominantly to assess –

THE COMMISSIONER:

Yes.

MR. LINES:

– the reports that emanate from those activities. I do note that on page 34 of the Annual Report there is a reference to four matters that were investigated by the Police Ombudsman pursuant to the powers under section 23, although there doesn't seem to be any detail about those particular matters. So, the Police Ombudsman under that section 23 can investigate matters where, in limited circumstances, where the complaint involves members of the Internal Investigation Section or an officer of higher rank than the officers of the Internal Investigation Section. And in a couple of other instances, but obviously it is not a matter that has involved the Police Ombudsman very much and it has only been very limited occasions when this Ombudsman has done that.

THE COMMISSIONER:

Well, the Police Ombudsman has been constrained, of course, by the absence of any skilled investigators in her –

MR. LINES:

Yes.

THE COMMISSIONER:

– and now the Acting Police Ombudsman's service.

MR. LINES:

Yes. That's correct. So I'm not sure how those four investigations were conducted, whether

by some other person brought in for the special purpose or whether one of the legal officers perhaps conducted it themselves. It will be interesting to hear from the Police Ombudsman or Acting Police Ombudsman about that.

THE COMMISSIONER:

Yes.

MR. LINES:

But the point that I make is that by and large all of the investigation of complaints and the resolution of the complaints are conducted by the police themselves.

THE COMMISSIONER:

I think that's common throughout Australia. I think as far as my researches show, the only jurisdiction where all complaints are investigated – all complaints of police officers are investigated independently of the Police Force is in Ireland, I think.

MR. LINES:

Your research is more extensive than mine, sir.

THE COMMISSIONER:

Well, I have had some assistance. But, I think probably what would be put against you by – by others might be the cost of employing a new force to investigate the Police Force and to have that new force obtain the necessary expertise to carry out investigations of that kind.

MR. LINES:

Yeah. My comment in response to that, Commissioner, is that from the Police Ombudsman's Annual Report, it was only a matter of 46 matters that were considered serious enough to require full investigation.

THE COMMISSIONER:

Yes.

MR. LINES:

So, we are not looking at many matters that would require the in depth investigation that might be in the public mind. And my view is that it would be a better use of resources for an existing body with investigators to have the function of undertaking those types of investigations. And I have suggested, in my submission, that your office may well be able to do that with your current investigation team. And in terms of the requirements for expertise, well a number of the investigators that your office has, and other offices have, are former police officers and –

THE COMMISSIONER:

Yes.

MR. LINES:

– have that inside knowledge in any event.

THE COMMISSIONER:

Yes.

MR. LINES:

So, I don't see it as an overly expensive issue to convey the function of an investigation of serious police misconduct to another body.

THE COMMISSIONER:

I suppose that raises another question too, if that were to be the scheme to be implemented; what is serious misconduct –

MR. LINES:

Yes.

THE COMMISSIONER:

– and where does serious misconduct start?

MR. LINES:

Yes. I would say that I'm probably not qualified to provide you some –

THE COMMISSIONER:

No.

MR. LINES:

– advice on that, sir. But, you already have, in a sense, the function of assessing what is serious misconduct in –

THE COMMISSIONER:

We do, we do.

MR. LINES:

– in the public administration arena. So, I'm sure that with that function it would not be a huge leap to apply those types of principles that you're utilising for that purpose to police misconduct.

THE COMMISSIONER:

Do you mean by that that serious misconduct is of the kind that has been identified by the Office for Public Integrity as serious misconduct?

MR. LINES:

Yes, I mean, that's correct, sir.

THE COMMISSIONER:

I see.

MR. LINES:

It should almost go without saying though that if your – if your functions included investigation of police misconduct, you should have the power to impose sanctions for that misconduct with there being a right of appeal from any sanction that you impose. And I understand that the Acting Police Ombudsman has suggested that in terms of the disciplinary framework that it should move away from the internal police tribunal to –

THE COMMISSIONER:

Yes.

MR. LINES:

– the external SACAT.

THE COMMISSIONER:

SACAT, yeah. Do you support that?

MR. LINES:

I do support that.

THE COMMISSIONER:

And are you talking then with the right of appeal being to SACAT?

MR. LINES:

Yes.

THE COMMISSIONER:

Yeah. And who would have the right of appeal, both the police officer and the Police Force or the oversight agency?

MR. LINES:

Well, the right of appeal would be from the police officer who's the subject to the sanction.

THE COMMISSIONER:

And only the police officers have the right of appeal?

MR. LINES:

To my mind, that makes perfect sense. I don't think the Commissioner should have any individual right.

THE COMMISSIONER:

Okay.

MR. LINES:

Yep. Finally, in respect of the oversight and management of police complaints, I have made a comment about the role of the Police Ombudsman in reviewing Freedom of Information matters. And I have put forward the view that there doesn't seem to be any good reason why that should remain with the Police Ombudsman. And given that my office conducts external reviews for all of government and local government FOI decisions, it could easily be accommodated within my own office.

I noticed from the former Police Ombudsman's Annual Report that there were 32 Freedom of Information reviews received by the office, and 12 were completed in the last financial year. In the same year my office completed 116 reviews. So, in terms of economy of scale it does seem to make sense for that function to be within my office.

THE COMMISSIONER:

Is it only FOI requests in relation to police that you don't have jurisdiction over?

MR. LINES:

That's correct.

THE COMMISSIONER:

Yeah.

MR. LINES:

If I may Commissioner, I'll move to the submission I've made in regard to complaints and reports about public administration.

THE COMMISSIONER:

Just before you do, if you don't mind. There are some other activities of the police that might require some sort of auditing, for example, telephone intercepts, listening device applications and the application of listening devices and forensic procedures. Who would you see would be the appropriate agency to audit those types of processes?

MR. LINES:

Yes, I noted that and, again, my view would be that whoever has the oversight of the complaints of misconduct would be well situated to do that. And if that comes to you, sir, then it should be your staff that are engaged in that.

THE COMMISSIONER:

Another possibility might be, because my agency is also subject to an audit, and that's by the person appointed under the ICAC Act to review the policies and procedures of my office, which is this year, Mr. Duggan, and was last year. He might be the appropriate person to conduct a

review of those types of matters, because he is conducting a review of those types of matters in relation to my office.

MR. LINES:

I wasn't aware of that, sir, but that does make sense. Yeah.

THE COMMISSIONER:

Yeah.

MR. LINES:

In regard to whether the OPI should be the central body for the receipt and assessment of complaints and reports about public administration, I've presented my position that I don't think that's the most effective way forward and I've given a number of reasons for that. But in summary –

THE COMMISSIONER:

I think your submission has been made public, has it not?

MR. LINES:

It has, yes.

THE COMMISSIONER:

Yes.

MR. LINES:

In summary, I reached that position on the basis that my office already has a very established position in the marketplace of complaints handling in regard to public administration. And when I look at the volume of the approaches from members of the public that we receive, it's in the order of 10,000 a year, that would be more than what the OPI and the other inquiry

agencies would receive put together, as I understand it.

THE COMMISSIONER:

It would certainly be significantly more than the Office for Public Integrity receives. But as I understand it, a lot of the approaches to your office are from people who are approaching the wrong office.

MR. LINES:

Correct, yes.

THE COMMISSIONER:

About 70 per cent of them?

MR. LINES:

Almost 70 per cent, yes.

THE COMMISSIONER:

Which office should they be approaching, most of those people?

MR. LINES:

Well, that – there's such a variety, whether it is to do with telecommunications or financial issues, with the banks, and insurance companies, health insurance, all these range of issues do come to our office.

THE COMMISSIONER:

So your title is attracting too much work.

MR. LINES:

It seems that way. But even if you discount that 70 per cent, we are still dealing with 3,000

matters that are within jurisdiction.

THE COMMISSIONER:

Quite. Which, again, is probably twice what the Office for Public Integrity is receiving.

MR. LINES:

Yes. And in that light it does seem to me a pity to have to re-educate, redirect the public to go to another agency when there's this established pattern and understanding within the public of where to at least make enquiries and to have some guidance with respect to issues relating to public administration. And the Ombudsman's office is more aligned in that area of public administration and issues relating to the way government departments and local government function, whereas the OPI, from its inception, has been associated with your office, obviously, and is seen to be part of your anti-corruption role.

THE COMMISSIONER:

I think before the establishment of the OPI – and before the creation of my position – there was no one who was given jurisdiction to receive complaints of misconduct and maladministration. That wasn't a historical part of your role.

MR. LINES:

That's correct.

THE COMMISSIONER:

And so complaints of that kind – or complainants of that type of conduct had nowhere to go. Now that there is such a route available through the Office for Public Integrity, what would be the advantage of rerouting it? Because your office doesn't have experience in misconduct – you would have had some experience in maladministration but not in misconduct. Your office is limited to administrative acts. What would be the advantage now of rerouting misconduct to your office?

MR. LINES:

Well, quite often the allegations or complaints about administrative error involve individual actions of public officers and often our investigations are actually looking at that personal conduct of a public officer in the cause of the complaint. So it is not a large step to take to be moving from an allegation of administrative error to misconduct. And, in fact, under the Ombudsman Act legislation I have to report misconduct on the part of public officers to their principal officer. So, it's envisaged in the Act, as it currently stands, that in the course of investigating administrative error I will come across misconduct, breaches of codes of ethics or standards by individual public officers and these need to be recorded to the principal officer for perhaps disciplinary action. So, it wouldn't be a big step to take for more of that work to come to my office. We're set up to investigate that type of activity in any event. Also –

THE COMMISSIONER:

When you say that, do you have any investigators?

MR. LINES:

Yes, sir. We have, well four people with the title of investigation officer, plus several others who are performing investigation officer functions and have legal degrees and so forth that enable them to do that.

THE COMMISSIONER:

Right. I follow.

MR. LINES:

But part of my submission, ultimately, is that the Ombudsman Act be amended to include definitions of maladministration and misconduct in line with the ICAC Act, so that members of the public can come directly to my office to deal with those range of matters.

THE COMMISSIONER:

I follow that. But would that mean that they can't go to OPI in relation to those matters?

MR. LINES:

No, not under the – not if we maintain the existing structure.

THE COMMISSIONER:

I see.

MR. LINES:

But the role of OPI in that instance would be, once it identifies that it is a matter of maladministration and/or misconduct without a component of corruption or criminal behaviour, that the matter is simply referred to my office to deal with rather than requiring another assessment by yourself. In the current arrangements, as you would appreciate, there is quite a bit of double handling that is happening here.

THE COMMISSIONER:

Yes, I understand that.

MR. LINES:

When the Office for Public Integrity receives a complaint, it will assess that information and then make a recommendation to you. I assume that you have to do some sort of assessment of that material as well. And then if you decide that it would be appropriately – should be appropriately referred to one of the public – one of the inquiry agencies such as my office, you will write to that agency and ask for their view. In our instance, when that request comes to my office we would do an assessment of the material that's provided with that letter and form a view and then advise you of that by separate correspondence. You then weigh up that view and then if you proceed with your referral that's another letter that comes to my office – and there may be some more material that comes with that than what we originally had, and so

another assessment occurs within my office as to all of that material, all of the issues and how we will deal with that matter. So, in that process, before we have actually launched into an investigation or an attempt to resolve the matter, there have been I think four assessments. If I add it up correctly.

So, my strong submission is that we need to reduce that level of handling of a matter and if a matter is assessed by the Office for Public Integrity as purely maladministration or misconduct, then I see no reason why it couldn't just be referred directly to my office to deal with in the ordinary way that my office deals with them.

THE COMMISSIONER:

Well, I suppose you could achieve that by repealing the obligation on me and the Office for Public Integrity to seek your views before a matter is referred to you. That would get rid of a couple of the assessments.

MR. LINES:

Yes.

THE COMMISSIONER:

But I think that section is in there sort of as an administrative decision politeness so that matters aren't imposed upon you without you first having an opportunity of –

MR. LINES:

Yeah.

THE COMMISSIONER:

– providing argument why that shouldn't happen.

MR. LINES:

Yeah.

THE COMMISSIONER:

And I think that provision is there for the further reason of you providing information as to why a matter should not be investigated at all.

As Mr. Riches said in his opening, I think about 900 of the 1500 complaints or reports have already been made to the Office for Public Integrity are not investigated. So more than 60 per cent or about 60 per cent never see the light of day and are never imposed upon anyone because the office assesses them as not requiring any investigation at all. If that situation were to be removed, that would increase your work.

MR. LINES:

Well, not necessarily, because we have to make an assessment of each matter that comes to us in any event. And if we are able to dismiss the matter, that can be done very quickly. And – certainly it would increase that initial stage of assessment work.

THE COMMISSIONER:

It would. It would. It would mean that you would now be – you or perhaps the Police Ombudsman – would have to be assessing 900 matters that are never seen by you or the Police Ombudsman. So, the work that the Office for Public Integrity does would fall upon you.

MR. LINES:

Yes. 900 amongst 10,000 is not a huge increase, if I may say.

THE COMMISSIONER:

No. If 10,000 were the matters you assessed. But I think you don't.

MR. LINES:

Well –

THE COMMISSIONER:

Because 70 per cent are outside jurisdiction.

MR. LINES:

Sure, but there is still an assessment that occurs with each of those to some extent.

THE COMMISSIONER:

An assessment – it wouldn't take long to assess a complaint about a telecommunications matter that –

MR. LINES:

That's right.

THE COMMISSIONER:

– that need not be investigated.

MR. LINES:

But I do stress the point that our office is well situated to do that assessment and early resolution that is so important to efficient complaint handling.

THE COMMISSIONER:

Yeah.

MR. LINES:

And that's one of the reasons why I say that in the area of public administration and misconduct of a low level, we would be well suited to – to be the central body –

THE COMMISSIONER:

Yeah.

MR. LINES:

– for receiving those types of complaints.

THE COMMISSIONER:

Yeah.

MR. LINES:

Also, it should be mentioned that my office has the advantage over the Office for Public Integrity, as it is currently constituted, to publish the reports of our investigations. And in my view, that's – that's a vital element in improvement or engendering improvement in public administration, to have this openness in and explaining to the public the results of our investigations so that there are learnings that occur from that. So I think that's an advantage that my office has in this area.

THE COMMISSIONER:

Yeah. I'm not sure how I see that as an advantage, because nobody is suggesting that should be removed because ordinarily my office doesn't investigate misconduct or maladministration. It might if I decide to exercise your powers, for example. But ordinarily we don't. So, in the usual case, if a matter is referred to you by my office, you will still publish that report.

MR. LINES:

Yes.

THE COMMISSIONER:

So –

MR. LINES:

So, but if – I suppose we’re talking at cross-purposes here, but if the OPI becomes a central body there’s a question mark still over what does it do with all of those incoming complaints. Is it meant to handle those complaints in some way or is it simply just to refer them out again to other bodies?

THE COMMISSIONER:

Well, that has to be considered, I think. If there was to be a one-stop-shop, as was suggested when the legislation was introduced, the question is what would the one-stop-shop do? Would it carry out any preliminary investigation to determine whether, first, it’s in – within jurisdiction and secondly, whose jurisdiction, or would it simply refer the matters to the appropriate jurisdiction?

MR. LINES:

Yes.

THE COMMISSIONER:

That’s a question of the triaging, I think of the –

MR. LINES:

That’s right.

THE COMMISSIONER:

– complaints and reports.

MR. LINES:

Yeah. And my point is that that’s probably not the most efficient way of handling these types of complaints, because then there’s still that second level of operation that has to occur after the initial receipt of the complaint by the OPI where, if it came very quickly or directly to my

office, we would be doing the assessment and resolution and referral if necessary very quickly. Of all the matters that we receive that don't require investigation we are able to finalise them within four days, on average.

THE COMMISSIONER:

Well, perhaps if I can ask for two figures: The first is how many matters have been referred to you by my office since September 2013? And how many matters do you investigate apart from those referred by my office?

MR. LINES:

Yes. When I last looked at the figure, towards the end of March, we had received 60 referrals from your office for the period since the – September 2013.

THE COMMISSIONER:

So that's 60 referrals in 18 months, yes?

MR. LINES:

Yes, that's right. It's true to say that we didn't receive many from your office in the first financial year of your operation. But it has picked up since this financial – current financial year.

THE COMMISSIONER:

Yeah. And how many matters are investigated by your office each year?

MR. LINES:

If I just refer to the annual report. As I said, we assess – of the matters that we received in the last financial year, we assessed 3,000 of them to be complaints within our jurisdiction. And I haven't quite got the figure at my fingertips, but it was approximately around – it was over 200 that we investigated, with – resulting in approximately 50 reports –

MS. STRICKLAND:

Finding error.

MR. LINES:

– finding error.

THE COMMISSIONER:

And the other 150 is – are dealt with how?

MR. LINES:

Either finding no error –

THE COMMISSIONER:

I see.

MR. LINES:

Yep. Or some other form of resolution.

THE COMMISSIONER:

Right, ok. Mr. Riches said in his opening this morning that there had been 1500 or so complaints and reports and 290 or thereabouts had been assessed as misconduct or maladministration. That would mean that of all of the complaints and the reports that are coming to the Office for Public Integrity you are receiving .6 of a per cent; so 99.4 per cent are dealt with without you having any involvement. Would that not be to your advantage, the advantage of your office?

MR. LINES:

To have –

THE COMMISSIONER:

60 out of 1500.

MR. LINES:

Yep.

THE COMMISSIONER:

4 and a half per cent, sorry. Shouldn't try and do mathematics [inaudible] – we'll say at 5 per cent. You're receiving by reference 5 per cent of those complaints and reports that are made to the Office for Public Integrity, which means you're not receiving 95 per cent. Isn't that to your office's advantage?

MR. LINES:

Certainly. I assume that some of those matters are being referred to other inquiry agencies as well.

THE COMMISSIONER:

I think it must follow that if you receive 60, and there has been 290 assessments of misconduct and maladministration, apart from those that are held within my office, which are only a few, about 220 or 210, 220 are being sent to other public authorities –

MR. LINES:

Yes.

THE COMMISSIONER:

– apart from your office –

MR. LINES:

Yes.

THE COMMISSIONER:

– to investigate. Again wouldn't that be to the advantage of your office?

MR. LINES:

Yes, I accept that.

THE COMMISSIONER:

Yes. So the Office for Public Integrity actually acts as a filter as far as you're concerned, so that you only receive the matters which require any investigation.

MR. LINES:

Yes. And that's acknowledged, sir.

THE COMMISSIONER:

Yep.

MR. LINES:

However, my submission is that we would prefer to be doing the filtering rather than an external body.

THE COMMISSIONER:

What would you do with the other 220?

MR. LINES:

Well we would assess them according to our own criteria.

THE COMMISSIONER:

But, say the criteria is the same and the assessment in due course is the same. And you have an assessment of 290 out of 1500 you think that you should deal with 60, who deals with the rest?

MR. LINES:

Yep. We can refer them back to the public authorities that are involved and –

THE COMMISSIONER:

That would be doing the same work as the Office for Public Integrity.

MR. LINES:

Yes, but the added advantage of my office is that if the public authority deals with the matter in a way that is unsatisfactory we would have power to review what that public authority has done and undertake our own investigation.

THE COMMISSIONER:

So can I. I can require them to do the investigation again and if I am not satisfied I can have the Minister intervene to have it done appropriately. And if I am still not satisfied I can report to Parliament.

MR. LINES:

Sure. However, Commissioner, you yourself can't under – cannot undertake another investigation.

THE COMMISSIONER:

Yes, I could. I could reassess it and – under section 24(7) – and investigate it for myself, exercising your powers.

MR. LINES:

All right. That's slightly different to what I had understood you to say to me previously in another context, but –

THE COMMISSIONER:

I think that's within my power. It wouldn't happen often because I think it's important in public administration to teach public authorities how to investigate appropriately, and to ensure that they do, so that persons who make complaints and reports can be satisfied that the investigation that's been carried out is transparent and has been carried out with the honest intention of determining what occurred.

MR. LINES:

I agree wholeheartedly with that, Commissioner. As I look at section 24(7) of your Act –

THE COMMISSIONER:

Yeah.

MR. LINES:

– part of the issue has been that it gives you an absolute discretion to – to modify an assessment –

THE COMMISSIONER:

That's right.

MR. LINES:

– but it doesn't give you the discretion to resume or intervene in an investigation once it's been referred.

THE COMMISSIONER:

Not sure that I agree with that because the subsection talks about the making of an

assessment, whether action is taken, and what action is taken. Now, it might be that that would – this hasn't happened yet – it might be that that would allow me to reassess and to take action for myself, using your powers under section 24(2)(ab) but anyway, we don't need to debate the law about that too much.

MR. LINES:

Yep.

THE COMMISSIONER:

It's a question of what is the best way to deal with complaints of this – complaints and reports of this kind.

MR. LINES:

Yes. So, they were probably the only submissions I wish to make on that area of your –

THE COMMISSIONER:

Thank you.

MR. LINES:

– review. The final section was to do with proposals for change to improve the current handling of matters.

THE COMMISSIONER:

Yes.

MR. LINES:

And I have made submissions there about some legislative changes –

THE COMMISSIONER:

Yes.

MR. LINES:

– and the schedule summarises or perhaps elaborates on that submission for your benefit. We’ve already touched on a few of those issues already.

THE COMMISSIONER:

Yes.

MR. LINES:

But, primarily, my submission is that there should be three key integrity agencies at the state level. One is your office, one is mine, and one is – the other is the Auditor General. And the three cover –

THE COMMISSIONER:

Sorry, what was the third one?

MR. LINES:

Auditor General.

THE COMMISSIONER:

Yes, yes. Yep.

MR. LINES:

So ICAC should be devoted and focused on corruption matters. My office should be focused on administrative improvement and the Auditor General’s focused on financial economic diligence. So the three would cover honesty in public administration, that’s your office, fairness in public administration, which is my office, and diligence in public administration, which is the Auditor General’s function. And for that to work best my submission is that each

needs to be bolstered and maintained as having very distinct areas. And in my submission the overlap that your office has into public administration improvement is not helpful, and my considered opinion is that it would work better if your office was bolstered and reinforced in its role in anticorruption – stamping out corruption – and my office bolstered and perhaps developed in terms of the maladministration and misconduct areas that we have talked about. And that's not to say that we don't have interaction and support for each other. But in having very clearly defined functions and roles that do not overlap I think would be better for the public in understanding who does what and respect for each – the integrity of each office as well.

So that's my primary submission in that regard. But if the current structure and arrangements are to continue, then I have listed some legislative changes that would help efficiencies in the way that we operate. And we have spoken about the role of subsection 24(7) of your Act.

THE COMMISSIONER:

Yes.

MR. LINES:

I would submit that it needs to be made clearer that you can take, or resume control of a referral once it's made.

THE COMMISSIONER:

Yes.

MR. LINES:

That would be helpful. In terms of section 37, I submit that it would be helpful if that section is amended to clarify that in dealing with a matter on referral from your office, an inquiry agency may exercise the powers, procedures and discretions available to it under the Act that that inquiry agency is established by.

THE COMMISSIONER:

I think that probably is implicit in the referral, but it might be better to spell it out.

MR. LINES:

Yes. I also submit that there should be a new section that stipulates that a referral under section 37 is subject to the jurisdictional limits set out for the inquiry agency under its own Act.

THE COMMISSIONER:

That could be tricky.

MR. LINES:

I understand that, yes. But it does – there is a dilemma in the current arrangement where, in a sense – the jurisdiction of my office is determined by your referral. And that could have some unintended consequences. I give the example of the – I’m not sure whether, Commissioner, you have looked at the Judicial Conduct Commissioner’s Bill?

THE COMMISSIONER:

Yes, I have.

MR. LINES:

That has as part of it an amendment to the Ombudsman Act to, section 5 of the Ombudsman’s Act, to exclude my jurisdiction – well, I don’t have it currently but – it’s to make it clear that I have no jurisdiction over matters that are subject to the Judicial Complaints Commissioner’s Act once it is passed. However, there is a provision in that legislation for matters to be referred to you if there is a suspicion of corruption in the nature of the complaint. There is nothing in the legislation that requires you to refer the matter back to the Judicial Conduct Commissioner, if you, having looked at the matter, consider that there is no corruption that you can pursue there. So, theoretically, once it’s in your possession, you could refer that matter to me to

investigate, which is quite inconsistent with the intention that has been espoused in the Bill – that I do not have jurisdiction over those sorts of matters.

THE COMMISSIONER:

I doubt if I'd have that power. But, again, we might be here lawyers arguing about that. I doubt very much that if a matter were referred to me I could refer it to somebody else. That would be inconsistent, I would have thought, with the referral, but –

MR. LINES:

Yep.

THE COMMISSIONER:

– but anyhow we needn't debate that.

MR. LINES:

Yep. But I sort of raise that as an example where there could be inadvertently an expansion of my jurisdiction because it rests with you on your referrals or your referral power.

THE COMMISSIONER:

Well, I think the present scheme, after the introduction of the ICAC Act, has had the effect of expanding your jurisdiction because prior to the ICAC Act you had no jurisdiction in relation to misconduct.

MR. LINES:

Correct.

THE COMMISSIONER:

When I refer a matter to you, you are given jurisdiction by the referral into misconduct, so it has had the effect, I think, of expanding your jurisdiction. The powers that you exercise, when

you exercise a jurisdiction which is given to – given by the referral, are yours, I think, under the Ombudsman's Act. And I don't see any problem about that. That seems to me to be administratively tidy enough.

MR. LINES:

Yes, and part of my submission in this schedule is that to make that abundantly clear, the Ombudsman Act should be amended to allow me to investigate matters of maladministration and misconduct directly as well.

THE COMMISSIONER:

Well, if you are given that jurisdiction, why would you need the section 37A that you propose? It wouldn't arise, would it?

MR. LINES:

Well, there are other jurisdictional limits that may be relevant, such as the limit on investigating complaints by an employee of an agency against their manager. So, it is essentially a managerial dispute rather than a matter that the Ombudsman was originally set up to investigate.

THE COMMISSIONER:

A workplace incident, you mean?

MR. LINES:

Yes.

THE COMMISSIONER:

Yeah. Yeah. Well, yeah, the – mm. Yes, well I'll think about that.

MR. LINES:

Recently, Commissioner, we identified that there may be an issue in the referral of information your investigators have obtained in the course of investigating a potential mis – corruption matter, and what use my office may make of that information. And so I have suggested that section 56A of your Act be amended to make it clear that information that you obtained can be used by an inquiry agency for the purpose of dealing with a matter on referral.

THE COMMISSIONER:

Is that because of the present reference in the Act only to enforcement – law enforcement agencies and prosecution authorities?

MR. LINES:

And public authorities but not inquiry agencies.

THE COMMISSIONER:

Yes. Yes, okay. I understand that. Can I take you back to your first statutory provision that you mentioned, section 4, to amend the definition of inquiry agency to include –

MR. LINES:

Yes. The Auditor General.

THE COMMISSIONER:

Auditor General. I have not raised with the Auditor General whether the Auditor General would wish to be an inquiry agency, because probably not historically the Auditor General's role. But section 39 of my – the ICAC Act does allow me to request the Auditor General to carry out assessments, and to request him to conduct an examination of accounts under the Public Finance Act. Would I need any more power than that?

MR. LINES:

It just struck me, sir, that the Auditor General plays an important role, obviously, in keeping

government agencies to account with the way they handle their resources and finances.

THE COMMISSIONER:

Undoubtedly.

MR. LINES:

And the definition of maladministration includes that type of concern. And it would be, in my submission, more effective if you could directly refer to the Auditor General as an inquiry agency rather than as a, in a sense an external consultant, and then have some oversight of the result of the involvement of the Auditor General.

THE COMMISSIONER:

It's just that auditors don't usually see themselves as inquiry agencies. They see themselves as assessing the work of others to determine whether or not it has been done accurately, rather than inquiring into it to determine how it should have been done.

MR. LINES:

Yes.

THE COMMISSIONER:

It might be a very much expanded role for the Auditor General, upon which the Auditor General would need to comment I think.

MR. LINES:

Certainly. And I wouldn't expect any amendment in that nature to be made –

THE COMMISSIONER:

No.

MR. LINES:

– without consultation with the Auditor General.

THE COMMISSIONER:

No.

MR. LINES:

I did want to highlight one matter about the definition of public officer in Schedule 1, and the concern I have about its broadness.

THE COMMISSIONER:

The concern you have about, sorry?

MR. LINES:

Concern about its broadness.

THE COMMISSIONER:

Broadness, yes.

MR. LINES:

Yeah. Currently, a person performing contract work for a public authority or the Crown is a public officer.

THE COMMISSIONER:

Yes.

MR. LINES:

In my view, that is too broad because, notionally, that could cover people that are providing cleaning services or the electrician that comes in for a day to fix up the lighting –

THE COMMISSIONER:

Yes.

MR. LINES:

– in a government department’s office.

THE COMMISSIONER:

Yeah.

MR. LINES:

In my view, I think the intention was that public officers include people who are performing contract work in discharge of the functions of a public authority or the Crown. So, they are actually providing service to the public on behalf of that public authority.

THE COMMISSIONER:

I think there’s good reason for the first class that you identified to be public officers. For example, those people are procured by someone in public administration to carry out the service. It would be important to know that the procurement process was transparent so that you’d investigate the conduct of that person procured, bringing – bring him or her within the Act. And the persons who are assisting to discharge the functions of an Act are covered by the definition of a person to whom a function or power of a public authority is delegated in accordance with an Act. So, I think there’s good reason to include contractors. There are many sorts of contractors who would be caught by the Act who presently don’t understand themselves to be – a lot of medical practitioners, who are providing specialist services to the Department of Health, would be contractors for the purposes of the Act under this. We wouldn’t want to exclude them from the reach of the Act, I think.

MR. LINES:

Certainly.

THE COMMISSIONER:

They may want to but –

MR. LINES:

Yeah.

THE COMMISSIONER:

– we wouldn't.

MR. LINES:

Yeah. Well, considering that, further thought needs to be given about that because as I look at it, it just seems way too broad and we could be investigating the conduct of people that really has no relationship to the functions of government.

THE COMMISSIONER:

Yes. I'm not so sure about that. In a sense I think the definition is somewhat too narrow because at the moment I think, for example, that people who provide a licencing service, directly licensed perhaps by an Act, may not be caught by the Act. And they should be. And there is good reason, I think, to increase the width of the definition of public officer which of course can be done, as you know, by regulation.

MR. LINES:

Yep.

THE COMMISSIONER:

But anyhow, I'll take on board what you say about that.

MR. LINES:

Thank you. Perhaps, just the final recommendation there about the Local Government Act, and it has been a situation where there's been investigation by your office in terms of breach of a Code of Conduct by a council member or an employee of council and you may have exercised my powers even to conduct that investigation. But the Local Government Act under section 264(2) only allows a lodgement of complaint with the District Court if there's a failure to comply with a recommendation.

THE COMMISSIONER:

Of the Ombudsman?

MR. LINES:

That's right, rather than your office. So I'm suggesting that it should be available whether the investigation is conducted by me or you.

THE COMMISSIONER:

I think that's right. I think if the present regime or something like the present regime were to continue that's a lacuna in the Act at the moment and it leads to the unsatisfactory result that if I had carried out the investigation and found misconduct, that councillor couldn't be the subject of proceedings in the District Court, but if you carried it out they could.

MR. LINES:

That's right.

THE COMMISSIONER:

It's an odd result.

MR. LINES:

It is. So, Commissioner –

THE COMMISSIONER:

I think as between ourselves, Mr. Lines, what is important from the public's point of view is that whatever scheme is settled upon is efficient and doesn't lead to inquiry agencies tripping over each other and misunderstand – because they misunderstand or they exceed their jurisdictions. And I think it's important from the public's point of view that the public know who might investigate their complaint or report so that they know where they should report or complain.

MR. LINES:

I agree wholeheartedly with those comments, sir.

THE COMMISSIONER:

Thank you.

MR. LINES:

I have no further submission to make at this point.

THE COMMISSIONER:

I'm very grateful, Mr. Lines, for your assistance and Ms. Strickland's assistance. I'm grateful for the submission you put in and for the time you put in this afternoon in making your submissions. Thank you.

MR. LINES:

Thank you sir.

THE COMMISSIONER:

The next person to make a submission is a member of the public, which is at 3 o'clock, I think, Mr. Riches?

MR. RICHES:

Yes, Commissioner.

THE COMMISSIONER:

I will adjourn the public hearing until 3 o'clock then, this afternoon. Thank you.

ADJOURNED 12:57pm

ICAC

OPEN HEARING

BEFORE THE HON. BRUCE LANDER QC
INDEPENDENT COMMISSIONER AGAINST CORRUPTION

MR. M. RICHES Counsel Assisting

Courtroom 3
Level 7, Riverside Centre Building
North Terrace, Adelaide

THURSDAY, 23 APRIL 2015 at 2:27pm

Witness:

VANSETTEN, PAUL, member of the public

THE COMMISSIONER:

Mr. Vansetten, would you just mind providing us with your full name. I don't want your address, just your name for the record, please.

MR. VANSETTEN:

Sure. Paul Evan Vansetten.

THE COMMISSIONER:

Thank you. And Mr. Vansetten you have provided me with a submission in relation to the review that I'm carrying out?

MR. VANSETTEN:

Yes, I did, sir.

THE COMMISSIONER:

Yes. And you asked to be able to speak to that?

MR. VANSETTEN:

Yes, I did.

THE COMMISSIONER:

Go ahead.

MR. VANSETTEN:

Go ahead?

THE COMMISSIONER:

Yes.

MR. VANSETTEN:

Yep. Thank you for this opportunity to raise my concerns and experiences when confiding with the Office of the Police Ombudsman. We are by default representative of the general public without the luxury of affording support for this inquiry. I am not familiar with legislation or components within, but we will attempt to raise our concerns nevertheless.

My wife and I have had the unfortunate experience of becoming involved with the justice system and in doing so discovered some anomalies within our Police Force that we thought would require the attention of some form of watchdog, and in this case the Police Ombudsman. The result of that has led us to pursuing the unachieved opportunities of a fair hearing, natural justice and/or subsequent appeal processes that demonstrate procedural fairness, good faith, honesty and rationality. The most prominent causation of this issue is that of the relationship between SAPOL and mentally ill offenders.

Our hope is that this hearing will effect change in the culture of the role of the Police Ombudsman and also reinstate some faith in the South Australian Police Force. Without a transparent, non-biased, fully autonomous watchdog the process of change, particularly a legislative aspect which, in turn, has the possibility to affect the culture of an agency it might oversee and the ability to have a fair hearing, has little chance of occurring. I have always had a concern, without risking the integrity of most police officers, of the issue of police investigating police. This has always – this always has potential to create an essence of bias and, in this instance, a lack of transparency and accountability. We are still of the mindset and hope that these issues could still have the propensity to be explored further in some form, in particular in realising – in the realisation of natural justice and the relationship between SAPOL and mentally ill prisoners in their custody and control and the culture related to that group in the community. And I realise this is not the forum for that.

As it currently stands, one could come to the conclusion that mentally ill people have control of their illnesses and should be denied fair and natural justice if they breach laws in the midst of

that illness. Our experience with the Police Ombudsman's service was confusing, frustrating and nothing but very disappointing and it has done nothing to give us any confidence in high-level matters that have potential to conceal, to cause significant concern and/or legislative change to SAPOL's investigative procedures and processes.

We had a situation where information was collected by police and was buried within the confines of SAPOL and not available for any legal issues that ensued. It was by mere persistence that I discovered this information, from which some police officers were disciplined and more investigated. And we still have this information and we believe that this information denied us the process of obtaining legal and natural justice. The investigation from the Police Ombudsman lasted for almost two years. And that was after the previously mentioned delay period of 18 months after an incident where the issue concerning mental health and duty of care was discovered.

THE COMMISSIONER:

Mr. Vansetten –

MR. VANSETTEN:

Yes, sire.

THE COMMISSIONER:

– it's up to you, but do you want to put in context how it was that you came into contact with SAPOL and the Police Ombudsman, the circumstances giving rise to that? You may not want to mention it.

MR. VANSETTEN:

Yeah. This information I discovered after 18 months was through a freedom of information application.

THE COMMISSIONER:

But, I was just – I was wondering whether you wanted to go back so that your contact with SAPOL could be understood. Are you – are you prepared to tell us how it is that you came into contact with SAPOL?

MR. VANSETTEN:

Sorry –

THE COMMISSIONER:

And then how it is you come into contact with the Police Ombudsman?

MR. VANSETTEN:

Yeah. Without going into too much detail, briefly, it was a family member involved who was suffering a mental illness at the time and had breached the law. And it was a major event. And we just were not happy with the treatment from SAPOL in regard to that mental illness situation.

THE COMMISSIONER:

And that family member was arrested?

MR. VANSETTEN:

Yes, sir.

THE COMMISSIONER:

And after his arrest, did you make a complaint about the way in which the police had conducted themselves?

MR. VANSETTEN:

Not after the arrest. I wasn't aware of – I had no factual evidence to back up my theory until I

obtained the FOI application, 18 months later.

THE COMMISSIONER:

So was your first contact with the Police Ombudsman 18 months after the family member was arrested?

MR. VANSETTEN:

Yes, sir.

THE COMMISSIONER:

And that was when you obtained information on an FOI application?

MR. VANSETTEN:

Yes.

THE COMMISSIONER:

And were you dissatisfied with the level of attention that you obtained from the Police Ombudsman after you made your complaint?

MR. VANSETTEN:

Initially, I went with the process. Getting further down the track I became concerned that allegations I had raised and evidence I had supplied was not either addressed at all or satisfactorily.

THE COMMISSIONER:

Thank you.

MR. VANSETTEN:

Various organisations – related organisations were involved, and including Internal Affairs or

the IIS. There was no – I had no understanding of their involvement, how they would complement the Police Ombudsman. I had no advice on procedure, what was to happen. And making contact with the Police Ombudsman's office was either by phone or email, and quite often lengthy delays in getting correspondence returned with asking for updates on where the case was up to. We had concerns with the legal process, that the outcome of our enquiries would have a bearing on legal matters which didn't happen because we didn't have the information available during the court process.

THE COMMISSIONER:

Yes. Yes, go ahead.

MR. VANSETTEN:

So – so my basic research led me to a piece of information in regard to the bias rule of natural justice. I am no legal expert, but I see the following as a point of interest for further discussion, raising the issue of a conflict of interest in the Police Commissioner's role in investigating fellow and subordinate police officers or the ability to override the decision of the Police Ombudsman's decision of guilt or innocence or subsequent disciplinary measures.

As lay members of the public, our observations and perception of this has occurred in this instance specifically to heed several unresolved issues I have raised with the Police Ombudsman. The bias rule that I have [inaudible] partially here demands that a decision maker should be disinterested or unbiased in the matter to be decided. Justice should not only be done, but seen to be done. If fair-minded people would reasonably apprehend or suspect the decision maker has prejudiced the matter, the rule is breached – often referred to as the reasonable apprehension of bias. So there seems to be some dissatisfaction with the Police Ombudsman's office. And it seems clear my concerns are related to that dissatisfaction. As I mentioned previously, four police officers were disciplined for their actions which go to identify and determine the seriousness and validity of the complaints I raised with the Police Ombudsman. One point in relation to that was a lengthy time frame of

investigations and several – investigations of several, and including senior, police officers in relation to evidence that we still have in our possession that showed lawful and factual references toward their illegal – alleged misconduct. Sorry, not illegal.

With this experience we sensed the feeling of not being valued or well informed, with many delays in the two separate investigations conducted by the Police Ombudsman. In our matter, without going into specifics of our personal situation, the delays experienced had the effect of both delaying and denying results that could be construed as very relevant for the legal process we experienced, and the denial of procedural fairness, natural justice, and that still exists today, those feelings. These delays also contributed to extremely high levels of anxiety for myself and my family members concerned. Many of the pertinent complaints were not addressed adequately, if at all. And through my own research, these matters were matters that pertained to Code of Conduct, the adherence to general orders, the noncompliance of procedures agreed to in the memorandum of understanding between emergency services, recommendations made by the Coroner in relation to deaths in custody and the subsequent and related parliamentary responses from the Police Commissioner. This includes the mental health and wellbeing of police prisoners, management custody orders and the transfer of relevant health information to the next agency.

I believe the police now have a programme, acronymed IMOST, of training which is a two-year programme that all police officers must do, and contains an element of looking after mentally ill prisoners. For example, the Adelaide Remand Centre requires that this prisoner information – requires this prisoner information to identify the health and wellbeing requirements of prisoners being transferred to that facility. In one report, the manager of the Remand Centre states that the Coroner – to the Coroner that unless this information regarding a prisoner is passed on by the transferring agency, in this case SAPOL, they will assume the prisoner has no issues.

I might add that the Police Ombudsman cited that the same police station concerned had been

before the Coroner's Court previously on similar matters. In this case the person who went to the Remand Centre had no medical history. Within 24 hours he was detained under the Mental Health Act for 8 days. And that should have been clearly avoided.

This did not occur in our situation, as I've just said, with very serious consequences. And that was the same issue identified as an influence in two deaths in custody in the Coroner's reports that I have read.

The issue of hidden evidence, denied to us by SAPOL and the undue hardship, financial burden in discovering and securing that evidence, we believe was critical to being present in a court of law to assist in being fairly and impartially tested for the benefit of both the defendant and the Prosecution and our right to pursue natural justice.

In the third paragraph of page 4 of the discussion paper it states that it is critical that there be in place an integrity system that is accessible, efficient, effective and simple. Our experience was anything but. I had to initiate communication with the Police Ombudsman's office due to lengthy periods of no contact for updates et cetera, and included no or lengthy delays in response time to some status update enquiries, as we previously discussed. I felt that I was becoming a pest in attempting to obtain relevant information for the matter at hand. In our view, the Police Ombudsman's integrity was tainted when evidence was dismissed as out of date and diminished when the evidence consisted of original audio, video, photographic and written documentation from SAPOL themselves. We are still in possession of that material. We sensed intimidation as we had to supply all of the evidence which I understand was my burden but it seemed that the Police Ombudsman's officers did not investigate the matter any further than they had to in relation to that material. Basically, we felt that if we didn't present it, it didn't exist.

I would like to add that recently, in relation to that, that I was part of a successful prosecution and conviction in regards to a separate matter whereby the incident was 30 years prior to any

police complaint being made and subsequent court action. In this case there was no physical evidence brought before the Courts. On that basis, I find it incomprehensible that factual video, audio and documentation – documented evidence, created by SAPOL which seemed to indicate blatant breaches of law, protocol and legislation was, I believe, to be disregarded or not fully examined to produce a satisfactory explanation as to why no further action was or could be administered. This also highlights the lack of procedural fairness and the denial of natural justice.

We believe that so many people involved in such a complex matter the investigational process of the matter was the only thing that was diminished, not the integrity of our evidence. There was nothing in our view that was accessible, efficient, effective and simple in our experiences. One issue that came to hand was the total lack of relationship or communication with the Police Ombudsman's office and relied purely on hard copy, email and limited phone communications. This we sensed created some distance in the relationship.

For instance, as the new or other relevant information came to hand it was a lengthy and cumbersome process to deliver that information to the investigator involved, if we knew which one from which department. And it was made seemingly clear that any correspondence is to be kept to an absolute minimum, even when information was sought by the complainant. Unfortunately, with all of the people involved in this enquiry not once was a face-to-face interview offered or done. This has the potential again to seem like we were not taken as seriously as expected given the nature of the complaints registered. This has the capacity to exclude extra and relevant information needed for the particular inquiry. Decisions were made with any – without any consult with us, including from the Commissioner, under what appears to be legislative privilege. I would imagine from these experiences that if this had of been a criminal matter or allegations presented by the police or prosecutor, not only would the evidence have been obtained fully and examined expediently and thoroughly, I am confident that I would not have conducted my business with the solicitors or the courts by phone or email alone. Attendance would have been of the utmost importance to discuss and evaluate many

details missed in written form only.

The involvement of various officers from Internal Affairs Branch during the investigation also made the process more confusing, with no explanation of their role and their association with my matter and how it was to complement the Office of the Police Ombudsman. In one telephone contact, for instance, the internal affairs officer conceded that the concerned police officers had the opportunity to collude their stories as they were all interviewed and able to discuss the process of questioning prior to the next interviewed police officer. This could raise a question of secure process of obtaining unsolicited evidence in – and investigating practices. We heard nothing more about that comment or any follow-up of that accusatory statement. Police statements supplied in relation to that matter seemed to confirm the theory of collusion even from a layperson's interpretation. But this seemed to be accepted without question by the Police Ombudsman's office.

It brings me to a point not raised in my submission but I think it's pertinent to the hearing, is why police officers are able to remove or cease all video recording during an incident. The incident was – they were engaged in – was a very high level and dangerous situation particularly for the officers concerned. I believe that it was mandatory to record all interaction between police and a potential offender, as stated by a police officer in one of the videos I have. This was also raised with the Police Ombudsman's office and yet is another issue which was not satisfactorily resolved. In that situation the video recorder operator was instructed, just seconds before the arrest, to move elsewhere. And within seconds of that instruction – sorry, move elsewhere just seconds prior to having an unknown and high-risk offender placed in custody. Within seconds of that instruction there were very suspicious and serious consequences to the offender's physical wellbeing. We have all seen the recent occurrences overseas and the consequences of video tapes of police in action. We are of the mind that if the video recorder operator was not ordered to relocate at that critical time of events, certain outcomes would have been very different even to the point of the necessity of attending this hearing. For the Police Ombudsman's office to maintain a high level of public

and professional integrity, particularly in the eyes of the public, these instances should have been further explored and followed by ethical and reasonable communication to the complainant, including avenues of legislative process. I would have been more comfortable if only one agency with one contact person was responsible for the entire process. I note the comment of a one-stop-shop and agree this would be much simpler to attempt to all communicate with rather than various agencies discussing various points of concern and duplicating written documents, receiving various interpretations from them – that of the other agency or from the agency that had not been attended to or discussed. My concerns were a multi-agency issue, so it made it all the more demanding.

I would think that any person making a complaint against police officers must be taken with the utmost seriousness and should include face-to-face service. It should not be relying on the ability of people being able to communicate well by written or oral skills they may or may not have or incur the expense of legal representation when formalising a complaint in such situations of extremely high anxiety, double-mindedness and the consequential impact of those involved, including more than one incident of police harassment. These reports also were not attended to by the Police Ombudsman.

In my case, I was an individual making a complaint against a very large organisation with almost unlimited legal and legislative resources and this point was very obvious on occasions. With these points mentioned above it seems clear that the Police Ombudsman's office is possibly unable to manage its workload or related complexity and for whatever reasons whether it be a lack of funding, personnel, or shortfalls in other resources, it needs fixing to address the complaints in the accessible, efficient, effective and simple manner. I say this without personal criticism for the agency mandate or for the individual officers within. The fact that many of the points raised with this office did not receive the attention required if any, and seemed not to be fully investigated given the serious nature of the alleged misconduct reported with the factual evidence and in our instance has affected and continues to affect the course of legal and natural justice and confidence.

My experience of this interaction – I now firmly believe there are too many departments, sections, personnel involved. In other words, too much duplication of the same service. Some of my concerns were raised with the other agencies based on varying allegations which created more than one investigation over the same issue. I would like to see a form of integration of these investigative sectors of these agencies to avoid relying on one outcome to support another enquiry -- in essence, a greater one-stop-shop for all related complaints. I also believe access to information relating to procedural methodology needs to be established by the investigating body for those who wish to lodge a complaint, including avenues of appeal and intervention of the Commissioner and Police Minister in the very early stages of the process not after legislative decision has been made and without any consultation to the complainant. Since applying the process would reduce the anxiety and confusion of consumers and assist in restoring more faith in the agency concerned and the overseeing body of that agency, including any risk of bias, lack of transparency, agency accountability and reducing the need to seek further avenues of resolution.

In our efforts to lodge some form of appeal we were directed to various authorities by the Police Ombudsman's office to no avail. And then felt we were sent on a wild goose chase with conflicting information or advice in our efforts to secure that accountability and natural justice which demonstrated a high level of unprofessionalism in our opinion. This includes being informed that criminal charges were to be laid, which was not followed through, and without sufficient explanation or consultation as to why this all did not occur, to attempting to identify any avenue of redress or appeal. I have been directed to the Attorney General's office, the District Court, the Supreme Court and finally and most recently I have been advised that the complainant has no avenue of redress whatsoever under the decision of the Police Ombudsman. I'm unsure of the fairness of this issue as I am still unclear which direction I should move to as all of the options were given in writing all this has achieved is a further delay in my determination and persistence in obtaining an outcome that represents unbiased accountability and fair justice. I note that an officer being investigated and possibly

disciplined does have an avenue for redress and I agree with that principle. I would also expect that the complainant should also have an avenue of redress when decisions are overridden without consult or reason.

As we are only one voice in this arena we feel like David in a David and Goliath system. That should not be the case when making complaints of such a serious nature with the possibility of equally serious consequences. I found it impossible, and not through a lack of trying, to find any assistance of some form of advocate for support or direction. I am left with the feeling that if we make it hard enough and drag it out long enough they'll just give up and go away. I would add that the reply from the Attorney General's office, where I was directed in relation to the advice from the Police Ombudsman's office, as an avenue of appeal was not correct and with no reply or response from the Attorney General's office, for a total of 12 months. Again, another very lengthy and unjust delay toward resolving this matter. Given the current issues we feel that this is not a fair process for any person identifying misconduct et cetera of our highly professional Police Force and in particular where it involves matters that have the propensity to change policy, agency cultures or legal outcomes. The delay factor is very concerning insofar as not knowing where one stands. Outcomes of one inquiry could have major implications for another issue, particularly where the issue at hand involves matters before the criminal law courts and subsequently causing very high levels of anxiety for those concerned.

I note on a recent news story a dolphin found dead in the Port River had an autopsy done in three months and found misadventure in the cause of death. If a dolphin can have such urgency in establishing the facts why does SAPOL have the luxury of two-year inquiries that are not fully investigated or appropriately addressed in a timely manner and subsequently not available for any court processes? Further, on page 8 of the discussion paper, under the heading "legislative scheme" I notice that SAPOL have a legislative obligation to report complaints re the misconduct of another member to the Police Ombudsman. I can confirm we have video evidence of such an issue that involved very serious allegations of more than

one officer to an officer, to a police officer Inspector in rank, with nothing developing from that. This was evident in the transcript of that part of the recording included in the official transcript used for the Court process by Prosecution. And it was signed as true and correct. Again, there was no communication that indicated that the matter was investigated by the Police Ombudsman's office. This was raised with the Police Ombudsman's office but was never and is still not addressed as with several other serious situations. I am not aware if this particular complaint was made known to the Commissioner, or if the Commissioner indeed disagreed with the complaint or any other inquiry and ordered the Police Ombudsman's office to discontinue or create a second assessment or raise the matter with the Minister and I see this all in the defendant's favour.

I note on page 8 it states if the Police Ombudsman recommends certain action and the Commissioner of Police disagrees with the recommendation the Police Ombudsman must confirm, vary or substitute the assessment or recommendation after conferral with the Commissioner of Police. The Commissioner of Police must give – must either give effect to the recommendation or refer the matter to the Minister for determination. In light of that statement one could assume that the Commissioner can overrule a decision by the Police Ombudsman and all of its relevant resources without any consultation or communication to all parties including the complainant. This, again, leads to the issue of transparency and accountability from the public's point of view particularly when the Commissioner of Police can disagree with the recommendations of his own workforce and setting an attitude of nepotism. It is another cause for an unwarranted and further anxiety in as much as had this legislation process been made aware of in the initial stages of lodging a complaint against police it would have had the effect of reducing uncertainty and raising confidence of an unbiased investigation, subsequent – and subsequent outcome. All subject to the Commissioner's ability and choice to agree or disagree, without consultation or explanation, this entire process could well be for nothing, as it seems in our case. We should have been informed in the initial stages of this process of the legislative risks, procedural processes and the system of seeking a satisfactory outcome for the concerns of the public.

I was informed by the Police Ombudsman's office that criminal charges would be laid against some police officers. This was after 18 months of investigation. Not five months later we were informed that only internal disciplinary action will be placed against those officers concerned and only one of the concerned in only one of the two complaints, after an apparent second assessment was ordered. A second and varied assessment was ordered. I was not informed of which authority ordered the second assessment, only that one was to be done. The same absence of information applied to inform me of any form of process that was used to change this proposed outcome. I also find it difficult to accept that the Commissioner would have personally studied all of the evidence presented by the complainant, such as we provided in full detail including the issues raised that were not investigated.

I can see no just process for a single person in authority, as I see it from the layperson's perspective, to be able to make these types of decisions fairly, justly, rationally and without bias and in particular without any and full consultation to all parties concerned. As I understand it, now I have no administrative process available to me to raise the issues through any current system. And, again, I feel disempowered to having no avenue of appeal or redress to bring these matters to the attention or resolution thus avoiding any possible change in this current format. I note on page 10 of the discussion paper it states where agreement cannot be reached the matter must be referred to the Minister for determination. At no time have we had contact with the Commissioner of Police, any other member of SAPOL, including the Police Minister's office, and that may be due to protocol. But as we have disagreements with the outcomes and with no explanation as to the reasons or processes involved we are forced to seek further information – intervention from other sources. We had no communication relating to this matter, we were not aware of this ruling until we received a copy of the current discussion paper for this meeting. Even after lodging formal dissatisfaction with the outcome from the Police Ombudsman's office with this investigation and after receiving information from the Police Ombudsman's office that we could go to the District Court or the Attorney General prior to that lodgement. I am curious as to know if this also applies for the

defendant. If the Police Commissioner – and as a layperson, I say – if the Police Commissioner is able to overturn the decisions of the Ombudsman with what appears to be a self-serving legislation what real purpose then does the Ombudsman serve? And I am sure the general public could easily create an attitude of professional bias and nepotism and the clear lack of integrity, transparency and accountability. The situation has the potential for one to come to the belief that police officers are protected more by legislation rather than the course of natural justice more so than those of other persons within the community facing similar allegations. This is more to the point where police – more to the point where if the police were the complainants, the subsequent need to answer in a court of law, I am certain that answering the charges in the court of law could not be overturned because the legal representative for the defendant disagrees. I am also under the impression that in a court of law both parties involved have a right to appeal any decision made by the judge. Why should that be any different in this matter?

I thank you for your time today and we hope this information goes some way to causing some further discussion into the effects and the laws surrounding procedural fairness including the rules of bias and making the Office of the Public [sic] Ombudsman a better-resourced entity to enable a very thorough and fair assessment of all complaints received in a timely and sincere manner, including face-to-face meetings as required. I believe that the Police Ombudsman's office needs the confidence of the Government and the community to be independent without the risk of perpetuating bias, lack of transparency, accountability, denial of natural justice as the current system seems to portray.

I believe that the right of appeal should extend to all parties in a matter involving the Police Ombudsman's office to ensure procedural fairness creating public confidence in the processes and I hope that legislation would be changed to include more comprehensive consultation on progression of matters raised in the process for those who commit to making complaints against a police officer, an action not taken lightly, and sense they are valued and well informed of the procedural fairness and legislative applications involved to achieve this justice. That is

all I have to say, sir.

THE COMMISSIONER:

Thank you, Mr. Vansetten. Perhaps I can just confirm that you subsequently made a complaint to the Office for Public Integrity about the conduct of SAPOL and the Police Ombudsman.

MR. VANSETTEN:

Yes, I did.

THE COMMISSIONER:

And subsequently you met with me, I think, and we discussed your complaint.

MR. VANSETTEN:

Yes, sir.

THE COMMISSIONER:

I can tell you that since I met with you, the Acting Police Ombudsman, Mr. Grant – who of course was appointed well after all of these circumstances arose – enquired of me as to how the policies and processes of his office could be improved as a result of my consideration of your matter. I have written to Mr. Grant and he has responded and I think that will go some way to improving the level of service that someone like yourself might receive in the future.

MR. VANSETTEN:

Thank you, sir.

THE COMMISSIONER:

Although you have not received, as I understand it, you have not received a level of service that was appropriate having regard to the gravity of your allegations, I think your complaints about

SAPOL and the Police Ombudsman have assisted to improve the system in the short future and will assist, I think, to improve the system in the long future.

MR. VANSETTEN:

That's good.

THE COMMISSIONER:

Thank you for your help Mr. Vansetten.

MR. VANSETTEN:

Thank you, sir.

THE COMMISSIONER:

And now, Mr. Riches, I think the Police Commissioner will be giving – will be speaking to his submission at 10 o'clock in the morning.

MR. RICHES:

10 am, yes.

THE COMMISSIONER:

So I will adjourn until that time. I think also there is a member of the public who is to speak at noon.

MR. RICHES:

12 o'clock, yes, Commissioner.

THE COMMISSIONER:

Yes, thank you. Well I'll adjourn until 10 o'clock in the morning.

MR. RICHES:

Thank you.

ADJOURNED 13:33pm

ICAC

OPEN HEARING

BEFORE THE HON. BRUCE LANDER QC
INDEPENDENT COMMISSIONER AGAINST CORRUPTION

MR. M. RICHES Counsel Assisting

Courtroom 3
Level 7, Riverside Centre Building
North Terrace, Adelaide

FRIDAY, 24 APRIL 2015 at 10:00am

Witnesses:

COMMISSIONER BURNS, GARY, Commissioner of Police, South Australia Police

SUPERINTENDENT BAULDERSTONE, CHRISTINE, Officer in Charge, Anti-Corruption

Branch, South Australia Police

SUPERINTENDENT PATTERSON, CRAIG, Officer in Charge, Internal Investigation

Section, South Australia Police

SHANAHAN, PETER, General Counsel, South Australia Police

THE COMMISSIONER:

Good morning, Commissioner.

COMMISSIONER BURNS:

Good morning, Commissioner.

THE COMMISSIONER:

I'm very grateful for you taking the time to come today at this public hearing. It will be very useful to have your input into the matters under consideration. I'm also very grateful that Superintendent Baulderstone and Superintendent Patterson could be present and Mr. Shanahan. I invite you to make any submission you wish to make in relation to the submission you have already made which of course I have read and to acquaint me with any facts which you think I need to know.

COMMISSIONER BURNS:

Thanks Commissioner. My intention is to actually refer to our written submission. I will go through that –

THE COMMISSIONER:

Yes.

COMMISSIONER BURNS:

– for your benefit. Then I will invite Christine Baulderstone from Anti-Corruption Branch to provide some detailed information about the branch itself and then Craig Patterson, who is in charge of the Internal Investigation Section, to make some comments in relation to the Ethical and Professional Standards Branch. I would also like the opportunity to respond to some of the information that was provided to you yesterday.

THE COMMISSIONER:

Certainly.

COMMISSIONER BURNS:

And clarify things for the record.

THE COMMISSIONER:

Sure.

COMMISSIONER BURNS:

This introduction will probably take me about ten to 15 minutes to read through.

THE COMMISSIONER:

Certainly.

COMMISSIONER BURNS:

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

The implementation of the 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. And this review is evidence of that continued commitment.

Notwithstanding the extent of the 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.

OPI and ICAC were intended to augment the roles of the Ombudsman, the Police Ombudsman

and the Commissioner for Public Sector Employment and 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 Police Ombudsman, which has in turn flowed through to SAPOL. In practical terms this translates to notable delays in bringing matters to an appropriately 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.

SAPOL has a high level community satisfaction relating to ethics and integrity and this achievement is a direct result of the professionalism and attitude demonstrated by the majority of 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 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 and this provides a state-wide response to the requirements of the Police (Complaints and Disciplinary Proceedings) Act and internal

investigations involving suspected criminal offences and breaches of the Code of Conduct as prescribed in Police Regulations. Internal Investigation Section investigators are required to investigate as directed by the Police Ombudsman who independently assesses each investigation and makes recommendations to my office.

Additionally SAPOL operates an Anti-Corruption Branch 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 their remit extends across matters of all public administration. Notably, prior to the 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.

In regards to the police complaints and mandatory reports, within the current legislative framework complaints about police conduct can be made direct to the Police Ombudsman, the OPI or to any member of SAPOL. Any complaint made direct to a member of SAPOL must in turn be provided to the Police Ombudsman.

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

And at this point it is important to acknowledge the independent role of the Police Ombudsman, 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, Internal Investigation staff, will await direction from the Police Ombudsman 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 the demands placed upon the Police Ombudsman's office by OPI and/or other workplace demands by the Police Ombudsman's 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 inquiry.

There are of course numerous other 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 this review.

In any case, a complementary scheme also operates which involves reports of suspected breaches of the Code of Conduct 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. And for the sake of clarity breaches of the Code of Conduct can range from very minor to the very serious, including such things as speaking inappropriately to another officer or failing to maintain care for property or similar matters. 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 Police Ombudsman 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 offence – sorry, it does not matter whether an officer has a grievance or not as they have a legislative, 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 Internal Investigation Section. Part of that assessment determines if the matter should be reported to the ICAC, and also determines if a matter could potentially involve a complaint about the conduct of the 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 Police Ombudsman before proceeding with internal action. Regardless of the assessment every report is referred on a daily basis to the Police Ombudsman.

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 police officer, having been notified of the mandatory report by SAPOL, to make contact with that member of the public involved, and ascertain if that 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 police officer refers the matter back to the Police Commissioner to deal with as he or she deems appropriate. If the member of the public does wish to make a complaint the police officer can then register the complaint and direct the Police Commissioner – the sorry, the Police Ombudsman can then register the complaint and direct the Police Commissioner as to how the matter is to be investigated. The Police Ombudsman will then retain the 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, Internal Investigation Section staff make decisions and commence action immediately to investigate or resolve these matters in any case. A responsibility of the Police Ombudsman is to advise the OPI of any reports which are considered to be serious or systemic misconduct or reports of maladministration. This is another outcome of the Police Ombudsman 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 Police Ombudsman.

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

Any system that imposes an obligation on the Police Ombudsman or any other agency to oversight every mandatory report of police misconduct would be onerous and counter-productive to the responsibility of the Police Commissioner to effectively manage police employees. For more serious matters external oversight already exists through ICAC.

Nonetheless, it is a point of agreement with the Police Ombudsman that in most instances a mandatory report made to me remains my responsibility to deal with.

The resources of the Police Ombudsman's office 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 Police Ombudsman 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.

With regard to the Police Ombudsman, the current framework and interoperability of agencies is influenced by a suite of legislation, most relevantly the ICAC Act, the Police Act, the Police (Complaints and Disciplinary Procedures) Act and I request that you consider the impact of the ICAC Act on the Police Ombudsman's function as part of this review.

The existence of an entity such as the Police Ombudsman is vitally important to the effective assessment of complaints from members of the public which we receive.

It is apparent that within the current framework the Office of the Police Ombudsman has developed a practical and operational understanding of the practices and procedures under

which SAPOL operate.

This naturally assists in the assessments of complaints received.

The heightened level of awareness comes not only from the day-to-day operation of the Police Ombudsman but SAPOL has also provided opportunity for the Police Ombudsman to view operational training sessions, deliver Police Ombudsman 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 Police Ombudsman is and remains an important factor. And I ask that in the process of review you consider the role of the Police Ombudsman as an independent oversight body with specific responsibilities towards police conduct in this state. In my submission, irrespective of what 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 Office – 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 mostly likely become more inefficient.

I provide this opinion based on what occurs currently when pursuant to section 23 of the ICAC Act OPI undertakes assessment processes 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 for OPI to undertake a comprehensive assessment of every report received before determining whether it is corruption, maladministration or misconduct.

The consequence of this is two-fold. Firstly, it requires SAPOL to collect and collate large

amount of information and pass it on to the OPI and secondly, it delays the assessment process and therefore the ability of SAPOL to commence an 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, the impact of the process on the ultimate administration of justice.

The other area we are looking at now is defining corruption. I have previously outlined my concerns regarding the very broad definitions of corruption within the current ICAC Act which effectively catches any suspected statutory offence no matter how minor. There is also a reporting requirement for misconduct. The primary objects of the Act outline the primary, of the ICAC, of – 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.

This 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 or ICAC having a lower threshold that 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 concerns about the duplicitous role of the OPI/ICAC and the Police Ombudsman and the inevitable inefficiency this creates.

SAPOL considers the definition of corruption which previously existed under the Anti-Corruption Branch ministerial directions would provide far greater focus and clarity for the operations of OPI and ICAC. And that is:

- 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) the 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; and
- c) the conduct of a public official or any other person involving a conspiracy or attempt to engage in conduct of a kind referred to in the first two paragraphs, where the 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 body such as SAPOL, this higher level of reporting is required. However, I ask that you consider in your review the current impact of the actual legislated definition of corruption.

I suggest the review might like to consider how the Office of the Police Ombudsman may operate if the definition of corruption did not capture every suspected statutory offence and the reports/complaints of police misconduct.

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

Sanctions being 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 Police Ombudsman 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 and 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 Police Ombudsman 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.

And thank you for the opportunity to provide these views.

THE COMMISSIONER:

Thank you, Commissioner.

COMMISSIONER BURNS:

At this stage if I could ask Chris to talk about Anti-Corruption Branch.

THE COMMISSIONER:

Sure. Superintendent.

SUPERINTENDENT BAULDERSTONE:

Anti-Corruption Branch has 19 staff which includes a special technical support unit. As the Commissioner has said, it was formerly controlled by ministerial directions, which is purely focused on the investigation of corruption matters state-wide which includes police and non police. However, we've had and still do have corruption investigations in relation to police with misconduct falling out of these. With the introduction of the ICAC we have maintained a corruption investigation focus albeit the expanded definition has resulted in approximately a 236 per cent increase in our workload. We currently have six joint investigations regarding police corruption with ICAC and four referred matters. That is about as far as we go. So we mainly focus on corruption, as you would be aware.

THE COMMISSIONER:

Thank you. Superintendent.

SUPERINTENDENT PATTERSON:

Thanks, Commissioner. As our Commissioner has already outlined Internal Investigation Section fits underneath Ethical and Professional Standards Branch and we mainly deal with all complaints and we've already outlined that they really form two categories of police complaints or mandatory reports. To provide some context for this hearing the day-to-day business of Internal Investigation Section is to deal and assess each and every complaint that we receive. Now those complaints can come in from various means and most often they come from our own members which are reported in on an email system. They fill out a form which we call a 185, which is a complaint form which comes into our office. It's also matters are referred by the Police Ombudsman that we receive. We also receive ministerial requests that come in that have a complaint associated with them. We also may get direct emails from members of the public.

Irrespective of how we receive a complaint, they all come to my office and they are dealt with. In regards to how we deal with them, the day-to-day business is that on each business day at 9 o'clock in the morning we have what we call an allocation meeting. So every complaint that is

received within the preceding 24 hours, with the exception of a weekend, is assessed and reviewed prior to that 9 o'clock meeting. So, the previous day, when the complaints come in that morning, early, they are assessed by Internal Investigation detectives, and they are all experienced members that have been there for some time with a tenure of a maximum of five years, and it's those officers which will make an assessment of a complaint. That is value added by our Intelligence and Probity Section and so that may be that if it relates to a police complaint about service delivery, there may be a police patrol in attendance so we look at our police communication taskings and other information that can add some value to the actual complaint. So by 9 o'clock, when we have our allocation meeting, individual officers within our branch would have split up those complaints and normally we try and keep them to a maximum of four, because it takes some time to review them and then they would provide myself and other members in a board room a synopsis or summary of that complaint. And from that an assessment is made in regards to whether it's a police complaint, whether it's a mandatory report, whether we need to advise the Police Ombudsman's office, whether we need to provide the ICAC office through OPI. All those assessments are made.

We have what we call an "allocation sheet", which is obviously a record of our decision-making process and in that forum, that allocation meeting, there is myself – my position chairs it. We also have the Internal Investigation supervisors which are making the assessment on individual complaints and we have our Intel people that are there as well to provide an input. Once we have determined how that matter should be dealt, if it relates to a Police Ombudsman matter we now have an electronic process where that same day that complaint is electronically transferred to the Police Ombudsman's office. So we are very confident that we deal with those initial complaints very quickly. How we deal with them after that, obviously, would depend on the nature of the complaint; if it's a Police Ombudsman, we await direction, which does cause us time delays. If it's a mandatory report then we deal with the issue immediately and it's sent to the appropriate area to investigate, whether that's from the Internal Investigation Section to investigate or whether we send it out to local management areas to investigate those complaints. And the Police Ombudsman, obviously, after they have done an

assessment, will write back to us and advise us what action they would like us to take. And we would take that action. It would be allocated within the Internal Investigation Section or to local management or a specific area in some cases depending on the nature of the complaint.

THE COMMISSIONER:

Thank you. Commissioner, may I raise a few matters with you in relation to your submission?

I agree with most of what you have said and in particular with your comments about the existing inefficiencies in the systems. I think the imposition of my office and the Office for Public Integrity compounded existing inefficiencies because it was not clear in the legislation who had responsibility for what and when. And that was one of the reasons I spoke to the Attorney General and I am sure it is probably the reason why this review is taking place.

There has been no failure of cooperation between SAPOL and the Police Ombudsman with my office and indeed there has been a ready cooperation with my office. But in the end result, we have a structure at the moment which does give rise to inefficiencies and delays and in that sense is probably compromising the integrity system in South Australia. One of the matters that I have observed is that there are now three different agencies carrying out assessments at first instance; SAPOL of course, as Superintendent Patterson has just described, OPI as you mentioned and also the Police Ombudsman. There might be a good argument for SAPOL to have responsibility for all the assessments. Would you agree with that?

COMMISSIONER BURNS:

Yeah, I think with the new legislation that has come in with the ICAC it has been put together with existing legislation and it really needs that review to say what is the structure for the future.

THE COMMISSIONER:

Sure.

COMMISSIONER BURNS:

And the majority of complaints we get SAPOL would adequately manage the assessments –

THE COMMISSIONER:

Yeah.

COMMISSIONER BURNS:

– and we would expect that the management of those assessments and investigations would be oversighted by a body whether it's OPI or the Police Ombudsman or ICAC. But I think at this stage what we've got is we have got three bodies, plus SAPOL, involved and legislation that has been running since the '80s cobbled together with legislation that was put in in the late 2000s and it really needs that holistic approach to the integrity system in South Australia.

THE COMMISSIONER:

Yeah, I think one of the problems at the moment is that a complainant may go to three different parties – to SAPOL, the Police Ombudsman or OPI – make their complaint and those agencies will make an assessment but the assessment may not be common because you have different levels of assessment by different agencies so that the argument might – there might be a good argument for having SAPOL assume responsibility for all assessments in the first instance, subject of course to oversight. But that SAPOL have the responsibility of making all assessments and that would seem to me allow SAPOL to move more quickly in relation to the investigation of those that are necessary to be investigated.

COMMISSIONER BURNS:

And I think that's the critical factor in providing an effective system and efficient system, is to make sure that the resolution of complaints are managed as closely as possible to the – when the complaint is made. And the current system doesn't allow that. I would think, and Craig would be able to correct me if I'm wrong here, but the vast majority of complaints that are dealt with involving police are actually made to police, not necessarily to the Police

Ombudsman. Because we are talking mandatory complaints which are internally generated and we are also talking the external generated complaints from a member of the public can either go to the Police Ombudsman or a police officer. So, I would concur. I think there is an opportunity there to streamline the system, have police do the assessments but be appropriately oversighted so that there is no concerns about the way police manage the system.

THE COMMISSIONER:

Yeah.

COMMISSIONER BURNS:

And that oversight should be rigorous and it should be made available at any point in time.

THE COMMISSIONER:

Yeah. Well, that – if that were the system, it would seem to me that police could get about either managing the complaint, if it's a management matter, or investigating it, if it's a matter that requires investigation, at an early stage. And an earlier stage than police presently can.

COMMISSIONER BURNS:

And that's correct. And I deal with the outcomes of these complaints and that when I, you know, provide penalties to some of the officers that – who have been found to breach the code and that. And I'm providing penalties three to four years after the event.

THE COMMISSIONER:

Yeah.

COMMISSIONER BURNS:

And I don't see how that makes for a sound disciplinary system when we're talking about breaches that might be around the way they talked to a member of the public, et cetera. It's

far better to address that quickly and provide that education and change behaviour, rather than go down it's almost like a courts martial system all the time.

THE COMMISSIONER:

Yeah. Well, that raises another matter whether the – whether the scheme, whatever it be, recognises more appropriately the fact of management of the Police Force rather than investigation of its officers. That's to say that the Commissioner of Police, you'd probably argue as Commissioner of Police that you have the responsibility of managing your Police Force and those matters that are complaints that relate to management matters ought to be dealt with by you as soon as possible.

COMMISSIONER BURNS:

And that's absolutely correct. And I think that once again, that gets back to assessment and appropriate oversight and because the majority of investigations that we're going to deal with are not going to be the high-end serious investigations which could be taken over by an ICAC or whatever investigative body that may fit under an ICAC. But a lot of the other investigations would be managed by police, both within the Internal Investigation Section, Anti-Corruption Branch or moved out to various other areas for investigation. But to me it's all about I have a duty or an accountability under the Police Act to effectively and efficiently manage the Police Force and to maintain standards of discipline. It would be very difficult for a Police Commissioner to maintain standards of discipline when you have a process that is so slow to make assessments and so slow to provide penalties or educational training or any other outcome for what I consider a lot of minor breaches, minor breaches of the Code of Conduct, not the serious breaches. And with the serious breaches obviously the oversight provided by the ICAC would ensure that all investigations are done thoroughly and the right outcome be achieved.

THE COMMISSIONER:

Over the last couple of months I have spoken to a number of agencies in the other states and I

went to New South Wales and Victoria for the purpose of speaking to police and the integrity agencies in those states. In both of those states the oversight agency has direct access to the police computer system in relation to complaints so that the oversight agency can know at any stage who has made a complaint, provided of course it's entered into the computer system but we assume that to be the case. What do you say about that as a way of obviating the necessity therefore for SAPOL to report to anyone because the integrity agency would know, without a report being made and which would allow the integrity agency or the oversight agency ready access to the whole of the police computer system in relation to complaints?

COMMISSIONER BURNS:

I think that's a fine solution and I think we have that solution now. The Police Ombudsman – I am not sure about your office but definitely the Police Ombudsman – can look into our system at any stage to see what status everything is in. While being able to do that – does that preclude the need for actually us to notify the Ombudsman's office about a complaint, because they should be able to just go in on the computer, check in the morning and see what's happening.

THE COMMISSIONER:

I wasn't aware that the Police Ombudsman had direct access to your systems.

SUPERINTENDENT PATTERSON:

Commissioner, no, they don't have direct access.

THE COMMISSIONER:

No.

SUPERINTENDENT PATTERSON:

We have an electronic system, we call it the blue system –

THE COMMISSIONER:

Yeah.

SUPERINTENDENT PATTERSON:

– where the files are transferred but they don't have the vision into our database is what you're alluding to.

THE COMMISSIONER:

Yeah.

SUPERINTENDENT PATTERSON:

But the proposal would be supported by us.

THE COMMISSIONER:

Good, because it seems to work very well in New South Wales and Victoria. It has cut out the need for the police there to report to the oversight agency all of the complaints because the oversight agency can find them for itself. And that seems to work rather well. The other thing in those states is the oversight agency doesn't leave a footprint when it examines the police computers. So that police don't know which one the oversight agency are looking at at any particular time, which I think also is an appropriate form of oversight.

COMMISSIONER BURNS:

Yeah, I agree. I would fully support that.

THE COMMISSIONER:

Good. If that be the case, then there would – and the oversight agency had direct access to the police information – it would seem that it would follow that police should do the assessing in the first instance because the oversight agency can watch that happening.

COMMISSIONER BURNS:

Yeah, I think that streamlines it because if police do the assessment in the first instance with the overseeing agency being able to access the system at any stage they can then question whether the assessment was correct or reaffirm the assessment. But what that does, the way you're proposing is that it will speed up the assessment process. Rather than waiting for the oversight agency to do the assessments –

THE COMMISSIONER:

Yep.

COMMISSIONER BURNS:

– they would be able to do the assessment or the checks post assessment so things would be moving as the oversight agency does the checking.

THE COMMISSIONER:

And that – that would mean SAPOL wouldn't have to wait as it does now for the Police Ombudsman to respond to the assessment before SAPOL goes about its work because it could just go about its work from the moment the complaint is made or the moment after the meeting at 9 o'clock every morning.

COMMISSIONER BURNS:

Yeah, that's correct. That would take all those time delays out and as I said that's one of the big issues about the management of a lot of these type of complaints is the delays –

THE COMMISSIONER:

Yeah.

COMMISSIONER BURNS:

– in commencing the investigations and then handing out penalties three to four years after the

event.

THE COMMISSIONER:

Yeah. Well, what then do you say to a system like this: That a complainant could complain to the oversight agency or to the Office for Public Integrity or to SAPOL but the oversight agency and the Office for Public Integrity would be required to provide that information immediately to SAPOL without any – any inquiry or any investigation of the matter and that SAPOL would then assess it as would – as it would any matter made directly – a complaint made directly to it.

COMMISSIONER BURNS:

It seems reasonable to me, and –

SUPERINTENDENT PATTERSON:

Well, in effect, that is what would happen now. Any complaint from an external agency would come to us and then it would go into that assessment process. The delay is when it's obviously referred to the Police Ombudsman or another agency.

THE COMMISSIONER:

Well, yeah, what I'm suggesting is taking away from the Police Ombudsman or whoever the integrity inquiry agency is and the Office for Public Integrity the responsibility of carrying out any assessment at all –

COMMISSIONER BURNS:

Yes.

THE COMMISSIONER:

– and imposing that responsibility on SAPOL.

COMMISSIONER BURNS:

Yes.

THE COMMISSIONER:

But that the integrity agency would know what assessment was being made at any particular time.

COMMISSIONER BURNS:

Correct.

SUPERINTENDENT PATTERSON:

If you had that oversight and that access to databases that would work.

THE COMMISSIONER:

Exactly. Do you think that'd work, Superintendent?

SUPERINTENDENT PATTERSON:

I do, yes.

THE COMMISSIONER:

Yeah, yeah. Well, that would seem to me to cut out all of the delays, or most of the delays, at first instance when complaints are usually made.

COMMISSIONER BURNS:

Yeah, it's generally the front end. Sometimes there's obviously delays in some of these cases based on length of investigation –

THE COMMISSIONER:

Sure.

COMMISSIONER BURNS:

– or going through the legal proceedings before the Police Disciplinary Tribunal. But the issues for us are generally around assessment and the delays in assessment, and then the delay to get the investigation under way.

THE COMMISSIONER:

Yeah. Well, it's not only investigations that ought not to be delayed. It's also management that ought not to be delayed. If the present system interferes with your ability to properly manage SAPOL then that is deleterious to the whole system.

COMMISSIONER BURNS:

Well, that's right. I mean when these complaints come in, the mandatory reports, I suppose every one of them goes under some form of investigation. Even those where we do conciliation where we meet with the complainant and we conciliate it. There still needs a level of investigation to determine the facts and determine the issues around it and what the complainant's looking for in an outcome. So everything we do has an element of investigation to it. You are talking about the managerial side of SAPOL. As I said we had that element of investigation, but the aim from me is to compact it as much as we can, get the appropriate outcome out of it and achieve it in a timeframe that is not only suitable to the complainant but to the officers involved.

THE COMMISSIONER:

It seems to me there are two victims in a sense, if a matter is delayed too long. The complainant continues to be a victim because he or she complained – his or her complaint has not been addressed but also the police officer who is the subject of the complaint in a sense becomes a victim, because the complaint's hanging over their head for a number of years.

COMMISSIONER BURNS:

And that's correct. And I mean if some of these, as I said the lower-level misconduct issues those that are picked up on the mandatory reporting, can be dealt with very quickly generally with some educational guidance or training, or things like that. Now, if you go into a system that is too onerous and bureaucratic, you get an outcome of education and training two years later – well, two years that officer is still potentially performing in the same manner. So the aim is deal with it as soon as possible, and provide the training and improve the performance.

THE COMMISSIONER:

Yeah. Well, discipline should be a reaction to the offence or whatever it be that you are disciplining for.

COMMISSIONER BURNS:

That's right, yeah.

THE COMMISSIONER:

There has been a suggestion that the only oversight that should occur is in relation to criminal offences and that ICAC already provides that oversight and there should be no other oversight. Would you –

COMMISSIONER BURNS:

No, I would be comfortable with all matters that are under complaint, be it mandatory or from members of the public, the oversight being available broadly, because I think we don't hide anything, we've got nothing to hide, we're going to do it properly. And so, that – I think while the concentration might be on the criminal side of things I can't see that why we wouldn't have – why that body shouldn't have the ability to look at the disciplinary side of things as well, at least as an oversight.

THE COMMISSIONER:

Well, most of the complaints made to you are not criminal in nature are they, they are mainly in

relation to conduct or misconduct?

COMMISSIONER BURNS:

Exactly, and for an oversight body, they would do their risk assessments as well and determine what they will look at and which carries more risk and you know they can do ad hoc audits any time they want to, as far as I'm concerned. Every complaint that's going to come to SAPOL is going to be managed appropriately and correctly.

THE COMMISSIONER:

What would you say if the scheme were constructed this way, that the oversight agency had the ability to carry out a random audit at any time perhaps at a particular level, and above, and that that oversight agency could require SAPOL to investigate in a particular way or alternatively could ask SAPOL to desist an investigation and take over the investigation itself?

COMMISSIONER BURNS:

I will ask Craig and Chris in a minute. But, you know, from a, you know, the broad perspective on that, look I think the audit regime – we live under audit regimes all the time with Anti-Corruption Branch audits – audits of everything we do with telephone intercepts et cetera. So audit's not an issue for us and as far as I'm concerned those audits can be, you know, on a regular basis or they can be ad hoc at any time that the oversight body wants it, it won't make any difference to us. I think in undertaking an audit you always have the right to ask whether an investigation is being conducted appropriately and suggest what may be done. But I think when it comes to actually making changes to an investigation, I think there would need to be that talk with the investigating agency whether it's Internal Investigations or ACB, to understand why they may be undertaking a particular strategy. And if at the end of the day, everyone – there's an agreement that the strategy needs to change or there's concerns about the strategy, well then I think there's that opportunity to change the strategy and move in a different direction.

THE COMMISSIONER:

Okay.

SUPERINTENDENT PATTERSON:

I concur fully. It's not unlike what would happen now. If the Police Ombudsman was of the view that we were heading in the wrong direction they would write to us and advise us you know a different level and on a majority of occasions we would do that. I would like to think that we are very, very transparent.

THE COMMISSIONER:

Yes.

SUPERINTENDENT PATTERSON:

And anything that the Ombudsman's office or OPI ask us, we give them everything.

THE COMMISSIONER:

Well, if that were the scheme then, what about the other aspect of what I mentioned – the oversight agency having the power to take over an investigation?

SUPERINTENDENT PATTERSON:

That would probably be subject to a little bit more discussion, I would respectfully submit to the Commissioner, because we would probably need to work out whether that's going to be legislated or on what authority that would – and how that would work.

THE COMMISSIONER:

Yeah.

SUPERINTENDENT PATTERSON:

We certainly would not be opposed to it –

THE COMMISSIONER:

No.

SUPERINTENDENT PATTERSON:

– because it's not unlike what happens now. But we would have to have some formal structure in regards to how that's actually managed.

THE COMMISSIONER:

I agree with that that it would have to be by way of legislation and it would have to be limited to investigations of a particular kind. I mean you couldn't have the oversight agency mucking around with management matters or anything of that type.

COMMISSIONER BURNS:

And in principle we agree with that. It just needs a process to achieve it.

THE COMMISSIONER:

The other matter that I've looked at is questions of minor misconduct that are the subject of the agreement between SAPOL and the Police Ombudsman. Would you wish to see the categorisation of minor misconduct continued and those matters being dealt with in a less formal way than matters of complaint in relation to more serious matters?

COMMISSIONER BURNS:

Yeah, I think there needs to be a delineation between matters which potentially could wind up in a – the Police Disciplinary Tribunal or something similar, to those matters that can be dealt with through minor misconduct processes. Whether we can streamline the minor misconduct processes is another issue. But, with the minor misconduct process it recognises that the complaint that has been made or the mandatory report that has been made is of a minor nature and that there's an opportunity to rectify the behaviour without going through a full

disciplinary review.

THE COMMISSIONER:

Yeah, yeah. The proposal I've suggested we might consider, that I might consider, would include the ability of the oversight agency to randomly audit mandatory reporting and the investigation of mandatory reports. Would you have any trouble with that?

COMMISSIONER BURNS:

No. I'd actually – I'm a big believer of the oversight agency. I would believe that the oversight agency would have access to everything we are doing in terms of the way complaints are managed, whether they are a mandatory report, a complaint by a member of the public or they're being managed under MMI or through the Police Disciplinary Tribunal. I've got no issues with the oversight agency being able to review what we're doing.

THE COMMISSIONER:

Good. I'll just say it. I don't think I agree with SAPOL's interpretation of mandatory reporting and the Police Ombudsman's obligations in relation to it. But that may be a matter for the past. As to the future it may not matter if a scheme of the kind that we're talking about were developed.

COMMISSIONER BURNS:

You might want to respond on that one.

SUPERINTENDENT PATTERSON:

We would be open to those suggestions in further discussions Commissioner. It's fair to say that all mandatory reports are provided to the Police Ombudsman.

THE COMMISSIONER:

Yes, I understand that happens –

SUPERINTENDENT PATTERSON:

Yeah, as it is now.

THE COMMISSIONER:

– under section 38, yes.

SUPERINTENDENT PATTERSON:

As it is now. So if we can streamline that and introduce a better practice we would – we would certainly support it.

THE COMMISSIONER:

What I am proposing is you wouldn't report anything to anyone because they would have access –

SUPERINTENDENT PATTERSON:

Yes.

THE COMMISSIONER:

– to that, so you wouldn't have the added obligation.

COMMISSIONER BURNS:

Correct.

SUPERINTENDENT PATTERSON:

Yes.

THE COMMISSIONER:

The Ombudsman has put the – not the Police Ombudsman, the Ombudsman – has put the

proposition that police shouldn't investigate police. Do you wish to say something about that?

COMMISSIONER BURNS:

This is one of the matters that I wanted to clarify that was raised yesterday. I'm not sure what the Ombudsman bases his statement on. But the reality is a statement like that needs to be backed up. And I find it quite naive and I find it insulting particularly to the professionalism and the integrity of the members of the South Australia Police. I point out that most of the major instances where South Australia Police have been involved in corruption or serious criminal matters, and have been placed before the courts – Boughen, Buckskin, Bonython, and so it goes – have been as a result of police investigations. And not all of them have been raised because of complaints by a member of the public, they have been raised because police officers have noticed something wrong and conducted an investigation.

So, I think, as I said I found it quite insulting. I think it's a direct impact on me because it says I run an organisation that can't be trusted, that lacks professionalism, and that's far from the case. Policing is built around the foundations of integrity and ethical behaviour and professionalism and we pride ourselves on that. So a comment like that, needs to be backed up in a lot of other ways. Now I know you have members of the South Australia Police seconded to conduct ICAC investigations and from my understanding they perform in an exemplary manner.

THE COMMISSIONER:

They do.

COMMISSIONER BURNS:

Just like other members of the South Australia Police. And as I said, if we have a look at – we manage all the investigations that have placed police before the courts. And we've also prosecuted a lot of police before the courts. So when you look at investigations you also have

to look at prosecutions. And so as I said, I'm disturbed by those comments and I do not agree with those comments.

THE COMMISSIONER:

Yes. Well, I think, as I put to him yesterday, every Police Force in Australia investigates itself in relation to complaints. The only police force that I am aware of that does otherwise, I think, is Ireland. Where the police force don't investigate themselves. Anyhow, I understand your point.

COMMISSIONER BURNS:

No, no. And while we're there, Commissioner, if I could raise another point?

THE COMMISSIONER:

Yes.

COMMISSIONER BURNS:

Now, I'm not sure whether some of those comments were based around the evidence provided or information provided by Vansetten. But, I'm only basing my information on the article in Adelaide Now or the Advertiser which states that Paul Vansetten appeared before the ICAC Corruption – Commissioner's first public hearing and he alleged he made a police complaint and after the Police Commissioner's intervention criminal charges were not laid against the involved police officers. What he alleged, from my understanding, is that after an 18 month investigation the Police Ombudsman stated criminal charges would be laid against police and five months later he was informed only disciplinary action would be taken after a second and varied assessment. But he did not divulge any details of his complaint, which I found quite strange.

But I'm advised, just to clarify this matter, that at about 5:35 am on the 25th of May 2010, police attended a disturbance at 10 Thorngate Drive, Paralowie. We received information from

a Daniel Vansetten, whose father is Paul Vansetten, that he had a very drunk female at the address and wanted her removed. Police attended and approached the front door and were shot at through the front door resulting in both officers receiving shrapnel wounds. Officers retreated and cordons were established and further resources including Star Group officers were called. And subsequently Daniel Vansetten was arrested.

In August 2010, Mr. Vansetten, Paul Vansetten, made a complaint alleging his son Daniel, when arrested, received several injuries including facial injuries. The Police Ombudsman made a section 21 determination that no investigation would occur pending the outcome of the Court proceedings. In November 2011, Paul Vansetten – Vansetten, the son this is, was sentenced to – I’m sorry, Daniel Vansetten – was arrested and then was subsequently sentenced to imprisonment in November 2011. In about March 2012, Mr. Vansetten lodged a second complaint regarding the failure of police to ensure his son was psychiatrically assessed. The Police Ombudsman requested an attempt to conciliate the matter; however, the matter could not be conciliated. The Police Ombudsman revoked their earlier determinations and requested a preliminary investigation into both the complaints.

And on the 17 of July 2012, the Police Ombudsman advised that Mr. Vansetten had withdrawn wishes for the first complaint, which was the alleged assault, to be investigated. The preliminary investigation report was prepared and the Police Ombudsman in September 2012 provided an Assessment and Recommendation addressing the second complaint. The Police Ombudsman recommended that five police officers receive managerial guidance in relation to failing to arrange a psychiatric assessment but on the 2nd of January 2013, Mr. Vansetten now wanted the first complaint, which was the alleged assault, investigated.

And in January 2013, Ethical and Professional Standards Branch partially disagreed with the assessment. The Branch agreed that only four police officers should receive managerial guidance. It was highlighted that the officers had not had the opportunity to provide their account of what had happened. The Police Ombudsman revoked their Assessment and

Recommendations and requested a full investigation including a section 31 report. In August 2013, the Police Ombudsman assessed that one or more officers assaulted Daniel Vansetten during the process of the arrest but that as the identity of that or those officers were not known, no action was to be taken. In September 2013, Ethical and Professional Standards Branch responded agreeing that no action should be taken against officers at the scene of the arrest but disagreeing with the Ombudsman's assessment that Daniel Vansetten had been assaulted by one or more officers. Assertions from police in attendance was that as Daniel Vansetten, he was on the roof of a house, was going down a ladder, he slipped on to the waiting officer and then on to the hard ground. At that time, Daniel Vansetten was in bare feet and it had been raining. Whilst it was conceded that Daniel Vansetten's injuries were caused around this time it was not conceded that police inflicted the injuries intentionally, as asserted by the Ombudsman. Daniel Vansetten also recorded a blood alcohol reading of .221 in the cells later that day.

So the other assertion that was made in that the Police Commissioner has the power of veto is incorrect. I have the power and delegated authority through my officers to work with the Police Ombudsman to determine an outcome and generally it's based around court, so it's around the legal outcomes. When it goes into a Police Disciplinary Tribunal or into a court we still make determinations about prospect of reasonable conviction. If I had a power of veto, power of veto means that I could just say no and it all stops there. I cannot say no. So the power of veto is an incorrect statement.

The other aspect about that is we have never gone to the Minister for a change to what the Ombudsman has said. And as an example of that, Norman Hoy who has recently been in court and the charges were dismissed, we disagreed with the findings of the Ombudsman. We didn't believe there was any reasonable prospect of conviction. The Ombudsman disagreed with us. It was taken to the DPP who made a determination and it was proceeded with by the DPP and the Police Ombudsman to prosecute Norman Hoy. If I had a power of veto I would have said no. If I wanted to take it further, I could have gone to the Minister and I didn't go to

the Minister. So we don't interfere as the assertion is that basically we interfere in the investigations and the role of the Police Ombudsman. So, I just think those points need to be clarified.

THE COMMISSIONER:

Yes. I understand your position. I understand that you don't have the power of veto. You have the power to disagree –

COMMISSIONER BURNS:

That's right.

THE COMMISSIONER:

– with the Police Ombudsman, which can lead to a reconsideration by the Police Ombudsman and perhaps a change in the assessment. But – and I understand that you have never had a power of veto, and nor –

COMMISSIONER BURNS:

Thank you.

THE COMMISSIONER:

– has it ever been purported to be exercised. Were they the two matters you wished to address?

COMMISSIONER BURNS:

Yes, they were; thank you.

THE COMMISSIONER:

Can I raise one other matter, that is, the continuation of the Police Disciplinary Tribunal? There has been suggestions made that complaints of police misconduct should be less formal

rather than under the Tribunal at the moment and should be heard in SACAT, by qualified people, perhaps it might be a representative of the Commissioner of Police, it might be a representative of PASA, it might be a representative of some other organisation, perhaps victims. Do you see any merit in perhaps deformatising to a certain extent the considerations of matters that need to be addressed in an adversarial system of that kind by taking it to SACAT?

COMMISSIONER BURNS:

I've only known the Police Disciplinary Tribunal and I think it performs an important function. Police are considered under a different regime to the rest of the public service.

THE COMMISSIONER:

Yeah.

COMMISSIONER BURNS:

There needs to be an understanding of that regime that we exist in. If the Police Disciplinary Tribunal was to move to SACAT or something similar then I would expect that there would be an area within SACAT that delivers – deals with police only. Because there needs to be understanding around that and the system we work in. So at this stage, I am comfortable with the Police Disciplinary Tribunal. But if there were changes coming out of any legislation changes or coming out of your review, I think that is something that could be looked at into the future particularly if we can take some of the legality and the black and white approach to police discipline out of the current, out of that system.

THE COMMISSIONER:

Well, that's what I'm suggesting would occur, that it would be – that the hearing in the SACAT would be before people who are qualified to hear, people as I said either nominated by the Police Commissioner or PASA perhaps or victim's group of some kind who would have experience and continuing experience on that tribunal. But that the matters would be dealt

with less formality than they presently are which might lead to an earlier resolution because they are less threatening than the Police Disciplinary Tribunal is to a police officer who is being charged.

COMMISSIONER BURNS:

Yeah, I find it difficult to answer that question at this stage.

THE COMMISSIONER:

Sure.

COMMISSIONER BURNS:

Because at the moment we are operating in this system.

THE COMMISSIONER:

Yes.

COMMISSIONER BURNS:

And I think the Disciplinary Tribunal suits this system. If you're looking at – for an overall response to how I think it should look in the future, yes I think we need to take the adversarial –

THE COMMISSIONER:

Yeah.

COMMISSIONER BURNS:

– system out of it because it is, it is a very black and white approach to delivering an outcome.

THE COMMISSIONER:

Well, it's almost raising to a criminal level a hearing in relation to misconduct which is only a civil matter. It's not a criminal matter. And it seems to me the Police Disciplinary Tribunal,

which I don't criticise for the way it does its work, it seems to me to be of a kind that elevates the conduct above itself as it were in its seriousness.

COMMISSIONER BURNS:

It's very much like a Magistrate's Court with a different standard of proof.

THE COMMISSIONER:

Yeah. Yeah, yeah, yeah, Briginshaw standard, yeah.

COMMISSIONER BURNS:

Yeah, but it's same conduct.

THE COMMISSIONER:

Do you see any part to a complainant to play in the system after the complaint is made and after perhaps a matter has not been conciliated?

COMMISSIONER BURNS:

Look, I – look I – if I could speak more broadly, I think when it comes to say victims of crime, they report a crime and police should always be aiming to keep the victim of crime informed even to the point where, even if we're going to file the matter, the victim of crime is told the matter has been filed. So I think in the present system we can do a conciliation, but the issue is that if the complainant doesn't agree to the conciliation then it progresses so I think there's opportunities to consider how that might work. But from my perspective I think we should always keep the complainant informed. And even on to the outcome. I think that's part of the resolution of the matter.

THE COMMISSIONER:

Yeah. Another suggestion that's been made is that if you are to have the continuing responsibility of imposing whatever discipline is to be imposed, either before or after a – if it's

necessary a hearing of some kind – should there be some sort of obligation on SAPOL to inform the public of the sanctions that are imposed in relation to particular conduct?

COMMISSIONER BURNS:

I don't necessarily agree with that. I think this is the –

THE COMMISSIONER:

I'm not suggesting, I'm asking whether you do agree.

COMMISSIONER BURNS:

Yeah, I don't agree with that concept then. My – look, my view is this is a disciplinary process that we are dealing with. We want people to be quite open in the way we deal with it. We want it to be more educational, more training. You know, if we have to go to heavy sanctions we go to heavy sanctions but the reality is if you put disciplinary outcomes into the public arena, what's the impact on morale of the police department, what's the likelihood of police feel constrained in the way they go about their duties and I would think it would – it goes well outside what happens to the rest of the public service and a whole range of other professions when it comes to disciplinary hearings. I'm all – all for criminal proceedings being made public, but not necessarily disciplinary proceedings.

THE COMMISSIONER:

And if I could put this, a different subject which, going back to triaging – is there any merit do you see in the triaging system having regard to the eventual outcome that might occur? That is to say that if the conduct which is complained of, without it being investigated but just on the face of it, the conduct complained of could never go above a managerial caution, that it be triaged on that basis immediately, so that it's never the subject of a full-scale investigation?

COMMISSIONER BURNS:

Yeah, I – I'll hand it to Craig but in a general – in a general sense I concur, because you can end

up doing these large investigations that ultimately you go through a very legal process to come out with a reprimand at the end of it when it could have been done very quickly in the beginning.

THE COMMISSIONER:

Yeah. Well, from an –

COMMISSIONER BURNS:

He's got –

THE COMMISSIONER:

So – yep.

SUPERINTENDENT PATTERSON:

I concur but it would probably need to have some guidelines or some further instruction in regards to how we are actually going to triage that. I think in principle that is excellent because if we can deal with it very simply, quickly and early, obviously that saves a lot of time.

THE COMMISSIONER:

If a matter could never rise above a managerial – caution or managerial guidance, would there be any merit in a system which did not allow either side to have the matter the subject of a hearing, so that a police officer who at worst would be cautioned could not claim the right to have a hearing in the disciplinary tribunal?

COMMISSIONER BURNS:

Yeah, I think that's got a lot of merit to it. Once again, as Craig said, there would be obviously guidelines and process around it. But the concept itself is a good concept.

THE COMMISSIONER:

It might take a few matters out of the Disciplinary Tribunal?

COMMISSIONER BURNS:

It would and you just heard Chris and Craig talk about the size of their areas and the number of people they have got involved and the number of complaints and investigations they put out. There are a lot of dollars and a lot of people involved in SAPOL on internal disciplinary issues that could be far better resourced or utilised dealing with criminal matters. And – and a lot of these matters that they're investigating are exactly those that you talk about that could be just managed very quickly with a limited sanction without any legal approach to it.

THE COMMISSIONER:

Well no civilian would have the right to have any sort of hearing in those circumstances. A civilian would – who's likely to be subject to a reprimand by the authority for which he or she works would simply be dealt with on a very informal basis.

COMMISSIONER BURNS:

That's – that's exactly right, yep.

SUPERINTENDENT PATTERSON:

Yeah.

THE COMMISSIONER:

Yeah. Is there anything else you or your superintendents wish to say? They are the questions I wanted to raise with you.

COMMISSIONER BURNS:

No, thank you, Commissioner.

THE COMMISSIONER:

I'm very grateful that you've taken the time and the trouble to come this morning. It's been very useful to have this discussion and in public. And this discussion will help me to decide what recommendations I'll make to government in relation to what – a scheme that needs to be improved. And that's what we're – I'm investigating, the scheme, not the people who are operating the scheme, but the scheme and how the scheme should be improved. Thank you.

COMMISSIONER BURNS:

Thank you for the time, it's very appreciated.

THE COMMISSIONER:

Thank you. Thank you very much.

COMMISSIONER BURNS:

Thank you.

THE COMMISSIONER:

I will resume again at 12 o'clock with a member of the public to give evidence.

ADJOURNED 11:06am

ICAC

OPEN HEARING

BEFORE THE HON. BRUCE LANDER QC
INDEPENDENT COMMISSIONER AGAINST CORRUPTION

MR. M. RICHES Counsel Assisting

Courtroom 3
Level 7, Riverside Centre Building
North Terrace, Adelaide

FRIDAY, 24 APRIL 2015 at 11:58am

Witness:

WILSON, JULIE, member of the public

THE COMMISSIONER:

Mrs. Wilson.

MRS. WILSON:

Good morning, Commissioner.

THE COMMISSIONER:

Good morning. Could you please just give me your full name? I don't want your address, but just your full name if you don't mind.

MRS. WILSON:

My name is Julie Wilson.

THE COMMISSIONER:

Thank you. And you have a lady here to support you?

MRS. WILSON:

I have, this is –

THE COMMISSIONER:

Yes. No, no –

MRS. WILSON:

– my friend –

THE COMMISSIONER:

I don't need to know her name.

MRS. WILSON:

Mhmm.

THE COMMISSIONER:

Mrs. Wilson, you tell me whatever you want to tell me in relation to the matter in which I am inquiring into.

MRS. WILSON:

Thank you. Commissioner, if you'd just be patient with me, because I just want to gather myself a little bit.

THE COMMISSIONER:

You – you take –

MRS. WILSON:

And I'd just like to – I just want to gather my –

THE COMMISSIONER:

– take as much time as you need to.

MRS. WILSON:

Thank you. I just want to gather my thoughts and I – I'm going to read it. I think that's going to be the easiest thing.

THE COMMISSIONER:

Yes.

MRS. WILSON:

My first entered complaint to the then Police Complaints Authority, the PCA, was April 2004. So I often might refer to the "PCA", meaning the Police Ombudsman.

THE COMMISSIONER:

Yes.

MRS. WILSON:

We needed answers as to why five young men had received differential treatment at the front desk of the Holden Hill Police Station. Two nights later my son Chris was murdered. We all needed a response. We needed a response from my police complaint in order to get on with our lives and to be assured urgent procedural change had been implemented. I believed our case to be a matter of public interest, especially to the wider youth community in our area.

The final Assessments of Recommendations of the then PCA were released in November 2007, three and a half years, with my last dated correspondence from the PCA dated February 2010, six years.

From the start in February 2004 our immediate response to my eldest son, Chris's death, was for us all to ask what went wrong, why, who was accountable, and what changes will be made to prevent a reoccurrence? It was well beyond the resources of the – my surviving son and the other men affected to pursue a matter of police accountability. And trying to get answers on behalf of us all took me well outside the realms of my own experience in life.

In January 2012, my remaining son Mark took his own life.

I'm okay. I look forward –

THE COMMISSIONER:

Take –

MRS. WILSON:

– to the establishment –

THE COMMISSIONER:

– take your time. I’m in no hurry.

MRS. WILSON:

I look forward to the establishment of an effective police complaints system that will serve any South Australian who through adversity find themselves asking the role of police.

Efficacy of the Police Ombudsman, formerly the Police Complaints Authority or the PCA.

I would just like to say that the structure of process is not changed by reshuffling and renaming departments.

In response to my persistence I did eventually feel that the PCA was acting in my best interests. I saw they were actively trying to move forward with my complaint process and I was kept appropriately informed by written correspondence in response to my many concerns. Over the years I made numerous telephone enquiries and requests to their department and I was communicated effectively at this level. These PCA communications offered me a wavering degree of confidence. But as time progressed the incapacities of their role became absolutely clear. The PCA was a toothless tiger in the face of SAPOL and the tribunal process.

Factors that magnified the limited powers of the Police Ombudsman or the PCA.

And I’ve listed three: PCA Assessments and Recommendations were varied by the Commissioner of Police – refer to the Third Varied Assessment and Recommendation (section 32) of the Registered Police Complaint number 188 – 18999. I don’t know about the section 32 bit.

My second point: Nomination by the head of the PCA for me, the mother of the deceased, to attend the closed tribunal proceeding was overridden by the Tri – by, by the Magis – was overridden by the Tribunal. I was expelled by the Tribunal as the nominee of the Police Complaints Authority. So it was overridden even though I was nominated.

THE COMMISSIONER:

Were you not allowed to attend at any time?

MRS. WILSON:

I was ignored. I asked. I asked, it is written a little further in.

And the third point that magnifies the limited powers of the Police Ombudsman is that the Coroner – it was the Coroner who identified 49 police errors and it wasn't the PCA.

THE COMMISSIONER:

I've read the Coroner's decision.

MRS. WILSON:

Thank you. My ejection from the Tribunal, my ongoing need to ring the PCA who in turn had to badger police towards processing my complaint, the PCA's clear frustration in chasing SAPOL to respond and the undermining of the PCA's Assessment and Recommendations. The entire protracted complaint process proved to me that the PCA could not do its job.

The efficacy of South Australian Police (SAPOL) in response to dealing with a police complaint.

This is from me a member of the community. Police secrecy in matters surrounding my police complaint and SAPOL communication inadequacies, and you can refer to the secrecy provisions in the South Australian Police (Complaints and Disciplinary Proceedings) Act 1985, it's 30 years old.

My son Chris was dead. We all knew things had gone des – we knew that things had gone desperately wrong and I was always exp – and I always expected a face to face response from the top rank of SAPOL but it was soon clear that no one in SAPOL was interested in responding to our personal plight. As the mother of Chris and Mark, I fervently wanted SAPOL to take ownership of police mishandlings. The lives of my surviving son, Mark, and the other young men who had gone to the police station for help that night had collapsed and I was experiencing Post Traumatic Stress Disorder myself. I expected and needed communication from SAPOL.

I needed SAPOL to readily deal with us. But entrenched police practices offered us no engagement and an opportunity to manage our trauma was blocked. We were all left dangling.

Since the Commissioner of Police had remained silent I expressed to the PCA my pressing need to be present at the Police Tribunal, to see how the justice system works. I was told I could seek permission from the Commissioner of Police, the Tribunal Magistrate or ask to be a PCA nominee. I undertook all these approaches without success. I was ejected from the Court as a nominee. The PCA on the 15th of November in 2006 had written and conveyed my disquiet to the Commissioner of Police, quote: “asking that he consider these matters and write direct to you about them”. But rather than respond accordingly, the Commissioner of Police ignored any interaction with me.

Rather, I found SAPOL’s energies were entirely devoted towards downplaying our critical incident by: (1) alienating me, the complainant, by not communicating with me; (2) and later frustrating the completion of the Coronial Inquest. See the “State Coroner berates the police” in the Advertiser on the 16th of the 11th 2007, page 38.

With my son Mark’s mental and physical health crumbling I made every effort to rightfully gain

entry to police tribunals. Answers failing, I sat outside tribunal courtrooms in waiting areas wherever I learned a tribunal was to take place.

But SAPOL only react to media. Ethical and Professional Standards Branch rang me at home within days of the Channel 7 News, it now began – it now being three years after the Chris event. And two, the Commissioner of Police signed a letter communicating to me days before an ABC TV 7:30 State related to Mark's taking his own life and that was in March 2012 that – all right – I had that letter. All too late for my son Mark.

At an informal meeting on the 21st of March 2007, this is earlier, brought about by Channel Ten news coverage, helped Nick Xenophon, held in the offices of the PCA, three years after Chris's death, I had listed several questions for the Ethical and Standards Branch member. I asked – among them I asked him what message can I convey to my son Mark now that he has no brother or family, except for me. I was told this was an unfair question. I also asked about quality assurance strategies within police practice. I was very concerned about this because I have worked in the health – I've worked in health and we get on to things much – I mean, I'm on the front line of health and we get on to things. I like to think we do. Specifically I asked this person to convey my need to attend the closed police tribunal to the Commissioner. But all I got was empty answers. I was incensed. I was incensed at the empty responses I was fed. The meeting was patronising. I brought it to an end because it wasn't worth my time. There were two other witnesses to this meeting.

It is critical that those subject to a traumatic event can work towards managing their trauma symptoms. This means confronting the trauma event as well as associated thoughts and beliefs. You've only got to refer to the Australian Guidelines for the Treatment of Acute Stress Disorder and Post Traumatic Stress Disorder, page 15.

For me my presence in the tribunal was imperative.

For me my presence in the tribunal was imperative. Just like viewing Chris's body more than once; standing on the tarmac where he was shot; attending organ donor ceremonies; speaking at the annual organ donor – donor ceremonies; attending more memorial services and more. The Australian Guidelines for Post Traumatic Stress Disorder in adults expound the benefits of exposure therapy towards recovery.

Police Tribunal blockades blocked my avenue to recovery. Justice needs to be seen to be done.

It was only after intervention by Nick Xenophon, a Member of the Legislative Council, a mounting of political pressure, in other words, that I successfully got into the tail end of the very last tribunal. Despite SAPOL ostracising me after my police complaint I did manage briefly to step inside the tribunal court three times: when I accompanied the PCA as his nominee – refer to “Kicked out of Hearing” in the Advertiser 8th of the 12th 2007 – when the Honourable Nick Xenophon legally represented me; I was allowed to enter briefly in the last tribunal and after the police – political intervention. Police secrecy provisions are archaic and they acted directly against our grief and the acute post trauma experienced. This view is supported by the Coroner. Every citizen needs to know how the justice system works.

After coronial findings had identified 49 errors in police procedure and being still without communication from SAPOL – from the SAPOL outfit, I wrote to the Commissioner for Victim's Rights hoping he would – could bring about an apology from the Commissioner of Police. As the mother of Chris and with Mark in considerably poor health, I fervently wanted SAPOL to take ownership of its mishandlings and I wanted this to be conveyed to us all from the Commissioner of Police. I saw communication and an apology could benefit each of us suffering Post Traumatic Stress Disorder relating to the police complaint. I was profoundly upset this significant request to secure an apology was denied. My step to reach the Commissioner had failed, again. Acknowledgement of a systemic failure was never addressed by SAPOL to aid the recovery of any of the victims of the 49 errors who went to that police

station.

And Mark took his own life four years later, after I wrote that letter. A long-term outcome is rather ironical. Eight years after my two sons and their mates went to the Holden Hill Police Station for help, the Commissioner of Police did sign a qualified – I don't call it an apology – a qualified piece of correspondence addressed to me. So those boys never heard anything. It was received in the days before the ABC TV 30 State Report was due to be aired relating to Mark taking his own life. And as I said before, all too late for Mark.

Significantly compounding my frustrations, which were littered throughout the complaint process, record keeping was inadequate. From that front desk at the police station most disturbingly important documents went missing. Refer to the Coroner's findings and recommendations for details.

Impact of police complaint mishandlings.

I believe unnecessary indulgence in time and money could have been averted had SAPOL openly and profoundly dealt with the critical incident. I saw the delays – the delays in responding to my police complaint as downplaying it. The whole process remained unresolved for years. SAPOL internal investigations began for me in August 2005 after the criminal sentencing when they started up interviews again. I later asked the PCA for a copy of this interview because I was unable to trust the police.

I viewed delays in examining my police complaint as a holdup to correcting police errors. If SAPOL did correct anything they never told or assured me or my son or any of the others. I also sensed that with SAPOL frustrating the advancement of the Coronial proceedings, it would muddy the detection of procedural errors and impose an unwarranted risk to the public back at the Holden Hill Police Station. Adjourning the Coronial Inquest in May 2007 and again in – in August, hugely exacerbated the hardship of those directly affected. And I mean the officers

too. I felt sorry for them.

With every Coronial Court adjournment my own emotional and financial burden rose. I was trying to support my mentally shattered son and it was impossible for me to carry on my role in the workforce. I would expect that the coronial financial expenses to our State were hugely exacerbated. Costs were posted as exceeding \$0.5m in the Advertiser, 21st of the 1st 2009.

To create an effective police complaints system we need, this is in my view:

A credible police agency where witnesses to police procedural failings can find sanctity somewhere in reporting these incidents. I had nowhere to go.

The appointment of an independent Police Ombudsman who is allocated appropriate powers.

An independent Police Ombudsman with authority to fully disclose relevant internal investigation to the Coroner as per the Coroner's recommendations: Christopher Wilson Inquest 2008, page 101 (section 48 of the Police Act be amended to remove the barrier).

An independent Police Ombudsman who has powers to facilitate a timely outcome for entire entered police complaints. They seemed to be tied up doing all the other sorts of things instead of getting on with it, it's – I'm heartened from what I heard this morning, Commissioner.

The government to review the Police (Complaints and Disciplinary Proceedings) Act 1985 as per the Coroner's recommendations, Christopher Wilson Inquest 2008, page 101.

To see how the justice system works: the indisputable right of entry to police tribunals for those present at the scene in cases encompassed by fatality.

To see how the justice system works: the indisputable right of entry to police tribunals for

families and/or significant others to attend police tribunals should they choose to maximise their post trauma recovery in this way in cases encompassed by fatality. I don't think that's asking much, Commissioner.

Proactive risk identification by police officers that is supported by the initiation of investigations as soon as possible to protect the community from unaddressed errors. For example, immediate transfer of police officers from the front desk if there has been a breach in their duty of care to a member of the public.

A police complaints system that acts in the best interests of traumatically affected complainants – and police actually. There's a lot of traumatised people.

Senior SAPOL ranks be fully conversant with the Australian Guidelines for the Treatment of Acute Stress Disorder and Post Traumatic Stress Disorder, supported by the Australian Government and National Health and Medical Research Council so that acute Post Traumatic Stress Disorder is understood and meets Australian standards, especially if determining matters related to trauma victims.

And to restore public confidence in the handling of police complaints, I suggest – I've listed about 12, 13, 14:

A police complaints system with an independent arbitrator who is not subject to the direction of the Commissioner of Police.

A police complaints system that in the case of a fatality surrounding the complaint has its own officers conduct the investigation, not this SAPOL Internal Investigation Branch.

A Commissioner of Police that takes no part in selection of an independent Police Ombudsman.

An independent Police Ombudsman with established legislative power that ensures nominees to police tribunals not be overruled.

An open and transparent police complaints system that ensures SAPOL's accountability and removes the secrecy provisions that SAPOL currently fall back on.

A Commissioner of Police that is morally obligated to stand by his word and respond accordingly when that Commissioner has claimed publicly to have no objection to others attending police tribunals. I heard that on ABC 891.

A review of the elements in a Police Disciplinary Tribunal that deny the requested entry of others. Example, family.

An appropriate response to South Australian citizens who dare question police practice. I don't need to be eye – cold-eyed out – sitting outside tribunals.

A financial viability assessment and evaluation of police secrecy provisions. The cost to all this secrecy – blocking me made me pursue it more, actually.

Notification to the complainant of impending Police Disciplinary Tribunals to reassure them the sys – the justice system is working.

A review of the ubiquitous power of the Commissioner of Police role. For me this role fractured my confidence in getting my complaint appropriately dealt with.

I've just added a few more today, actually. This is to restore public confidence in the handling of police complaints: I would like to see more gender balance; if we're reflecting the community, where are the women? Where are other nationalities? We need – we need these people.

And this is another one I've added: there's too many layers in police. There's not enough on the front. It might have been touched on earlier by the Commissioner. There's too many layers. Nobody knows who's what and whose role is what, as it transpired in Chris's case. And I guess it's a career structure that's done this. You just move people sideways and add to it, and there's no one down at the ground doing the hard work. I would just like to say I'm – about quality assurance, those audits would be good.

In conclusion I will just say this now. Sometime after the Coronial Inquest in 2010 The Honourable John Darley MLC drafted the Coroner's Findings Inquest Amendment Bill.

The purpose of the Bill was to amend The Coroner's Act 2003, to require the Attorney General, within 6 months after the making of the recommendations by the Coroner, to provide the Parliament with report outlining details of any action taken or proposed to be taken in consequence of those recommendations, consistent with the legislative requirements that apply to deaths in custody. Where no action is anticipated to be taken, the Attorney General would be required to provide reasons for not taking action or proposing to take action.

The Bill would have gone some way towards providing some accountability on the part of the Government with respect to Coronial Inquests that identify systemic failures – that identify systemic failures. In my case, it would have provided me with the certainty that the 49 failures identified by the Coroner would not be ignored.

The provisions of the Bill were subsequently incorporated into another Bill introduced by the Honourable Stephen Wade MLC Shadow Attorney General. That Bill was passed by the Legislative Council. However, the Government ultimately rejected the proposal.

South Australian citizens left emotionally haemorrhaging after a critical police incident deserve somewhere to go when ordinary pathways are blocked by entrenched protocol.

After all is said and done, a credible early response to my concerns from the upper ranks of SAPOL would only have served to benefit their organisation.

THE COMMISSIONER:

I've read the Coroner's decision and the recommendations he made as a consequence of the inquest into your son Chris's death. I've also spoken to him about it. I think your son's inquest motivated the Coroner to make a submission in relation to this review. I'll have regard to his recommendations in deciding upon what I think to be an appropriate scheme for the oversight of complaints about police conduct. I understand from reading his reasons the circumstances that led up to Chris's death and why you wanted answers in relation to those circumstances. I've read your submission and I've understood the frustration that you've suffered over the years. Do you mind if I ask you a couple of questions?

MRS. WILSON:

Mhmm, please go ahead.

THE COMMISSIONER:

Were you at any stage given any reasons by the Tribunal as to why you couldn't attend in the Tribunal?

MRS. WILSON:

No. I have correspondence at home – that poor clerk, I was ringing – and I did start getting correspondence when the tribunals were happening because I pestered them but I didn't get any response from the Magistrate.

THE COMMISSIONER:

Was it important to you at that stage to participate by way – way of watching –

MRS. WILSON:

Just watching.

THE COMMISSIONER:

– the Tribunal?

MRS. WILSON:

Just I wanted to see it unfold. I needed to see that unfold.

THE COMMISSIONER:

And do you think if you'd seen that you would have been better informed as to what had happened?

MRS. WILSON:

Yes. Yes. It's about justice.

THE COMMISSIONER:

Yes, I understand that.

MRS. WILSON:

Mm.

THE COMMISSIONER:

Was that the most significant hurt in the process which you've outlined today, the fact that you weren't able to participate by watching in the – in the process, or was it the failure of SAPOL to respond in a timely fashion? Or something else, of course.

MRS. WILSON:

Lack of communication all round. I didn't know what was happening. Constantly ringing the

PCA to – what’s happening next? I was sort of dismissed, it was like brushing a fly away.

THE COMMISSIONER:

Apart from, clearly, you suggesting that complainants should be entitled to be present during the hearing in relation to misconduct on the part of police officers, do you have any other suggestions how complainants ought to play a part in the scheme?

MRS. WILSON:

If they ask, they need to be considered. I can understand that could – I – I think they need due consideration. I don’t feel – I don’t even believe I was considered.

THE COMMISSIONER:

I’m sorry?

MRS. WILSON:

They –

THE COMMISSIONER:

I didn’t hear you.

MRS. WILSON:

– they need to be considered.

THE COMMISSIONER:

Yeah.

MRS. WILSON:

And if they’re nominated – this, this as I say just demonstrated though – I could see that the PCA had no power. Because I was asked to leave. It was the hostility in that room.

THE COMMISSIONER:

And how many occasions did that happen, that you were asked to leave?

MRS. WILSON:

Once.

THE COMMISSIONER:

Once –

MRS. WILSON:

‘Cause then I – then Nick Xenophon got me in –

THE COMMISSIONER:

Yeah, I follow.

MRS. WILSON:

– briefly you know. And then – then things changed a bit. It was like the last minute of the last – it was as if I’m there advocating for my dead son, I need to be there. And my boy that was trying to – and all the others.

THE COMMISSIONER:

You were present I think earlier this morning in this room, when –

MRS. WILSON:

I was.

THE COMMISSIONER:

– the Police Commissioner made his submission.

MRS. WILSON:

I was.

THE COMMISSIONER:

And you would have heard the dialogue that I – the dialogue that I had with the Commissioner in relation to perhaps something what I – might be some improvements in the scheme. Did you want to comment on any of what I might have said or, or what –

MRS. WILSON:

I think –

THE COMMISSIONER:

– the Police Commissioner said in response?

MRS. WILSON:

I think – I think it's a good idea if they – if they can be watched elsewhere, they do their work and without leaving a footprint that they're being watched.

THE COMMISSIONER:

Yeah.

MRS. WILSON:

There's nothing to worry – as the Commissioner said, they have nothing to hide.

THE COMMISSIONER:

No. So you would see some advantage then in an oversight agency being able to audit any complaint made to –

MRS. WILSON:

Yes, yes.

THE COMMISSIONER:

– police, and without police knowing it?

MRS. WILSON:

Yeah. And just pick it up; pick it up.

THE COMMISSIONER:

And take it over, if necessary?

MRS. WILSON:

And let them deem – deem the power to take it over, yes.

THE COMMISSIONER:

Yeah. Yeah.

MRS. WILSON:

Yes, yes.

THE COMMISSIONER:

I also suggested to the Police Commissioner that the scheme ought to have very early assessments so that matters are dealt with –

MRS. WILSON:

Yes.

THE COMMISSIONER:

– as soon as possible.

MRS. WILSON:

Yes, yes.

THE COMMISSIONER:

Do you agree with that as a proposition?

MRS. WILSON:

I do agree with it. It's – I do agree with it.

THE COMMISSIONER:

You experienced 6 years I think –

MRS. WILSON:

Mm.

THE COMMISSIONER:

– in relation to your complaint, is that –

MRS. WILSON:

By the time the case was closed. Because I was still trying – I didn't have any communication. I'm still wondering years later what happened. There were a lot of Standing Orders that were changed but I mean they won't say that that's as a result of my case but I did pursue that and down the track got a lot of change to Standing Orders. But you can have all the Standing Orders in the world, if you haven't got enough people on the ground, you can't do it.

THE COMMISSIONER:

No. No, quite. Was there anything in any of the suggestions I put to the Police

Commissioner this morning that you would have objected to as – as part of the scheme?

MRS. WILSON:

I couldn't agree that he's – that he felt the Police Complaints Authority – or the Police Ombudsman independent.

THE COMMISSIONER:

Well, yes –

MRS. WILSON:

I couldn't – he, he, he says he's independent.

THE COMMISSIONER:

Well, my – my questions were based on the premise that there would be – that there might be an authority with true independence. Now, is there anything you disagree with anything I put to the Police Commissioner?

MRS. WILSON:

No, I can't – I do think – I do think police – the investigations – you have to have police that know the system. I mean I engaged a – a lawyer who was an ex-police officer. Because he knows the system. So, I don't – no I don't. I think, you know, you need the people that work on the front line of ex – worked, experienced police people involved but it's no good under the Police Commissioner because if – I don't know what role, I don't know whether they're ex-policemen or, I don't know. But I mean, I might be wrong here, but I think if nurses are, are – are looked into they – they have police, they have people of other people looking in on their – on, on their error. And as, you know, you have a – a number of people, you have, you don't just have just nurses, well, do you? No, it's a – it's a –

THE COMMISSIONER:

In New South Wales the Police Integrity Commission has oversight in relation to complaints about police conduct and they have access, as I said to the Police Commissioner this morning, to the whole of the New South Wales Police intelligence in relation to complaints about police conduct and the Police Integrity Commission in New South Wales can audit –

MRS. WILSON:

Yes, yes.

THE COMMISSIONER:

– the whole system without leaving any footprint.

MRS. WILSON:

That – that’s it, yes, sounds good to me.

THE COMMISSIONER:

And can if it thinks appropriate require the police to stop an investigation –

MRS. WILSON:

Yes.

THE COMMISSIONER:

– and take it over itself.

MRS. WILSON:

Yes.

THE COMMISSIONER:

Do you see some merit in that? In your experience – thinking about your experience?

MRS. WILSON:

I do because I think police can handle it themselves in that respect. They know their job, I'm hoping they know their job. They're just all tied up with paperwork.

THE COMMISSIONER:

Mm. Mm.

MRS. WILSON:

We need to free police up to get out on – get out doing stuff, front line stuff. Not all tangled up with internal investigations and – I mean with their own stuff but when – certainly in a fatality I believe that it should be moved out of their hands. I had no confidence. I got my lawyer, she actually mentioned – I don't – I don't want those police that when they went the night before then dealing with my case the next day. I had absolutely no confidence in that.

THE COMMISSIONER:

Yes. I understand that. Is there anything else you want to tell me?

MRS. WILSON:

If I could – if you could just give me half a moment –

THE COMMISSIONER:

Of course.

MRS. WILSON:

– I'll –

THE COMMISSIONER:

Of course.

MRS. WILSON:

No, I think that's about it. I just – I just think –

THE COMMISSIONER:

The – your submission will be included in our website in due course and – and your submissions you made today and the discussion we had today. You don't object to that?

MRS. WILSON:

I do not object –

THE COMMISSIONER:

No.

MRS. WILSON:

– no.

THE COMMISSIONER:

That will give people an opportunity to understand your experience with the system. I will also include on the website – I have included on the website the reasons of the Coroner in relation to your son Chris's inquest because they form part of his submission to – to me. Which will also let those who read the website understand the circumstances in which you required investigation. I'm very grateful that you came today; it was very brave of you.

MRS. WILSON:

Thank you.

THE COMMISSIONER:

Thank you Mrs. Wilson.

MRS. WILSON:

Thank you.

THE COMMISSIONER:

I'll resume on Tuesday next week at ten.

ADJOURNED 12:42pm

ICAC

OPEN HEARING

BEFORE THE HON. BRUCE LANDER QC
INDEPENDENT COMMISSIONER AGAINST CORRUPTION

MR. M. RICHES Counsel Assisting

Courtroom 3
Level 7, Riverside Centre Building
North Terrace, Adelaide

MONDAY, 28 APRIL 2015 at 9:59am

Witnesses:

CARROLL, MARK, President, Police Association of South Australia

SCHEFFLER, THOMAS, Secretary, Police Association of South Australia

BAILES, MORRY, Managing Partner, Tindall Gask Bentley Lawyers, Principal Legal
Advisor to the Police Association of South Australia

THE COMMISSIONER:

Good morning, Mr. Carroll.

MR. CARROLL:

Hello Commissioner. How are you?

THE COMMISSIONER:

Mr Scheffler, Mr. Bailes, thank you very much for coming.

MR. BAILES:

Commissioner.

MR. SCHEFFLER:

Thank you.

THE COMMISSIONER:

I will be interested in anything you have to say, Mr. Carroll.

MR. CARROLL:

Thank you Commissioner. First, if I can introduce the secretary of the Police Association Mr. Thomas Scheffler. Tom has worked for the Association for more than 13 years. He has advocated for many hundreds of Association members who have had to front the police disciplinary system. Prior to joining the Association Tom served with SAPOL for 29 years and was a member of the CIB for 17 years. I am also joined by the Managing Partner of Tindall Gask Bentley Lawyers, Mr. Morry Bailes, who has an intimate knowledge of legal issues associated with the police disciplinary system. Over 20 plus years he has represented many Association members and can speak with authority on the absolute need for the Police Disciplinary Tribunal.

My oral statement to you today, Commissioner, should be considered in conjunction with my written submission dated the 26th March, prepared on behalf of the members of the Police Association of South Australia. One point I want to make very clear from the outset is that the Police Association supports external oversight. Police officers operate under the highest levels of scrutiny and regulation. And the investigation of police corruption and serious misconduct is an essential function. The current system you are now reviewing has provided the necessary protections for both complainants and police for many years and as you have acknowledged the South Australian community is well served by a professional ethical and high calibre Police Force.

The Stevens review: former District Court Judge Stevens undertook a comprehensive review of the current system in 1998. In response to the findings and recommendations of that review the now late former Attorney General Trevor Griffin introduced into Parliament in 1999 a Bill to amend the Police (Complaints and Disciplinary Proceedings) Act. I have already provided your office with a copy of that review.

What I draw from it and what I implore you to consider is the absolute necessity for investigative or preliminary decision-making bodies to apply the principles of natural justice and procedural fairness particularly where the exercise of power plays a significant part in the final decision-making process which impacts directly on the individual concerned. Adverse findings or comments made in Police Ombudsman assessments have the potential to cause irreparable damage to a police officer's status, reputation and livelihood, including the opportunity of promotion.

The current legislative scheme therefore provides the right to know and be heard. Many sections of the Act import a natural justice requirement into the reporting and assessing functions of the Police Ombudsman. Any future legislative scheme should undoubtedly do the same. The importance of these check and balance requirements in the present Act is that they safeguard individuals from the improper exercise of investigative and decision-making

power. They are checks and balances which ensure the practice of fairness and equity within the complaints process.

Delay: You have identified that delay in so far as concluding matters under the present system constitute the biggest single issue of concern. I can indicate that this existed at the time of the Stevens review; delay is caused chiefly at the investigation stage rather than at the point when, for example, disciplinary charges are laid. I note your acknowledgement of the fact that an additional layer of oversight and review brought about by the introduction of the OPI and ICAC has contributed to the delay issue.

I understand that the OPI assessment process is often comprehensive and even borders on what can be described as a preliminary investigation. This can result in not only delay but also duplication of effort. To the extent that it is possible, therefore, we advocate strongly that in run of the mill disciplinary matters the ICAC and OPI should play little part. The introduction of the Office of Public Integrity, with its statutory functions, provides another avenue for complaints against police. It now enables a person to complain to SAPOL, the Police Ombudsman or the OPI. This is far from a common-sense structure and it seems apparent to us that it will not continue into the future.

I note that your 2013-14 Annual Report highlights the fact that the OPI was originally intended to be the one-stop-shop to triage complaints and reports about public administration. You highlighted the Deputy Premier's 2010 review that the notification point should be independent of any agency to be investigated. The responsibility to initially assess and allocate those complaints to the correct investigator should lie with the system not the public. To achieve this it would seem, in our view, pointless to retain the office of Police Ombudsman but we would only hold to this view as long as such integrity reform delivered a truly independent Office of Public Integrity. We say that, at present, under the legislative arrangements it does not.

An independent OPI: I note that in your Annual Report you agree with the Deputy Premier that the complaint handling system for police ought to be a system in which the Commissioner and Police Ombudsman are at arm's length as appropriate in the handling of complaints. You have also commented that the present system has the potential to diminish public confidence in the independence of the Police Ombudsman as the Commissioner of Police may disagree with directions, decisions and recommendations of the independent oversight body.

A passage from the Stevens review at pages 76 to 77 is informative on this topic. And I quote: "The argument is that the Authority does not affect the rights of a police officer complained about as he has no disciplinary power, and punishment or sanction would be imposed by the Commissioner, a tribunal or a court. Such an argument overlooks section 34(3) of the Act, which states the Commissioner must take all steps necessary to give effect to any recommendations of the Authority. Although the recommendations which are made in the assessments are not final, in the sense they need to be applied and implemented by the Commissioner, they nevertheless are of more than a persuasive nature. The Commissioner certainly cannot lightly dismiss any recommendations by the Authority. And indeed, he must take all such steps as are necessary to give effect to any such recommendations. The Commissioner is not empowered to substitute his own assessments and recommendations for that of the Authority but can only inform the Authority of his disagreement which the Authority is to consider in confirming, varying or making a new assessment. The only other option being to refer the matter to the Minister for determination. As the recommendations of the Authority are not recommendations that the Commissioner can lightly disagree with or ignore, the assessment and recommendations are a decisive step in action being taken against a police officer who has been found guilty of conduct by the Authority. And further, although the assessments made by the Authority are not final in the strict sense that the Authority cannot impose a penalty, they nonetheless are an exercise of power which plays a significant role in the final outcome. The police officer's employment could be affected by an assessment. He can, on the recommendation of the Authority, be subjected to criminal proceedings or disciplinary proceedings, his reputation may be damaged by publication of the assessment."

We understand that, although provided for in the Police Complaints Act, matters are rarely referred to the Minister. And the Police Ombudsman does not have to vary his or her assessment if the Police Commissioner disagrees. The Police Ombudsman can confirm it after considering the Commissioner's position. It falls to the Commissioner to refer the matter to the Minister if agreement cannot be reached. One might consider this to be a robust process which ensures a level of natural justice. Yet, if this is considered too close a relationship in which the Police Ombudsman and Police Commissioner are not sufficiently at arm's length, then so it must be in our submission for the present legislative arrangements of the ICAC and the OPI.

The ICAC and the OPI: You have indicated, Commissioner, in your annual report that the ICAC and OPI are designed to work harmoniously and to that end you have responsibility for both your office and the OPI. Both offices share the same CEO. The CEO has commented that whilst the OPI has been created as a separate office for practical purposes the office of the Commissioner and the OPI are one entity with all employees employed by the Commissioner and working together towards a common goal.

The functions and objectives of the OPI are to receive and assess complaints about public administration and reports about corruption, misconduct and maladministration in public administration from inquiry agencies, public authorities and public officers. The OPI makes recommendations as to whether, and by whom, complaints and reports should be investigated. And the ICAC is not bound by the OPI recommendations. The ICAC is a law enforcement agency. Therefore, is the legislative construction of the operation of the ICAC and OPI not at sufficient arm's length? I note that the ICAC legal team advises both the Commissioner and the OPI by providing legal advice in relation to a variety of matters including assessments, investigations, industrial and corporate compliance. The Commissioner appoints members of the legal team to act as counsel assisting him or her in investigations into corruption in public administration. It also provides advice in relation to the construction of the ICAC Act and

legislative amendments. Legal officers are not independent of the ICAC or the OPI. How can the OPI perform a truly independent role insofar as assessing complaints if it is controlled by the ICAC and reliant on the same legal resources as the ICAC? Does this not create a substantial conflict or at the very least a perceived conflict? What if the OPI were to receive a complaint about ICAC staff or investigators? Isn't the assessment process of such complaint flawed if assessment and recommendations are mandated to be made to the ICAC under section 23 and the ICAC is not bound by the recommendation under section 18, part 2?

No doubt, Commissioner, you are acquainted with the integrity and anti-corruption systems in Victoria. In 2010 that system underwent a review as to its effectiveness. That review led to the introduction of a broad-based anti-corruption commission. The Police Association provided a comprehensive submission to the Public Sector Standards Commissioner. And I table a copy of that submission for your information.

THE COMMISSIONER:

Thank you very much.

MR. CARROLL:

The Police Association of Victoria was highly critical of the then Office of Public Integrity and its relationship with the Victorian Ombudsman and Victoria Police. It questioned those organisations' ability to deal independently and comprehensively with corruption in Victoria. The submission highlighted the unwillingness of the OPI to identify members of its own staff when they were suspected of committing serious theft offences. In a case of OPI v Bolton serious questions arose about the evidence of OPI staff and investigators who repeatedly denied the existence of audio recordings which the defence subpoenaed and which were important to Sergeant Bolton's defence. Three other witnesses contradicted that evidence and when the OPI investigator was recalled she changed her earlier sworn testimony.

The Victorian Police Association in its submission presented other examples of misconduct of

OPI investigators, and I draw your attention to Clause 9.4 of that submission. Clearly, a strong and viable integrity and anti-corruption system must be beyond reproach. The Victoria Police Association submission underscore that it is not in the public interest for the exercise of coercive powers to go unchecked without a formal process for complaint, investigation and review.

Corruption investigators are subject to the same pressures and temptations as any other law enforcement officer and just as prone to doing the wrong thing. Misconduct is not confined to specific sections of the police or public sector; it is a product of human frailty. It would be naive to presume that the factors that motivate misconduct do not operate on individuals within anti-corruption agencies. As much as it is important for the public to have confidence in its Police Force, it is just as important for the public and members of SA Police to have confidence in the operations of external oversight agencies. But the present legislative arrangements of the ICAC and OPI come with the potential to compromise both entities. Indeed, one could perceive the present arrangements as similar to an arrangement whereby the Police Ombudsman was responsible to the Police Commissioner for the performance of its functions and the Police Commissioner was not bound by any recommendations of the Police Ombudsman. That is a situation that would not be tolerated, yet for all intents and purposes that appears to be the present legislative arrangement for the ICAC and the OPI.

The OPI and the Police Ombudsman: We have suggested a new model based on a truly independent OPI. The OPI as an independent statutory body could deliver that envisaged by the Deputy Premier. It could be the independent agency to receive and assess all complaints by the public et cetera, as indicated in the present section 17(a) to (c) of the Act. If that complaint were against a police officer, the OPI would assess it. If it related to corruption, criminality or serious and systemic misconduct then it could be referred to the ICAC to investigate. If none of those elements existed the matter would be referred to SAPOL to investigate. At the conclusion of either an ICAC or SAPOL investigation, a report and recommendation as to action would be returned to the OPI, which would either agree or

dissent. In matters of an agreed outcome which involved criminal or disciplinary proceedings the matter would be forwarded to either the DPP or SAPOL to prosecute as the case may be.

In a matter of dissent, particularly with regard to legal proceedings, the OPI could forward the matter to the Crown Solicitor and act on the independent advice received. The OPI acting in such a manner would then render the present Police Ombudsman's role redundant. I note that the proper and efficient use of public resources dedicated to the oversight and management of police conduct is an essential consideration in this review. The Police Association supports an independent OPI subsuming the role of the Police Ombudsman and sees the OPI as perfectly placed to receive all complaints from the public and allocate them to the appropriate agency for investigation.

The Police Disciplinary Tribunal: Commissioner you have received submissions from other stakeholders who advocate scrapping the Police Disciplinary Tribunal.

You have questioned the Tribunal's utility and whether a less formal system, one which might involve the new SA Civil and Administrative Tribunal would be more appropriate. We hold fervently to the view that the PDT should remain. First, the existing scheme of discipline is enshrined in legislation in both the Police Act and the Police (Complaints and Disciplinary Proceedings) Act. It has existed in this way for many years because both the South Australia Police and the Police Association value its fairness, impartiality and success.

Unlike other jurisdictions employing an administrative approach, South Australia has avoided the common complaints of a lack of procedural fairness, transparency and just outcome. When 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 specialised independent Magistrate is a system which should without question remain. The Association sees nothing wrong with an evidence-based adversarial model when dealing with an accused police officer's rights and entitlements and believes the

South Australia Police share that view. To do less is to demean the sworn office, discourage police and long-term erode the very high quality of candidate who is attracted to the police occupation in South Australia. Proceedings before the Police Disciplinary Tribunal are confidential and there exists strong public interest reasons that this should always be the case. The Police Disciplinary Tribunal is essentially an employment tribunal which deals independently with employer/employee discipline issues. The private nature of the proceedings prevents the name and shame nature of public examinations in which individuals can be publicly vilified. The destruction of the reputations of innocent individuals is an anathema to any civilised democratic society. The operation of section 40 of the Act pertaining to proceedings before the Tribunal has been effective and should remain. Section 40(7) of the Act empowers the Tribunal to admit the Police Ombudsman or his or her nominees and any other person including members of the public to be present at proceedings of the Tribunal. Of course, the Tribunal exercises this power at its discretion. Commissioner our written submission included the written opinion of barrister, Marie Shaw QC who set out reasons for the PDT's retention.

THE COMMISSIONER:

It wasn't a legal opinion.

MR. CARROLL:

I beg your pardon, sir?

THE COMMISSIONER:

It wasn't a legal opinion.

MR. CARROLL:

It was prepared by Marie Shaw, barrister, that's right.

THE COMMISSIONER:

But it's not a legal opinion.

MR. CARROLL:

No. She identified, one, the 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 and determine whether a police officer has breached the Police Act. Two, 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 the 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. And three, 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 among other 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. Commissioner, it is important to recognise that police officers represented by the Police Association have confidence in the PDT. History shows that the PDT has never been fundamentally unwieldy, inefficient, expensive or inconsistent in its process and outcomes. There is no suggestion that the present processes do not work or have failed. At the time of Mrs. Shaw's advice our statistics indicated that since December 2011 only three matters have proceeded to trial. 34 had been withdrawn and 64 had been concluded by way of guilty pleas. Clearly in the public interest is for police officers to discharge their critical and onerous duty with confidence in the current system and its disciplinary body. Confidence in its experience and history of fair hearings. The PDT delivers that confidence. It determines

the facts, deals in evidence rather than speculation and is independent and transparent. The Police Association will continue to advocate for its retention long into the future.

The ICAC: The Police Association is uncomfortable with the Independent Commissioner Against Corruption Act, in so far as it allows for the investigation of matters related purely to misconduct, when that misconduct is neither corrupt nor tantamount to maladministration. These matters ought to be investigated but we consider that to be the job of the South Australia Police, in so far 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. We agree with your statement that the definition of corruption in public administration in the ICAC Act is very wide, in that it includes any offence committed by a public officer while acting in his or her capacity as a public officer, however minor. In defining corruption, the Association has long held to the view that criminality and issues of police discipline not be linked. Police conduct which would ordinarily be considered in breach of the Code of Conduct pursuant to the Police Act and Regulations should only be the subject of proceedings before an ICAC if the conduct under consideration falls within a legislative definition of corruption that deals with dishonest activity arising out of public office or public service.

As stated by the Police Commissioner, SAPOL's Anti-Corruption Branch operated according to directions issued by the Minister to the Commissioner pursuant to the Police Act. Corruption was defined in the Minister's directions. That definition appears to operate in a way that does not confuse police discipline with dishonest conduct of a corrupt kind.

Police investigating police: When it comes to the question of police conducting internal investigations into other police, one must appreciate a self-evident reality. It is that police are the most capable resource available for the task – investigations are what we do. Some decry the practice of internal police investigations but to take their argument to its logical conclusion,

one would have to bar police, seconded, retired or resigned from any involvement on any occasion. This is infinitely impractical. Concerns about bias and or conflict real or perceived clearly exist. But the experience of the Police Association and its legal providers is that the ACB and IIS investigators pursue the truth with unrelenting zeal. Our legal practitioners report that the method of questioning some IIS and ACB members employ is continuously importune. Many disciplinary interviews amount to interrogations in which unjustified propositions are put and serious accusations made.

In any event, an independent OPI would assess any investigation and recommendation from a complaint it receives. ICAC oversight of investigations of police by police would also provide impartiality and transparency. The audit function you raised last week Commissioner would be welcomed.

In summary: Police officers perform a unique role and operate under the highest levels of scrutiny and regulation. The nature of their duties is such that it can attract many and varied complaints many of which are proved unsubstantiated and in public service police were until the ascent of the ICAC Act the only group other than in recent times being protective services officers who are compelled when lawfully directed to answer questions about matters relating not to their – not only to their on duty but also their off duty conduct. That applied to no other category of employment in the wider South Australian public sector. South Australian police officers are known for their professionalism and ethics. They seek a police complaints system that doesn't confuse police discipline with criminality; it must be fair, evidentiary based and independent. Thank you and I'm happy to take any questions you have, Commissioner.

THE COMMISSIONER:

Thank you. The last point that you made, Mr. Carroll, that there is a risk that the system might confuse disciplinary proceedings with criminality. Isn't that what the present system is? Exactly that, it does confuse those two matters?

MR. CARROLL:

Well, we don't think so because when you take into account the Police Act and Regulations it sets out the Code of Conduct.

THE COMMISSIONER:

I understand that.

MR. CARROLL:

It set out what is to be investigated and how it's to be determined and assessed.

THE COMMISSIONER:

But –

MR. CARROLL:

In the – oh, sorry, sir.

THE COMMISSIONER:

No, you go ahead.

MR. CARROLL:

In the ICAC Act, I mean the broad definition of corruption, when it picks up minor breaches of criminality. That might be a police officer involved in a speeding incident. Or it might be an argument between excessive force or assault. It is those minor complaints the police have always investigated and there is always a process involved in relation to whether that is handled in the Police Disciplinary Tribunal or it is handled in a court.

THE COMMISSIONER:

I am not suggesting that police shouldn't investigate it. But what I'm saying is that the present system does confuse a concept of disciplinary proceedings and criminal proceedings. Because

it treats disciplinary proceedings as if they were criminal proceedings.

MR. CARROLL:

You are mentioning the Police Disciplinary Tribunal process?

THE COMMISSIONER:

Well, that and the investigation process itself. Criminal proceedings commence with an investigation. And they conclude if a person is charged with a hearing before a tribunal or a court. That's exactly what you do for disciplinary proceedings at the moment.

MR. CARROLL:

Before I ask Morry to respond – in relation to that though sir, if you consider the amount of complaints that are made against police, by where those complaints come, who we deal with on a daily basis, we want a system that is evidentiary based where people who make complaints, if that's taken to its logical conclusion and our members say that they're not guilty of it, that there should be a proper evidentiary hearing where witnesses can be cross-examined.

THE COMMISSIONER:

But why should a person who has been complained about for a disciplinary matter have to plead guilty or not guilty? It is not a criminal matter.

MR. CARROLL:

Because it may very well be that the complaint that's made against them they are not guilty of.

THE COMMISSIONER:

No. No. But, if you are a civilian and in the public sector, and someone makes a complaint about your conduct, an investigation might occur but the investigation doesn't ask the person who is the subject of the investigation to plead guilty or not guilty. That's a criminal matter.

MR. CARROLL:

And our members, unlike other public servants, are compelled to answer those questions.

THE COMMISSIONER:

I'm not sure what the relevance of that is.

MR. CARROLL:

Well –

THE COMMISSIONER:

What I am putting to you at the moment is that the present system is overformalised to the disadvantage of your members.

MR. CARROLL:

We would disagree. We would say that –

THE COMMISSIONER:

They're treated like criminals –

MR. CARROLL:

Well, there are other processes that already exist in relation to the system to deal with minor misconduct, to deal with minor matters. But that already exists.

THE COMMISSIONER:

Put those aside. In relation to matters of serious misconduct your people are being treated as if it were a criminal matter. And I can't understand why your organisation would support that.

MR. CARROLL:

Well, I think, for the reasons I have outlined to you, sir.

THE COMMISSIONER:

You want your people to be treated as if they were criminals?

MR. CARROLL:

No, I am not saying that. I am saying that at the moment people make police complaints –

THE COMMISSIONER:

I know they do.

MR. CARROLL:

– and there are great ramifications for any member found guilty of a complaint. And we want to make sure before that happens to our members, who would lose tens and tens of thousands of dollars if they are demoted for example, that we want to make sure that the evidence that is going to be relied upon is properly tested.

THE COMMISSIONER:

I think what's necessary to be done is to discriminate between those matters that could give rise to, for example, termination, demotion, reduction in pay, transfer or something of that kind. They have to be treated seriously, if that is a possible result. But at the moment the system treats every matter the same way.

MR. CARROLL:

Well, there is a system of minor misconduct.

THE COMMISSIONER:

I know that.

MR. CARROLL:

And informal resolution of matters. And that already exists and there is already a determination in general orders in relation to how that would happen.

THE COMMISSIONER:

But there are many misconduct matters that are not minor misconduct matters but are not likely to ever lead to termination or suspension, demotion or anything of that kind. They're treated as if they were. And they go to the Tribunal.

MR. CARROLL:

Well, they don't have to be. The system already allows the Commissioner to treat them differently, if he so desires.

THE COMMISSIONER:

How could he treat it differently?

MR. CARROLL:

They can be considered to be dealt with under the minor misconduct or the informal resolution process.

THE COMMISSIONER:

No, we're at cross purposes. I am not talking about minor misconduct. I am talking about a matter that is misconduct. Not minor. It can't be minor misconduct.

MR. CARROLL:

All matters can be determined, are misconduct.

THE COMMISSIONER:

Yeah. At the moment those matters can end up in the Tribunal where there is no prospect that the police officer will suffer any serious sanction such as demotion et cetera, et cetera.

That seems to me to be extraordinary. And it is extraordinary that your Association wants it to continue.

MR. CARROLL:

Well, that's your view, I suppose, sir, but –

THE COMMISSIONER:

Well, that is.

MR. CARROLL:

And I'm saying to you that if you look at the statistics of the Police Disciplinary Tribunal, many occasions we will have a contest between the facts in issue, what the allegations are. And in this system the PDT provides that appropriate, necessary adversarial system where things can be tested, where we can say, well, no, if they are going to be guilty of that breach of regulation as defined in the Police Code, then our member will say, well, I agree to this but that is not correct in relation to that fact in issue. And that becomes the debating point.

THE COMMISSIONER:

Yeah. There are some –

MR. CARROLL:

Did you want to say anything Morry?

MR. BAILES:

No. Sorry, Commissioner. I'll hear you out and add anything that I need say after that.

THE COMMISSIONER:

Okay. There are some circumstances where it is necessary to make findings of fact. And they will arise where a matter gives rise to an allegation of serious misconduct that could give

rise to termination, demotion et cetera and there will be a need in those circumstances to be findings of fact. But where such a sanction is not – would not be imposed, having regard to the conduct, for example investigation, why do you need a disciplinary tribunal to hear it?

MR. BAILES:

Perhaps I can answer that one Commissioner. The current approach by the South Australia Police is that matters that are laid in the Tribunal are only Category A and Category B matters. And the penalties relating to those, range from termination to demotion –

MR. SCHEFFLER:

Reduction of seniority.

MR. BAILES:

– reduction of seniority. So it is only those matters which can involve a serious penalty that are in fact tried. The Category C matters that you are probably referring to, the current approach of SAPOL is not to lay those before the Tribunal.

THE COMMISSIONER:

But the member can take it to the Tribunal.

MR. BAILES:

No. A Category C matter can be concluded in a way that doesn't require it before the Tribunal.

THE COMMISSIONER:

It may be —

MR. CARROLL:

But in minor misconduct matters, you're quite right.

THE COMMISSIONER:

It may be concluded, but the member can take it to the Tribunal, can he not?

MR. CARROLL:

Yes.

THE COMMISSIONER:

And they do.

MR. CARROLL:

Because they say they're not guilty of the conduct.

THE COMMISSIONER:

I understand that. But I was just taking up Mr. Bailes's point. A lot of the matters that go to the Tribunal are not initiated by the Commissioner, but are in the Tribunal because of the police officer's claim to want a tribunal hearing.

MR. CARROLL:

Because they are not guilty of what has been alleged.

THE COMMISSIONER:

That may be.

MR. CARROLL:

That's what they are saying sir. That's why it's there. Because the complaint has been investigated and the determination has been made. Our member is saying but I am not guilty of that. And it might be judged as minor misconduct and what we do in that system is the member can determine as to whether they are happy to go through the minor misconduct

process by saying yep, I accept that I have breached that certain code and we won't go to a full investigation and it won't go to the Police Disciplinary Tribunal but if the allegations are put to the member that they say that is not the case then they do choose to have the full investigation.

THE COMMISSIONER:

But these are – are these minor misconduct – could these include minor misconduct matters?

MR. CARROLL:

Yes. Yes.

THE COMMISSIONER:

So your officers could tie up a tribunal in relation to a minor misconduct matter that could only give rise to managerial caution.

MR. CARROLL:

No, because the member chooses based on what the allegations are as to – at the beginning of the process – as to whether they say that they accept that being allegation, is a fact or not.

THE COMMISSIONER:

Yeah, no I understand that. But if the matter is minor misconduct and if the investigation reaches a conclusion that the officer has been guilty of minor misconduct and that might give rise to managerial caution, or discipline – managerial caution – your member can take it to the Tribunal.

MR. CARROLL:

No. No, Commissioner.

MR. BAILES:

No, Commissioner, that's not so. The Act – the method for contesting that finding is to make an application to the Commissioner. So once it's designated minor –

THE COMMISSIONER:

You are talking about minor misconduct?

MR. BAILES:

Yes.

THE COMMISSIONER:

Alright. Well, let's put minor misconduct out the way. Let's put it out the way. That doesn't go to the Tribunal. The other matters do if your member wishes them to.

MR. BAILES:

Well, Commissioner, I beg to differ.

THE COMMISSIONER:

Are you saying that's not right?

MR. BAILES:

Well, what I say is that it is up to the Commissioner of the day –

THE COMMISSIONER:

No, no the Commissioner can do it. Also the member can –

MR. BAILES:

A Category A or Category B matter is laid by the Commissioner.

THE COMMISSIONER:

I understand that.

MR. BAILES:

So, it's not a choice of the member. They are in the Tribunal.

THE COMMISSIONER:

They are in that case, Mr. Bailes. But concentrate if you wouldn't mind on my proposition. If the Commissioner doesn't lay it in the Tribunal, the member may take it there.

MR. BAILES:

No.

THE COMMISSIONER:

Is that right, you say no.

MR. BAILES:

No. No, no, I don't –

THE COMMISSIONER:

I don't think – I don't think your colleagues agree with that.

MR. SCHEFFLER:

No, I agree with Mr. Bailes. It's only when it's a minor misconduct can the member elect to challenge that in the Police Disciplinary Tribunal. They have got an opportunity to do that.

THE COMMISSIONER:

It is only with – when it is minor misconduct.

MR. CARROLL:

In the beginning.

MR. SCHEFFLER:

Minor misconduct.

THE COMMISSIONER:

I thought that's what Mr. Carroll said couldn't be challenged.

MR. CARROLL:

No. At the begin—

MR. SCHEFFLER:

So, within the disciplinary process at the moment we have a managerial support process, as you are aware of, where people get managerial advice. Those matters are recorded and not reported. A member has not got any opportunity to challenge that. They will receive that managerial advice no matter what. And they need to accept that. Then there's nowhere to take that, nowhere to appeal it. And we also accept that process. Because it has no impact on the member.

The next level up we have minor misconduct. And when a member gets advised that a matter is being determined as a minor misconduct process they have the ability to challenge that within seven days of receiving notification —

THE COMMISSIONER:

And how can they challenge that?

MR. SCHEFFLER:

— and ask that to be heard in the Police Disciplinary Tribunal. Now it doesn't even mean that the member does accept — if a member accepts the minor misconduct process they can still

challenge those issues in the minor misconduct process.

THE COMMISSIONER:

But that – that was my point –

MR. SCHEFFLER:

Commissioner just further to that –

THE COMMISSIONER:

Yeah, you go on. You go on.

MR. SCHEFFLER:

What our concern is, even with the minor misconduct process, which obviously some people might think it is a preferred option, there are longstanding ramifications for members.

MR. CARROLL:

That's right.

MR. SCHEFFLER:

Even under that process you can have a transfer of four months but on top of that it will go on the member's record on their probity report and further to that in future when they apply for promotions, whether they apply for their medals when they are – when they are due to receive a medal, that minor misconduct record will have a significant role to play as far as – as I've said, when they are applying for a promotion what have you or their medal. So, in a number of cases, and I would say it is probably less cases, the members choose to have the matter heard in the Police Disciplinary Tribunal because they are so concerned that they will not get a proper hearing under a minor misconduct process. Now as far as the next level goes that is when members get disciplinary charges, so they receive a formal disciplinary charge, and the members under that particular process, obviously they come to the Association and we give

them some sort of comfort in how that process works but then they have – they do have the opportunity then to challenge that in the police disciplinary process and if you would look at those statistics when you can see that approximately one third of matters – members are found not guilty. The matters are withdrawn – matters are withdrawn from the Disciplinary Tribunal – that's quite effective.

And if you look at all of the other guilty pleas many of them have come about through negotiation, through legal counsel, and a number of items in those Police Disciplinary Tribunals, a number of cases you will find that is agreement reached in relation to statements that have been provided, some are removed, redacted. There's a whole range of issues that go through that which will have a long term impact on our members.

MR. CARROLL:

There might even be duplicitous charges so they might be charged with the Code of Conduct under their behaviour, their honesty and integrity and conduct prejudicial –

THE COMMISSIONER:

After a minor misconduct matter?

MR. CARROLL:

No no no, this is in the PDT process that Tom is just talking about and so when it comes to conclusion within the PDT because there is a range of charges that have been laid on the member and through negotiations that is discussed in relation to withdrawal of some charges of the Code of Conduct for an acceptance of a plea on one instead of three breaches arising out of the same set of circumstances.

THE COMMISSIONER:

Are we agreed then that minor misconduct matters can be taken to the Tribunal by an officer?

MR. CARROLL:

Yes.

THE COMMISSIONER:

Mr. Bailes?

MR. BAILES:

Yeah. Commissioner, forgive me. I had assumed the position where you've gone past the post and it is purely a minor misconduct process.

THE COMMISSIONER:

All right. Well, the point I was making is that the police officer himself or herself can elect to have the matter heard by the Tribunal. Now, there's been a suggestion that the Tribunal system is overly complicated and formal. You would not agree with that?

MR. CARROLL:

We don't – we don't find anything wrong with that.

THE COMMISSIONER:

Overcomplicated?

MR. CARROLL:

We don't – we don't – we don't think that it's overly complicated and we like the formality of it.

THE COMMISSIONER:

Well, do you agree it's overcomplicated?

MR. CARROLL:

No.

THE COMMISSIONER:

Do you agree it's formal?

MR. CARROLL:

Yes.

THE COMMISSIONER:

And you agree that the time taken – that matters take to reach the stage where they can be remitted is very long?

MR. CARROLL:

Yes.

THE COMMISSIONER:

And what is the reason for that?

MR. CARROLL:

We think it's to do a lot with the investigation process and perhaps the assessment process in relation to how long an investigation takes to reach its conclusion. We have some members who, at the moment, are waiting between 12 and 24 months after they have been interrogated for an outcome before coming to find out whether they are going to be charged with a breach of regulations, whether it be minor misconduct or not.

MR. BAILES:

Do you mind if I add something? Commissioner, because you have identified delay, we've given it some thought. Can I just provide an explanation that may assist? Mr. Carroll has made reference to the fact that in our view, our collective view, the predominant delay is at the investigation stage. Once it's before the Tribunal, we tend to get on with it. We've got a

fairly enthusiastic Magistrate who won't allow us to sit around being idle. The statistics might belie what actually occurs because if there are criminal proceedings on foot, arising out of the same conduct, the Police Disciplinary Tribunal necessarily adjourns the disciplinary proceedings whilst the criminal proceedings are concluded. So that can account for – on the statistics – some matters that sit before the Tribunal for a period of time. You've learnt this morning that about a third of matters are withdrawn. So, we say that that is vindication for having a formal process so that you can carefully look at evidence as distinct from some other jurisdictions where an administrative approach to police discipline has led to a less than quality system of discipline.

THE COMMISSIONER:

Why would that be?

MR. BAILES:

Because there is less ability to – there is no evidentiary-based system or hearing. There is no cross examination of witnesses.

THE COMMISSIONER:

Why would that be?

MR. BAILES:

Sorry?

THE COMMISSIONER:

Why would that be?

MR. BAILES:

Well, let me take Western Australia, for example. There is an ability for the Commissioner of Police in Western Australia to conduct a hearing. He has entirely abandoned that process.

THE COMMISSIONER:

The Commissioner of Police?

MR. BAILES:

The Commissioner of Police.

THE COMMISSIONER:

I'm not suggesting that.

MR. BAILES:

I'm sorry?

THE COMMISSIONER:

Nobody is suggesting that, I don't think.

MR. BAILES:

Well, maybe not, but we look at examples from other jurisdictions, that are in our view less –

THE COMMISSIONER:

I think the suggestion that's been made is that administrative tribunals such as SACAT which might be comprised of delegates of PASA, the Commissioner of Police, Victims of Crime, might hear the matter.

MR. BAILES:

Well I will let Mr. Carroll remark on that but my final point in relation to delay is that the matters that are run to trial in the Police Disciplinary Tribunal, so those that take the longest, are generally the Category A matters. And as you have heard, from December 2011, there has only been three contested matters. So whether you take a personal view about it or not, the

attitude of the Association and its members is that it is content with the process. It sees a benefit in the formality because it enables a proper scrutiny of the evidence.

THE COMMISSIONER:

But an administrative tribunal can be quite formal too, I mean, you would have appeared before the Administrative Appeals Tribunal –

MR. BAILES:

Certainly, but our argument –

THE COMMISSIONER:

They conduct themselves as if they were a court.

MR. BAILES:

Our riposte to that Commissioner would be if it ain't broke don't fix it. Why move it to another tribunal?

THE COMMISSIONER:

That assumes it is not broken of course and what I am suggesting is, and it has been suggested, that the system is overcomplicated and formal and time-wasting.

MR. BAILES:

Well if it is simply going to be allegedly overcomplicated, formal and time wasting in another forum we'd prefer it to remain where it is.

THE COMMISSIONER:

Even with those descriptions?

MR. BAILES:

Well, I don't agree with those descriptions but the point is if you are going –

THE COMMISSIONER:

That is not my impression of the Tribunal, that's the Magistrate's impression.

MR. BAILES:

Well, if you are simply going to pick up what you have got now and put it in another place we would argue against that.

THE COMMISSIONER:

But nobody would suggest that. You don't just pick it up and put it in another place because that can't work. What it is, is you change. You might have to change things to make it less complicated, less formal, quicker, surer and such that people have more confidence in the system. The police need to have confidence in the system; there is no doubt about that. But so also does the public.

MR. CARROLL:

Are you suggesting that police don't have confidence in the PDT system?

THE COMMISSIONER:

No, I am not suggesting that at all.

MR. CARROLL.

Because that is not our experience. We have had, I mean in relation to the SACAT, I mean the documentation in relation to it that has been provided to us from the Government talks about not having contested hearings. It talks about not having the need for legal representation. Please understand that because of the outcome of a finding of guilt, it has severe ramifications for a police officer, member's status, reputation, promotion opportunities and earnings.

THE COMMISSIONER:

I understand that.

MR. CARROLL:

We want the contested hearing. We want the ability to cross-examine those people that complain and make false and malicious complaints against police and if that is the case we don't want it heard in an administrative way on the papers. We want the ability to cross-examine them and put them to proof.

THE COMMISSIONER:

I do not know what was proposed at any stage and what was put to your organisation in relation to how an administrative tribunal should organise itself. I have sat on administrative tribunals when I was a judge. I was a Deputy President of the Administrative Appeals Tribunal. I know how they work if they are properly organised. Everyone in tribunal hearings before me had the right to cross-examine anyone else. And that is the usual course of events. The evidence is tested and the administrative decision maker makes a decision on the tested evidence.

MR. CARROLL:

So it does exactly what the PDT does.

THE COMMISSIONER:

No, that is not what the PDT does. It would be done administratively. The rules of evidence are different in as much as the rules of evidence are relaxed. The hearing would be quicker, it would be less formal, it would be less complicated and your members would know the result of the complaint much quicker than they would now, which must be to their advantage.

MR. CARROLL:

Well, as I have said and as I have pointed out in both my written submission and in my oral

statement, we are very content with the way the PDT works. We have no problems with the adversarial nature of it. Our members are professional police witnesses that deal with complexities and formalities in their work on a daily basis. We are very comfortable with the Magistrate who understands policing, police work, and hears on a regular basis the evidence given by police officers in the Magistrates Court. We think it fits in perfectly with the way that we go about our business.

THE COMMISSIONER:

How many matters have been heard in the last four years?

MR. CARROLL:

In the Police Disciplinary Tribunal as trial, three.

THE COMMISSIONER:

Three.

MR. CARROLL:

Three. And in relation to the other matters that come before it, there may be some –

THE COMMISSIONER:

So there has only been a need for a tribunal of that kind for three hearings in four years.

MR. CARROLL:

For three trials but there is much more in relation to pre-trial conferences, there is more.

THE COMMISSIONER:

That has nothing to do with the Tribunal. That is the way the parties deal with each other.

MR. CARROLL:

Yes.

THE COMMISSIONER:

That is a different thing, that's quite different. And they can deal with each other in exactly the same way whether the ultimate hearing is in a tribunal or in an administrative tribunal.

MR. SCHEFFLER:

Commissioner, could I just add to that, the Magistrate at the Police Disciplinary Tribunal at those early stages usually makes some comments in relation to the evidence that is being presented.

THE COMMISSIONER:

So he should –

MR. BAILES:

And makes suggestions perhaps to the parties to have the matter resolved at an early stage.

THE COMMISSIONER:

Mr. Scheffler, that is not only something that is done by a court. Tribunals do that too. They have pretrial hearings. They have directions hearings. They do exactly the same thing as courts. They are just not courts.

MR. SCHEFFLER:

Commissioner, you suggested that the Police Association, Victims of Crime Commissioner would be involved in a tribunal. We would not support that. We would like a true independent body, a Magistrate, dealing with –

THE COMMISSIONER:

All right perhaps the president of SACAT then, who is a Supreme Court judge.

MR. CARROLL:

Yes, that's right and we would hope that they would be available for the hearing of the matters so that things are happening in a timely way.

THE COMMISSIONER:

That would be something we would have to talk about. All right well, we've dealt with probably the end of the process before, we should have dealt with the start of the process and unfortunately that is my fault. Let us deal with the start of the process. At the moment a person can make a complaint to SAPOL, to the Office for Public Integrity and to the Police Ombudsman, which seems to me to be unsatisfactory.

MR. CARROLL:

I think I have agreed with you in my statement.

THE COMMISSIONER:

I put to the Police Commissioner, I think you were present at the time, both and you and Mr. Scheffler were present at the time Mr. Carroll, that perhaps all of the triaging of complaints about police officers ought to be done by police.

MR. CARROLL:

And I think I have said in my oral statement that we support an independent OPI and a lot of the complaints, I would have thought if you are looking for public confidence in the system too would come through the OPI and then they would be triaged there. Certainly that is what was – I think – foreseen for the role of the OPI when this was first mooted back in 2010, so –

THE COMMISSIONER:

I am not sure but at the moment you have the capacity of police to triage complaints made directly to police –

MR. CARROLL:

Mandatory reporting –

THE COMMISSIONER:

And for the OPI to assess those matters directly to OPI, that seems to be unsatisfactory. You have two people assessing them in perhaps two different ways.

MR. CARROLL:

Well, yes. And I think our submission to you has been that an independent OPI would do that.

THE COMMISSIONER:

Well –

MR. CARROLL:

In relation to whether that is right or wrong, depending on your context or your circumstance we would have to look at it in relation to any proposed legislation that might come out of this hearing.

THE COMMISSIONER:

Are you suggesting then that all complaints have to go to OPI, rather than to police?

MR. CARROLL:

Well, at the moment, as you have identified, as we have said, they can go to three people.

THE COMMISSIONER:

I know that.

MR. CARROLL:

So –

THE COMMISSIONER:

We're suggesting about the future.

MR. CARROLL:

In the future then our submission to you is that the OPI would handle all complaints. And they would assess them.

THE COMMISSIONER:

All complaints about police.

MR. CARROLL:

Well, that is right.

THE COMMISSIONER:

And they, and OPI would assess –

MR. CARROLL:

And they would determine – they would determine as to whether the matter involved anything that an ICAC would investigate and if it did not come under the definition of corruption for what an ICAC is established for then it would go to SAPOL to investigate.

THE COMMISSIONER:

Without OPI making any assessment of it.

MR. CARROLL:

Well, they would determine as to what the nature of the complaint was. They would send it to the investigative body to investigate that complaint and then they would look at the

investigation and the recommendations from that.

THE COMMISSIONER:

Well, at the moment, OPI when it receives complaints makes an assessment of them and those matters that it assesses as corruption, it recommends that I deal with and I – as you said in your presentation I can agree or disagree with the recommendation. But those other matters that are not corruption, OPI at the present time does an assessment of them. About 60 per cent are assessed as requiring no action at all. Well, a significant percentage is. Of all the complaints made to OPI, more than 60 per cent are assessed as requiring no action at all. That is, they are never referred to anyone. Are you suggesting that should continue so that those police officers who are the subject of a complaint to OPI, which OPI assesses as requiring no action at all, should remain?

MR. CARROLL:

In what regard? Not advising SAPOL or –

THE COMMISSIONER:

No –

MR. CARROLL:

It just comes into the OPI and –

THE COMMISSIONER:

There might be enquiries made of SAPOL about some facts but then OPI assesses it as requiring no action at all, makes the recommendation to me, I agree and the matter is completed.

MR. CARROLL:

Well, I suppose what we have said under our system is that the OPI would not be reporting to you. It would be – it would be of a presumed taking of a complaint and sending it off to

SAPOL to investigate.

THE COMMISSIONER:

No, but what I am asking you is in the future. Do you want OPI to be assessing these matters?

MR. CARROLL:

Well I would have thought that when you talk about having public confidence in the system, then the reasons for an Independent Commissioner Against Corruption, a reason for an Office for Public Integrity was to provide that one-stop-shop for all people to make their complaints to it. If all complaints are made and assessed by SAPOL we might find ourselves in a few more years' time having another hearing such as this because people are unhappy with that system.

THE COMMISSIONER:

At the moment –

MR. CARROLL:

But I would have to look – I would say, sir, that we would have to assess that on what a new model would come, before we could actually make one, a determined decision on whether that would be a good idea or a bad one.

THE COMMISSIONER:

Well, that is the suggestion I made to the Police Commissioner, I am making to you. That police make all of the assessments, SAPOL does all of the assessing; do you agree with that and do you agree that that would be –

MR. CARROLL:

I would have to look at the structure of that. I am not going to give a definitive answer at this point. We have certainly given our submission in relation to what we believe the OPI should be and how that should operate.

THE COMMISSIONER:

Well, as I said to the Commissioner, if that were the case, police would not have to report to the oversight agency because that oversight agency would have direct access to police records. Do you agree with that as a proposition?

MR. CARROLL:

Well we agree with external oversight, I think I have said that.

THE COMMISSIONER:

No, do you agree with the oversight body having direct access to all of the police records relating to complaints?

MR. CARROLL:

Look, I do not see any problem in that at all.

THE COMMISSIONER:

No. Well the Commissioner apparently sees – that is the way in which the systems work in New South Wales and Victoria as you know. And they seem to work well. So if it were the case that the oversight agency had direct access to the police records and SAPOL would not have to report anything to the oversight agency because the oversight agency would have it; would you agree with that?

MR. CARROLL:

Well, you would presume that the oversight agency had access to all of the complaints that were made, they would have access to it. What the checks and balances of that access would be would be I suppose a matter for debate.

THE COMMISSIONER:

And SAPOL would each morning as it presently does, as was explained by Superintendent Patterson, would make an assessment of each of these matters and decide for itself how they would be investigated. So what I was putting to the Commissioner is that SAPOL have that responsibility for every matter. But you seem to want OPI still involved.

MR. CARROLL:

Well, the OPI, as far as what it was set up to do, as we understood it in relation to what you have said about the Deputy Premier wanting it to be a one-stop-shop for triaging, then that would work against that as a proposition wouldn't it? Because it would go – every complaint against police would go directly to SAPOL.

THE COMMISSIONER:

That is right. Do you have any trouble with that?

MR. CARROLL:

We would have to take that under consideration.

THE COMMISSIONER:

All right, well say that were the case, and all of the matters go to SAPOL and SAPOL assess them every day, and SAPOL get on with their investigation, what I proposed to the Commissioner was that the oversight agency would then randomly audit any of those matters and might have the power to interfere in a matter and take over the investigation itself. What do you think of that as a proposition?

MR. CARROLL:

In relation to a police discipline matter, run of the mill complaint, or something with the hallmarks of corruption or systemic misconduct or –

THE COMMISSIONER:

No.

MR. CARROLL:

What would be the determining factor for an ICAC to take over the investigation?

THE COMMISSIONER:

I did not say ICAC.

MR. CARROLL:

The OPI, sorry.

THE COMMISSIONER:

The oversight agency. Let us assume that the system is presently as it stands, that ICAC has responsibility for corruption – and we will talk about the definition of corruption in a minute. But as to the other matters, the oversight agency randomly audits those matters and they will be something that don't amount to criminal conduct because otherwise they would be at ICAC; what do you think of that as a proposition?

MR. CARROLL:

Well, I have said we would have no problem with external oversight.

THE COMMISSIONER:

Yeah but you do not have any trouble with the external oversight having that random audit?

MR. CARROLL:

No, not at all, I think I have said that already.

THE COMMISSIONER:

And that it could give perhaps directions to SAPOL as to how the investigation take place?

MR. CARROLL:

Well, I think we have a similar system to that now with the Police Ombudsman.

THE COMMISSIONER:

That would mean that you would not have all of the correspondence that presently goes backwards and forwards to the oversight agency which takes up a lot of time, takes up a lot of effort. And really is, in the end result, non productive. And then if the police were to investigate these matters, assuming that I reject the Ombudsman's suggestion that police should not investigate police. But if police were to investigate these matters, police would make the findings as to the conduct?

MR. CARROLL:

Well, I think that would be part of the investigative process as to determining the evidence and what would come of that evidence in relation to a conduct setting, yes.

THE COMMISSIONER:

That is what police do in all investigations at the moment.

MR. CARROLL:

That is what they do now, yeah.

THE COMMISSIONER:

But at the moment the system does not do that for police conduct, because it is the – after SAPOL has finished its investigation the Police Ombudsman makes assessments of the evidence, effectively findings. It seems a very complicated procedure; do you agree?

MR. CARROLL:

Well, someone would be making an assessment on that, wouldn't they?

THE COMMISSIONER:

Yeah. The police. And the oversight agency could say whether they agree or disagreed with it by randomly auditing.

MR. CARROLL:

That is right.

THE COMMISSIONER:

Would you agree with that?

MR. CARROLL:

Well, yes and that is what I suppose happens in effect now with the Police Ombudsman. They either agree –

THE COMMISSIONER:

No.

MR. CARROLL:

– they agree with the investigation that comes towards them or they disagree.

THE COMMISSIONER:

No, it is the other way around. When it goes to the Police Ombudsman now he makes the assessment and recommendation and the Police Commissioner can disagree.

MR. CARROLL:

Yes. He makes the recommendation on the investigation conducted by the police.

THE COMMISSIONER:

Yeah. Which seems to me to be strange. You would think –

MR. CARROLL:

You are just talking about the reverse of it being true.

THE COMMISSIONER:

Yeah. Yeah. What' I'm –

MR. CARROLL:

I suppose I've said in what we put forward as proposition with the OPI it works exactly the same. SAPOL would investigate the matter, would make the recommendations, would send it to the OPI for assessment as to whether they agreed or disagreed, I think that's what I said. So you are talking about the reverse, we are talking about the same thing but perhaps in a different context.

THE COMMISSIONER:

Well, I do not think what I am putting to you as a model, you've put to me but what I am putting to you is an oversight agency which has less impact upon each particular investigation that it presently does but can monitor any of them at any time.

MR. CARROLL:

And I have said external oversight we have no problem with at all.

THE COMMISSIONER:

Well, yeah –

MR. CARROLL:

So –

THE COMMISSIONER:

– of that kind then?

MR. CARROLL:

Of course.

THE COMMISSIONER:

Nobody, I think, disagrees with external oversight. The question is the model, which is what I am putting. The model I am putting to you at the moment.

THE COMMISSIONER:

This is the model you put to the Commissioner the other day.

THE COMMISSIONER:

Yeah. Yeah. Do you have any trouble with any of that?

MR. CARROLL:

I would have to have a look at the detail of it in a much more analytical way. But from what you are saying in relation to your model as I understand it to be you were saying that any member of the community who has a complaint against police would lodge that complaint to the police to assess and they would then assess it, they would either investigate it or not and that would be overseen by either the OPI – by the OPI.

THE COMMISSIONER:

By an agency, let just call it an agency at that stage before we get too complicated.

MR. CARROLL:

Okay and that would not be on every complaint, that would only be randomly, as a random audit.

THE COMMISSIONER:

Yes. And those matters that are assessed by police as corruption would go straight to ICAC and be dealt with by ICAC independently of that oversight agency. Although it may be that ICAC would require SAPOL to carry out the investigation as it presently does now under the existing Act. So that really means the oversight agency limits itself to misconduct of a kind that is not criminal conduct. Would that be acceptable to your members, do you think?

MR. CARROLL:

This is the OPI now you are talking about?

THE COMMISSIONER:

No, no we have not got to that. We are just talking about an oversight agency.

MR. CARROLL:

An oversight agency. Well, that is what happens now so, yeah.

THE COMMISSIONER:

Yeah. And so that oversight agency would randomly audit and might give directions to SAPOL as to a particular investigation.

MR. CARROLL:

They might, yes.

THE COMMISSIONER:

All right.

MR. CARROLL:

And the Commissioner may or may not – may disagree or not disagree. I suppose it comes

down to the detail and whether we are going to be seeing the same kind of complaints that we have seen in the current system between the Ombudsman and the Police Commissioner. So there is a possibility of that – I mean I am not saying that I disagree with you Commissioner. And I am not saying that I agree with you. What we are saying is that it is another model that you are suggesting and that we want to see the detail in relation to that before formally responding.

THE COMMISSIONER:

Yeah. Well, then if this were the model, the police would not want the oversight agency to be ICAC?

MR. CARROLL:

For misconduct?

THE COMMISSIONER:

Yes.

MR. CARROLL:

No.

THE COMMISSIONER:

Then, that would mean it would have to be the Police Ombudsman as he is presently constituted, but with different powers or the Office for Public Integrity.

MR. CARROLL:

That is right.

THE COMMISSIONER:

I think everyone has advocated that the – including the Acting Police Ombudsman himself –

that the Police Ombudsman's office might – as you have advocated – might be brought to an end.

MR. CARROLL:

That is right. We don't – I mean central to your consideration as you have stated in this review is in relation to public resources so it would seem if the ICAC and the OPI have been created and it is an oversight agency, to look at police complaints, and whatever model that you come up with and what you have suggested may be a good idea, I am not saying it isn't. But, I can't see the point of an ICAC, an OPI, an Ombudsman and SAPOL. It just seems to be a waste of public resources but I qualified that in my oral statement by saying we would be happy with that as long as the OPI was fully independent.

THE COMMISSIONER:

Yes. Okay, well say you are right about that and there is lot of support for what you say in relation to that, and the Office for Public Integrity became the oversight agency, what is your comment about the independence of the Office for Public Integrity assuming the model I have mentioned that it doesn't triage anything, it simply has oversight.

MR. CARROLL:

Ok, so your model is there is no triaging of a police complaint in the OPI. It is directly to the SAPOL and it is randomly audited by the OPI.

THE COMMISSIONER:

That is it.

MR. CARROLL:

It may be a good idea. I am not saying it is not but I would like to see the detail before making a definitive answer on that, sir.

THE COMMISSIONER:

Well, do you see any problems with that type of –

MR. CARROLL:

I suppose I would see some of our own members might not want to report to their employer. They might want an independent person to lodge a complaint with because they might not have faith in their employer investigating their complaint seriously.

THE COMMISSIONER:

I think that might be right, and I think a lot of the public would not want to report directly to police.

MR. CARROLL:

That's exactly right.

THE COMMISSIONER:

You would allow them to report to OPI but OPI would have to provide the report to police for triaging.

MR. CARROLL:

Well, and that's right. And so, that's why in our model we said, well, if the OPI is truly going to be a one-stop-shop for the public to make their complaint about whether it be police, whether it be about a public servant, whether it be about anyone, instead of the individual having to work out where to go, it is very clear that it would go to the OPI and that is where we have deliberated and come to a position on that, that the OPI would become the one-stop-shop as envisaged by the Deputy Premier and so you asked me about what would be some of the concerns with every complaint going to SAPOL. I think that people would feel like that is more of the same.

THE COMMISSIONER:

What I am probably putting to you is that there is no one-stop-shop, because it can't work, perhaps. Because not only can't it work because of reluctance on the part of SAPOL officers to report to SAPOL or members of the public to report to SAPOL but also because of matters raised by the Ombudsman in relation to complaints about civilian authorities. So let's get away just from the one-stop-shop as a proposition, if I might. If the Office for Public Integrity were the oversight agency with the type of random powers of audit to which I have referred and the power to direct in relation to misconduct matters would your organisation support that?

MR. CARROLL:

As I said, it may be a very good idea but I wouldn't give a definitive answer to you today on that. I would want to see the detail in relation to all that and how that would work. But, look, it is a proposition that I have heard you speak of, last week, so –

THE COMMISSIONER:

I am happy to of course give more detail because I am still making up my mind about this. But what sort of detail do you need?

MR. CARROLL:

Well, I would like to look at how it would work in practice. Who would be involved, what the other parts of that system are, where somebody as part of the end of the complaint process, the assessment, how it is determined, the right to know and be heard, the natural justice side of things, the procedural fairness. I would look at all of that before I, you know, say yes, that is a great idea because it might have other things hanging off of it. I don't think that is unreasonable.

THE COMMISSIONER:

No, I'm not suggesting it is, I'm not suggesting it is. I just want to know what you want to know

so I can tell you and think about it. I am not going into the detail of the investigation. The investigation would proceed, I would have thought, the same way as any police investigation would have any other –

MR. CARROLL:

I would agree with that.

THE COMMISSIONER:

Yeah. The tricky thing is of course investigating misconduct is different to investigating a crime. Because you are dealing with a lower level of conduct. Would you agree?

MR. CARROLL:

Yes.

THE COMMISSIONER:

Yeah. But, I mean there is a strong argument for police to do that.

MR. CARROLL:

Yes. But it would depend. It is interesting I suppose, I mean you have talked about minor misconduct. I mean the way that our Act is set up is that every breach of discipline and every breach of the Code of Conduct, whether it be minor or not, is a breach of the Code of Conduct. So when the Act was changed back in '98, I remember having this debate with my predecessor in the office of the then Minister of Police. Because we didn't like the fact that minor misconduct when it was structured within the Act was not going to allow a police officer to have their day in court because the way it was set up originally is that if it was determined minor misconduct your appeal was to Caesar judging Caesar being the Police Commissioner because if you disagreed with the finding of the minor misconduct, a process, you would then be appealing your right directly to the employer whose job it is to investigate you for the minor misconduct breach. So we argued very passionately in our submission to the 2004

Parliamentary Select Committee to actually have the ability for somebody to determine at the very stage, if it is going to be considered minor, what does that mean first and foremost to the officer and if it was going to be dealt with in a minor way and they were accepting of the facts, would they be happy to then plead guilty to the minor misconduct and go through that process. But if they wanted to say no, listen I disagree with that complaint. I disagree with what the complainant said about my behaviour, it didn't occur, then they would want to know that they could have the ability to test that complainant's version of events. And that is why we have had this argument for many years about the right for the officer to be heard and determined about their guilt or innocence in a contested hearing and an adversarial way because the reality is of all this stuff is that, you talked about the difference between criminality and conduct, well some of the conduct findings and being found guilty can actually have a far greater significant financial penalty than any criminal matter that a member might find themselves engaged in. So, for example we have had members who have been demoted because of their conduct. And I am not saying that's wrong, but they have been demoted because of their conduct. Or they have been reduced in their incremental earnings. For many, many years they are now, their earnings have been reduced so that the actual penalty for the breach of the Code of Conduct, whether it be minor or not, could be several thousands, tens of thousands of dollars. So, so you have got to take that into account as well I would have thought.

THE COMMISSIONER:

But for minor misconduct you wouldn't suffer that penalty, would you?

MR. CARROLL:

Well, you can – well, I forget –

THE COMMISSIONER:

I don't think so. I don't think so.

MR. CARROLL:

– exactly where the penalties lay but can you be transferred and things like that for minor misconduct.

THE COMMISSIONER:

I do not think so. I think if you treat minor misconduct as a management matter, you might take away a lot of the anxiety of your members, not that they plead guilty to it. You don't plead guilty to behavioural matters, you assess them and you advise people in relation to behavioural matters.

MR. CARROLL:

Well perhaps there should be a difference then between what a breach of the Code of Conduct is and what a managerial outcome is. And perhaps we should proceed – perhaps we should proceed by saying this is not a Code of Conduct matter.

THE COMMISSIONER:

That might be right. It seems to me –

MR. CARROLL:

Because at the moment everything is a Code of Conduct matter.

THE COMMISSIONER:

It seems to me that the Commissioner has a duty to manage his Police Force.

MR. CARROLL:

Of that there is no doubt.

THE COMMISSIONER:

And if the system interferes with the management responsibilities, that is not a good result for the Police Force, or for the Commissioner. It might be that the system ought to recognise that

behavioural matters are management matters and nothing more. Not Code of Conduct matters but management matters which will be addressed immediately by whoever is responsible for management of that officer.

MR. CARROLL:

Well the managerial support process we were very active in discussing that with the then Commissioner Mr. Hyde, in relation to having some other process where it wasn't a breach of the Code of Conduct, where there was some form of educative and counselling type of role. I mean we are very supportive of the managerial support process.

THE COMMISSIONER:

Well, then it might be that the system would have behavioural conduct which is not a Code of Conduct matter, where there has been, police officer is alleged to have been rude or there has been an allegation of delay in services, something of that kind, which is not misconduct, it's a behavioural matter. And it is dealt with as a management matter.

MR. CARROLL:

We would be supportive of that.

THE COMMISSIONER:

And there is no investigation, there is no hearing, there is no right to hearing, it is dealt with as a management matter by the police.

MR. CARROLL:

And we do have a form of that now because the Police Commissioner can make that determination already about any complaint.

THE COMMISSIONER:

Perhaps, but I don't think the present system recognises this appropriately. Then the next

matters are misconduct matters, which are investigated. And because they could lead to a serious penalty of the kind that you mentioned, including financial implications and effect on promotion as Mr. Scheffler said, something of that kind. And they are the matters that are regularly audited by the independent oversight authority, what would your members say about that?

MR. CARROLL:

I think that that's an appropriate methodology in relation to separating that which is not a breach of the Code of Conduct.

THE COMMISSIONER:

Yes.

MR. CARROLL:

Now we have operated certainly all of our careers under a very formal frame work about the regulation of police behaviour. And if we are going to go down and say that this is a separation now between what can be determined to be a more managerial methodology, then we have no problems with that. I think what Tom is trying to say is that we already have that process. There is a managerial support process. There are complaints that are made that can be determined by the Commissioner or his delegate to fall into that process. If that needs to be highlighted more clearly within the legislation we wouldn't be opposed to that.

MR. BAILES:

May I contribute Commissioner; I agree that there are matters before the Police Disciplinary Tribunal of a behavioural nature that are there by virtue of the fact they are breach of the Code of Conduct where one puzzles to one's self as to whether or not it's in fact the correct forum. So I think your suggested approach is laudable, because behavioural matters ought not to be treated as a breach of the Code of Conduct. That would be an advantage to the members. What we want to hang on to is a robust evidentiary system when it comes to the more serious

—

MR. CARROLL:

Serious nature.

THE COMMISSIONER:

Well then that would be reserved for the serious misconduct matters which don't amount to criminal conduct because they are dealt with as —

MR. BAILES:

Well, sometimes Commissioner, they are of a nature that a complainant might not want to make a criminal complaint or because of the difference of the standard of proof in the Police Disciplinary Tribunal, it's on balance of probabilities, something may be able to be proved there that can't be proved criminally.

THE COMMISSIONER.

Possibly.

MR. BAILES:

And so the allegations might be very serious. An alleged sexual misconduct matter for example, where de facto what is being alleged is an indecent assault for example. Those are very serious matters that would lend themselves to a full evidentiary hearing.

THE COMMISSIONER:

Well, I won't go back to where we started the debate but you can have an evidentiary matter in a SACAT that is what SACAT is all about. It is evidentiary based. But anyway we won't go back to that. So then Mr. Carroll what I am rather suggesting is what are substantial changes, might be substantial changes, to the present system which will effectively give police more responsibility in the triaging of complaints and will allow police to deal with behavioural

matters immediately so that they do not have to wait for OPI to assess them or don't have to wait until the Police Ombudsman agrees. They can manage them immediately. If they are minor behavioural matters it might be done by Sergeant Smith speaking to Constable Jones, you should not do that again. That is the end of that matter, let's get on with our lives. That sort of thing.

MR. CARROLL:

Well, I mean, I think some of that happens now, to be honest Commissioner.

THE COMMISSIONER:

It does. But the system can take over at the moment because there has to be a report made to the Police Ombudsman, the Police Ombudsman's got to make an assessment, you go backwards and forwards.

MR. CARROLL:

And then there was that debate about the mandatory reporting and whether they should go to the Police Ombudsman or not and that argument of last year, so –

THE COMMISSIONER:

Yeah, well, I won't deal with mandatory reporting at the moment. It might be more than we can deal with all at once. But then the triage can be done by police. Management matters are dealt with as management and serious misconduct matters are investigated by police with a random audit power to the independent oversight authority. That would be acceptable?

MR. CARROLL:

As I said to you before, it might be a good idea.

THE COMMISSIONER:

Yeah. And I should say that independent authority would have the right to audit the

management matters just to make sure they are being assessed appropriately so the police aren't under assessing or over assessing effectively in that relation.

MR. CARROLL:

Yes.

THE COMMISSIONER:

Ok. All right. That would mean, of course, now that you have raised mandatory reporting, that would mean that the independent oversight agency would have access to mandatory reports as well of course because they would be in the system.

MR. CARROLL:

Well, I think the Commissioner said of this, police have nothing to hide in these things. I mean external oversight has never been a problem. As I have mentioned ad nauseam, police officers are highly scrutinised and highly regulated and nothing that comes out of this is going to change that.

THE COMMISSIONER:

It's in both SAPOL's interest and your members' interest that SAPOL enjoys a high reputation.

MR. CARROLL:

Absolutely.

THE COMMISSIONER:

And it is of course in the public's interest the same and it's a question of getting a balance so that your people think they are being dealt with fairly and the public think they are being dealt with appropriately.

MR. CARROLL:

That's right. And I think the history will show that not everyone has felt like that has occurred.

THE COMMISSIONER:

No. Well, I think there has been dissatisfaction amongst your members in relation to, I think, what is an overcomplicated system, which might be able to be freed up.

MR. CARROLL:

As I said, it might be a good idea.

THE COMMISSIONER:

Yes. Well, probably might need a couple more conversations.

MR. CARROLL:

I think I will just round off that debate though.

THE COMMISSIONER:

Yes.

MR. CARROLL:

And whether it is the administrative tribunal or Police Disciplinary Tribunal, at the end it is very important for our members to know that they have been treated appropriately by the employer. They haven't been subject to duress and they have an independent person to assess what they have gone through. And we will always fight for that. And I'm not suggesting that you're not saying that that shouldn't occur, but as far as the mechanics go, anything that is investigated is investigated as a breach of the Code of Conduct unless it is determined to be some kind of managerial support process. But it is still a breach of the Code of Conduct. I think in any of your review or recommendations going forward then Part 5 of the Police Act and the Code of Conduct in the regulations support as to what that is, because anything can be captured with that. The way that it is so broad in relation to what the

offences are of the breach of the Code of Conduct that would need serious consideration to separate what we think is a Code of Conduct, what we think is behaviour that should be dealt with in a managerial way.

THE COMMISSIONER:

I understand, Mr. Carroll, that your members need to be satisfied that the process is fair, and that individually they have been treated fairly. At the same time the public has to be satisfied that the investigations are properly scrutinised, and have been carried out appropriately and that the appropriate result is arrived at. It is a matter of balance.

MR. CARROLL:

Yes.

THE COMMISSIONER:

One last matter if I might deal with which you haven't made so much of in your written submission but you have made more of today was an apparent concern that OPI and ICAC are not independent of each other. OPI's role is very limited, as you understand. It only receives complaints and reports, makes assessments and makes recommendations to me as to how I should deal with them. It does nothing else. What is the perception of –

MR. CARROLL:

Well, we have said that the way that it's constructed at present, is that if we were going to do away with the Police Ombudsman, I said I think in the context of this argument, then that was only on the acknowledgement that the OPI would be an independent statutory office, not determined by anybody else. So the way that the ICAC sits at the moment, if for example, and this is the – when you talk about having confidence in the system –

THE COMMISSIONER:

Mm.

MR. CARROLL:

I have tabled the Victorian Police submission because I think it is very important to understand what happens when things have not been gotten right in relation to how it all occurs.

THE COMMISSIONER:

But that office had quite different powers than the Office for Public Integrity.

MR. CARROLL:

That is right. But it was still – I mean, the Association was arguing for an independent corruption agency, they were dissatisfied with the way that they could not have their complaints heard seriously about some of the officers who were investigating their members and they argued that they were done inappropriately and there was not sufficient independent oversight of the independent oversight. So who, guards – who watches –

THE COMMISSIONER:

Who watches the watchers?

MR. CARROLL:

– the watchers? And so, what we are saying is, if we have a member or anyone who has a complaint against an ICAC investigator and they go to the OPI with their complaint and the OPI makes a recommendation to you – not to you, sir, to the ICAC Commissioner, then that recommendation doesn't have to be accepted. So, therefore, we used in the context of, that's really no different because the ICAC is a law enforcement agency. It's really no different to the Police Commissioner being in charge of the Police Ombudsman, the Ombudsman making a recommendation and the Police Commissioner just rejecting it out of hand because the statutory mechanics allow it to happen. So we have raised it as a concern that perhaps if the Ombudsman is going to be wound up then perhaps if the OPI was going to become the true one-stop-shop which was our argument which was what was raised by the Deputy Premier,

then that needed to be considered in relation to the relationship between the OPI and the ICAC, the sharing of resources and the way that it operates as really a single entity.

THE COMMISSIONER:

Yeah. I am not sure that I follow entirely what your concern is. I mean, if your concern is that ICAC ought to be subject to an inspectorate, that's a different matter. Is that what you're putting?

MR. CARROLL:

Well, I mean, it already is in relation to Mr. Duggan, but certainly at the moment the way that the legislation is framed, the OPI can make a recommendation to you – or not you but to the ICAC – and it doesn't have to be accepted.

THE COMMISSIONER:

But what's the problem with that?

MR. CARROLL:

Well, that is probably one of the arguments in relation to the Ombudsman, when we have read in your documentation that there is a belief or the Deputy Premier believes that there is too close – not too close – but the relationship between the Police Ombudsman and the Police Commissioner isn't sufficiently at arm's length from each other. Well if that is the case, if that's a proposition that's right, then certainly the construct of this current arrangement with the ICAC and the OPI, surely would fit into a similar argument.

THE COMMISSIONER:

But at the moment, for example, the OPI might recommend to me that a matter be assessed as corruption. And recommend that I investigate it. And I think well, perhaps it might give rise to a criminal offence, but it is unlikely to ever result in a prosecution, and therefore I would assess it for myself as serious misconduct, the difficulties about something like that are what?

MR. CARROLL:

Well –

THE COMMISSIONER:

See I am only dealing with recommendations, they do no more than suggest how each matter should be dealt with. I have to decide how each matter can be dealt with – what's then the difficulty?

MR. CARROLL:

The ICAC is a law enforcement agency.

THE COMMISSIONER:

So?

MR. CARROLL:

The OPI is a complaint construct and it's making recommendations and it doesn't have to be accepted by anyone.

THE COMMISSIONER:

That's right. It's a triaging machine.

MR. CARROLL:

So how is that any different to a police complaint under the present system going into the Police Ombudsman and the criticism that has been made in relation to the Police Commissioner whether he accepts or rejects anything that comes out of the assessment or recommendation. I mean I found them to be a similar argument. That's what we have addressed in our statement to you today.

THE COMMISSIONER:

Okay.

MR. CARROLL:

That that should be considered in light of whatever the new legislation will be relative to police complaints and how the OPI might be considered in relation to that in the future.

THE COMMISSIONER:

I think that they are quite different models but anyhow I will consider what you've said today because I hadn't read your written submission to be putting that. I will take on board what you have said today.

MR. CARROLL:

I think in our written submission we talk about an independent OPI. I think are the words we use in the written submission. But I agree that we have gone into more detail in our oral submission before you today.

THE COMMISSIONER:

Yeah, okay. Well, I will certainly consider that. Mr. Carroll, is there anything else you want to put?

MR. CARROLL:

No, I think that's –

THE COMMISSIONER:

It's like – yeah. It's likely, Mr. Carroll, that I'll be speaking with you again in relation to the matters that we have discussed today. The purpose of having a public hearing today was to allow the public to hear us having a discussion so that they knew, the public can understand what is being debated and what might arise out of it. But as I say, it's likely that I will be

speaking both to you and to the Commissioner and other people again.

MR. CARROLL:

And we would appreciate that opportunity. And I might say we've chosen purposefully not to mention individual cases that would support some of our arguments and that would be done in a confidential manner if we thought it appropriate.

THE COMMISSIONER:

Well, I think that's appropriate. I understand there will be individual cases would support your arguments and probably other arguments. But we don't need to air those here.

MR. CARROLL:

No.

THE COMMISSIONER:

No. Well, thank you very much. Mr. Riches, did you want to add anything?

MR. RICHES:

Commissioner, if I can just ask one question for any of the speakers. Irrespective of the model that might be adopted what role does the Police Association see a complainant having in the assessment and resolution of complaints?

MR. CARROLL:

The role for the complainant in the assessment and recommendation of action?

MR. RICHES:

Yes.

MR. CARROLL:

Well, I think that you would let the system determine it and discuss that with the complainant and give them an outcome or not – I don't really see a role for the complainant. I mean it's sort of – they are sort of conflicted aren't they? I mean, I make the complaint and I'm going to recommend the action that should be taken. I mean, I just think common sense revolts at that.

THE COMMISSIONER:

I think Mr. Riches is rather suggesting should the complainant have a right of appeal against any result that's arrived at if the complainant considers the sanctions inadequate or the determination of –

MR. CARROLL:

Well, no, I think you are crossing over the line there. I mean, we're talking about employer/employee relationships. I mean, there's not too many people that can complain against any other employee anywhere and not like the outcome and then appeal somewhere. I mean I just don't think that's a proposition that we would support.

MR. SCHEFFLER:

Commissioner, there are some opportunities for that, and especially with the managerial support process I believe that there's some discussion goes on with the complainant if they are willing to accept that the matter could be dealt with rather swiftly and at that very low level. Furthermore, in many cases when you get statements from complainants that go to the Police Disciplinary Tribunal with formal charges there are sometimes comments by the complainant saying, "Look I just want this person told off". And they end up in the Police Disciplinary Tribunal with very serious charges because obviously the Commissioner would have a different view in relation to the discipline of his force compared against a person out in the street. And you would have such a variance like a person perhaps that frequents places like Hindley Street, that is a common street offender, might have a different approach to somebody that's a professional person that gets dealt with by a police officer. Everyone has – the variety is so

great but I am sure that from what we have experienced the complainants do have some input, but not a total input.

MR. CARROLL:

I would imagine, if I may sir, that the consistency that's required in relation to outcome for certain behaviours needs to have the control of the Commissioner. I think that would be his argument.

THE COMMISSIONER:

Well, I – yes. I think the complainants have to be treated sensitively –

MR. CARROLL:

Absolutely.

THE COMMISSIONER:

– and they have to be kept acquainted with their complaints but of course they can't assume the management of SAPOL by having made a complaint.

MR. CARROLL:

No. No. We can't manage SAPOL so I don't think the complainant is going to be able to.

THE COMMISSIONER:

No. I am sure you keep trying. Thank you gentleman for coming this morning, I'm grateful. And as I said we will meet again before the review is complete.

MR. CARROLL:

Thank you sir.

MR. SCHEFFLER:

Thank you.

THE COMMISSIONER:

Mr. Grant's in the hearing room, so – are you ready to proceed Mr. Grant, or do you want a break?

MR. GRANT:

I would just appreciate a short break –

THE COMMISSIONER:

Yes, of course. Five minutes?

MR. GRANT:

Yes, thank you, sir.

THE COMMISSIONER:

I'll adjourn for five minutes.

ADJOURNED 11:30am

ICAC

OPEN HEARING

BEFORE THE HON. BRUCE LANDER QC
INDEPENDENT COMMISSIONER AGAINST CORRUPTION

MR. M. RICHES Counsel Assisting

Courtroom 3
Level 7, Riverside Centre Building
North Terrace, Adelaide

MONDAY, 28 APRIL 2015 at 11:39am

Witness:

GRANT, MICHAEL, Acting Police Ombudsman SA

THE COMMISSIONER:

Good morning, Mr. Grant.

MR. GRANT:

Good morning, sir.

THE COMMISSIONER:

Thank you very much for coming today. I've had the opportunity of reading your submission but I'll be glad to hear of anything you wish to say.

MR. GRANT:

Thank you. Thank you, Commissioner. I intend, sir, to make my oral submissions in the same order as the written ones under the same headings.

THE COMMISSIONER:

Thank you.

MR. GRANT:

And the first one that was placed on the website as the subject of your inquiry was, are there too many agencies.

THE COMMISSIONER:

Yes.

MR. GRANT:

As I say in my written submissions there should be only one agency, that being the Office for Public Integrity. But, I – I have of course heard what the Commissioner of Police had to say and I do support the notion which came out of the discussion you had, Commissioner, with the Commissioner of Police that a matter which is managerial in essence, should be sent without

any assessment from the OPI to the Commissioner of Police for action or directly to the Commissioner of Police. I'd include minor complaints as well, but I will – perhaps I could enlarge on that at a later time, sir, when you –

THE COMMISSIONER:

Yes.

MR. GRANT:

– and discuss that in more detail. The second point to be addressed was, what role should each agency play with respect to the oversight and management of the police.

I propose that the Commissioner of Police would have the oversight of the investigation, not only of managerial complaints but also of minor complaints. This oversight would be subject to audit from the overseeing agency whichever – whatever that form it does take, which of itself would leave no footprint if the – if an audit is done. And that – this leads on – on to the way in which certain conduct is categorised and to the definition of what is managerial and what is minor. And on to the next topic which is, should there be a reconsideration of the manner in which alleged inappropriate conduct is categorised; should the role of the oversight agency depend on that categorisation.

As I set out in my written submissions, sir, if the conduct is such as to require managerial intervention only, and not formal disciplinary proceedings it should be treated differently from other types of conduct. This is the type of conduct that should be sent direct from the OPI to the Commissioner or direct to the Commissioner for him or her to assess and deal with. The benefit of this would be as the Commissioner of Police adverted to in his appearance here last week, timely action on his part to provide managerial correction and guidance which – which was a source of frustration for the Commissioner from the evidence he gave.

THE COMMISSIONER:

Yes.

MR. GRANT:

A second type of conduct and – and separate from managerial is alleged conduct that potentially does require more formal disciplinary proceedings. In the United Kingdom such conduct is sent for local resolution by a police authority and in deciding whether it can be resolved locally, two questions – two basic questions are posed: First, would the conduct, even if it could be proved, justify criminal proceedings? If no, then would the conduct, even if it could be proved, be likely to warrant dismissal, requirement to retire or resign, demotion in rank or the imposition of a fine? If the answer is no to those questions, then the conduct may be classified as minor and – and be sent to the Commissioner of Police for early resolution. In a similar way to conduct requiring only managerial action and without the oversight of the overseeing agency, that is other than the random audit to keep tabs on what's happening. The difference between managerial and minor is that I would envisage that a member of the public, if dissatisfied with the outcome of a minor complaint, would be afforded the right of review by the overseeing agency. If the member of the public was dissatisfied with the agency's response there would be no further review. Apart, of course, from the normal remedy of the judicial review of administrative action.

THE COMMISSIONER:

Yeah.

MR. GRANT:

That leaves the third category of conduct, not managerial and not minor. I envisage that the investigation of this type of alleged conduct would be overseen from the beginning by the overseeing agency, along with a subsequent assessment and – and recommendation of any action to be taken.

THE COMMISSIONER:

That – in an audit fashion?

MR. GRANT:

I would – I would have it – I would see it as being more specific and more targeted than the audit, that if it's other than minor, that a track is kept of it from the very beginning and the agency later became involved in the assessment along – following the investigation.

THE COMMISSIONER:

Yeah.

MR. GRANT:

The next topic, sir, was, how can the police complaint system be made more efficient. The existing Act really invites delay and confusion. Because of the Act the Police Ombudsman is not truly independent, his or her assessment and recommendations can be resisted by the Commissioner of Police. A Minister may intervene in the case of disagreement cannot be resolved. The proceedings whereby disciplinary sanctions can be applied are unwieldy and unsatisfactory and they don't permit the Commissioner of Police the flexibility that the Commissioner needs to – to manage the Police Force. In my submission, sir, the solution is to repeal the Act in its entirety, start again and I add that this of course would mean the abolition of the Office of the Police Ombudsman. I would suggest however, that there still should be an office that has a – has an oversight body, if not – not the same as the Police Ombudsman but at least similar to it, if not in name, then at least in function.

THE COMMISSIONER:

And dedicated to police complaints?

MR. GRANT:

And dedicated to police complaints.

THE COMMISSIONER:

Yes.

MR. GRANT:

As I – in my written submissions I envisaged that the equivalent of the Police Ombudsman by whatever name thought appropriate would fit under the general umbrella of the ICAC and ultimately be subject to the oversight and direction of the ICAC where necessary. Similar to the Office for Public Integrity, would have a separate function to the ICAC but still be subject to oversight and direction when deemed necessary by the ICAC.

THE COMMISSIONER:

Mm.

MR. GRANT:

I note the comments of the Commissioner of Police, sir, when he appeared here last week that the Office of the Police Ombudsman is vitally important, that the Police Ombudsman is familiar with the Police Force and its operations. In my view, the point made by the Commissioner of Police is an important one. It's highly desirable that the office which will assess and recommend action with regard to alleged police misconduct, falling short of corruption, that is, has a sound professional and respectful working relationship with the police and a thorough knowledge of the conditions – conditions under which police operate. At the same time that office must walk the sometimes very fine line between a working mutually respectful and professional relationship and one that's too close and too familiar. The current system, in my view, doesn't tend to enhance that professional and mutually respectful distance between the police and the Police Ombudsman.

The next item, sir, is the question posed: What role should an oversight agency have in the making of findings about police conduct and the imposition of penalty? The replacement Act should not provide for the current level of police involvement in the findings and

recommendations stage or the disciplinary proceedings stage. That is for conduct other than managerial or minor.

There is a – a lack of independence of the Police Ombudsman under the current system. I don't doubt that the South Australian Police deserve the good reputation that they have. But it's in their best interests and the best interests of the public that the system is seen to be as independent from them as it reasonably can be. This is not to say that the police should not investigate. I wholeheartedly support the comments of the Commissioner of Police in that regard for two principal reasons. The South Australian Police has a reputation second to none in Australia, and I have absolute confidence in the investigators of the Internal Investigation Section. In my experience, they are skilled, highly professional investigators of undoubted integrity and in my experience over many years, if anything, police investigators, when investigating their own for serious misconduct or crime are tougher on the police than they are on the general public. And SAPOL has demonstrated over many years its commitment to detecting corrupt officers and arresting and charging them. The second point is that good investigators are very hard to find. Perhaps you can be called an investigator after doing a five-week course somewhere. But that doesn't make you an investigator. In my experience, the best investigators are to be found in the ranks of the Police Force. And the cost of recruiting expert investigators, who would inevitably be drawn from the ranks of police forces and then maintain their training and salaries and conditions would be prohibitive.

Now to return to the features of the present Act which I see as negatives, the police are – I use the word encouraged, by the present Act to disagree with findings and recommendations of the oversight agency. This does lead to really what is a partisan debate and a type of horse trading which is not desirable. The total control of the disciplinary functions is, is – belongs to the Commissioner of Police. The Commissioner of Police may choose to ignore recommendations from the Police Disciplinary Tribunal and there's no appeal from the sanction that is imposed, except by the police officer concerned. Some sanctions imposed, in my view, don't adequately reflect the conduct proven or admitted.

How can the existing system be made more simple? I want to address now the prosecution of disciplinary proceedings and the body that hears those proceedings which certainly engaged the Police Association and they have very strong views on that. Under the current system, the Commissioner of Police cannot even issue a reprimand to a police officer unless that police officer has been formally charged with a breach of discipline and appears before the Police Disciplinary Tribunal. This doesn't encourage the timely resolution of complaints or allow the Commissioner to take timely managerial action and I note a comment from Mr. Scheffler in that regard. And I thought it was a – one that was worth noting. When – when he made comments about the current system he said, well, managerial advice – that has no impact on the member. And that seems to me to be one of the problems with this minor misconduct system and the way one can, certainly can avoid the Tribunal if you admit the facts or ask for the police to – the Police Commissioner to deal with it. But the sanctions, or disciplinary sanctions, are – are quite, are very, very mild. And as I said, don't even allow the Commissioner of Police to reprimand someone for misbehaviour. Now when someone does go before the Police Disciplinary Tribunal, proceedings in the nature of a criminal trial must follow if they are going to contest the charge, no matter how trivial it might be. Barristers are briefed by the Police Association, for the benefit of their members, and I don't criticise that. The rules of evidence apply. The procedure adopted must mirror those – as required by the Act – but the procedures must mirror those of a criminal trial in the Magistrate's Court. In my view this should change. Adversarial proceedings for managerial and minor matters should be abolished by a new Act. The Commissioner or his delegate should be given the power in informal proceedings to hear and determine managerial and minor matters where the only sanctions that can be imposed fall short of sanctions such as dismissal, reduction in rank and so forth. But warrant a reprimand or counselling or training courses and so on.

If an appeal is provided it should be made clear that it is not an appeal de novo but – but by way of review to the SACAT in its review jurisdiction. In that regard, sir, I note that the Commissioner of Police in his appearance before you last week agreed with your suggestion

that there should be a delineation between a disciplinary tribunal and a more informal forum. The Commissioner said that there was a need to reduce what he termed legality and the black and white and to take out the adversarial. Similarly Commissioner you posed the question to the Commissioner of Police if it could never rise above the managerial would you support a system where neither side appears before a formal hearing? And the Commissioner responded that that proposal had merit. He agreed with you that it would take a considerable number of matters away from formal disciplinary proceedings.

I address now further, more serious matters – I've been really addressing minor misconduct and managerial issues – of how they should be heard and determined and – and who should – who should be the one to apply a sanction. Now, I've made it clear what my view is of the integrity of the South Australian Police Force and its good standing and its reputation, but the police aren't a special case when it comes disciplinary proceedings. In my opinion, there is no good reason why disciplinary proceedings against the police should be conducted as if they were a criminal trial. The police are unique in this regard, in my experience of disciplinary proceedings. Similarly, there is no good reason why the rules of evidence should apply in police disciplinary matters. Instead, and in my view the Tribunal should inform itself as it sees fit and be governed only by the requirement that it act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms. Now, Commissioner, you would certainly recognise that recital. It's a – it's standard for disciplinary proceedings in the state –

THE COMMISSIONER:

Yes.

MR. GRANT:

– and in the country as a whole.

Now, I've given as an example a tribunal set up to hear disciplinary proceedings against health

practitioners. And “health practitioner” is defined in the – in the relevant Act; it’s the Health Practitioner Regulation National Law (South Australia) Act 2010. “Health practitioner” includes chiropractic, dental, dental therapist, dental hygienist, medical, that is surgeons, general practitioners, all forms of doctors, medical radiation practice, nursing and midwifery, occupational therapy, optometry, osteopathy, pharmacy, physiotherapy, podiatry and psychology. Very very broad range of professionals.

That – the Tribunal set under – set up under that Act is not bound by the rules of evidence and can inform itself as it sees fit and acts according to equity and good conscience and so forth and the substantial merits of the case. That Tribunal, not being bound by the rules of evidence and acting according to equity and good conscience, can impose significant and severe sanctions for offending behaviour, which is classified in ascending seriousness. Unsatisfactory professional performance, unprofessional conduct, professional misconduct. Now in making a finding the Tribunal may, in ascending order of seriousness, caution or reprimand, impose a condition on practise, impose a fine not exceeding \$30,000, suspend the right to practise for a period of time, or cancel the practitioner’s registration, in other words, strike off the practitioner.

Now that last amounts to professional death. And that sanction may be imposed after facts are found proved on the balance of probabilities, without following the procedures of a criminal trial and without being governed by the rules of evidence. In my submission, sir, if surgeons of all kinds, medical specialists, general practitioners, nurses, midwives, dentists and psychologists, to name a few health practitioners, can be seen as rightly being subjected by the Parliament to disciplinary proceedings in that form then, in my view, so can the police.

The Tribunal under that – the Health Practitioner Regulation National Law, is constituted by a president who must be an experienced legal practitioner or – of at least seven years standing – or a Magistrate appointed by the Governor. He or she will sit with panel members appointed by the Governor. At least two panel members must be a member of the same profession as

the respondent to the proceedings and one other, who will not be a health practitioner, and that – a lay member, in other words. I suggest a similar type of tribunal would be appropriate to hear and determine police disciplinary matters. Set up under the South Australian Civil – the SACAT system. In its original jurisdiction it would consist of a senior member of SACAT along with a member of the Police Force appointed to SACAT as an assessor under the Act and a lay member assessor. The Tribunal would impose the disciplinary sanction, not the Commissioner of Police. An application for a review of any decision would be brought to the SACAT in its review jurisdiction and that reviewing tribunal would be chaired by the president, who would be a Supreme Court judge or by a deputy president who would be a District Court judge.

Now I move on to the issue of the prosecution of proceedings in disciplinary matters. Under the system I envisage the police would not be permitted to appear to prosecute proceedings in the original jurisdiction or in the review jurisdiction. By definition – by definition of course the proceedings before the Tribunal would be neither managerial nor minor; they would be relatively serious. The perception – and I am referring only to a perception – that police may not be prosecuting with the vigour they should be, should be avoided. The perception also of a conflict should be avoided. Those who appear should be independent of the police, for example, the DPP or the Crown Solicitor. Apart from anything else it must be an unpleasant task for a police officer to appear to prosecute another. That's one issue. But the important matter is that of public perception. In a recent case, and I won't – I don't intend to go in any detail, I recommended that police not appear to prosecute what I viewed as an instance of alleged serious misconduct. It has been conveyed to me that this will be resisted primarily but not only on the basis of the perceived cost. The Crown Solicitor for example would bill for its services. In reality that's a situation of bookkeeping entries with no real money exchanging hands between two crown agencies. I remain convinced that police should under any new system not be permitted to appear before a disciplinary tribunal as prosecutors.

I turn finally now, sir, to the purpose of disciplinary proceedings. The purpose of disciplinary

proceedings is not to punish. The purpose of disciplinary proceedings are twofold: One is the protection of the public; two, is the protection of the relevant profession or calling, that is, the Police Force itself. Now, I note in that regard comments made by Mr. Carroll, and I say with respect that the comment is misconceived. When talking about disciplinary proceedings he portrayed it as a – a matter of – an industrial matter, a matter between an employer and employee and it's really no such thing. It's a matter of the proceedings being brought for the protection of the public and for the protection of the relevant profession. In my view the system set up for the health practitioners reflects that principle. The current setup for police disciplinary proceedings does not reflect that principle. As an example, sir, the current Act refers to a police officer being guilty of a breach. And it refers to the Commissioner imposing punishment for a breach. In my opinion, this encourages the wrong focus. The focus should not be on the punishment of an individual but primarily on the protection of the public and the profession of policing itself. The question therefore is not what punishment fits the crime. It is rather, what steps should be taken to best protect the public and to protect the integrity of the policing profession. So it's not – the purpose is not – well, the focus is not what it should be. It's not an employer/employee relationship. It's not industrial.

Another comment made by the – by Mr. Carroll which I thought was worthy of comment: he commented that before the Police Disciplinary Tribunal, you don't get proceedings that are duplicitous, that is, he said, arising out of the same set of circumstances. Now that, in my view, is undoubtedly the language of criminal proceedings. It's not unusual, and I think this is one of the difficulties with the prosecution, the laying of charges and indeed the hearing of charges in the Police Disciplinary Tribunal, the proceedings have got this criminal influence – criminal proceedings influence. So if, for example, one was dealing with police conduct – I will just take that as a hypothetical – where the police officer is said to do one, two, three or four things that are said to be improper. The police officer abducts someone in the police car, the police officer throws their phone away, throws their wallet away, the police officer strikes someone. Now in criminal proceedings you have to break those down into four separate charges and prove them beyond reasonable doubt unless you could say they were all part of

the one course of conduct. In disciplinary proceedings there is no reason why – and it occurs commonly, indeed there's a – a recent full court judgment which illustrates the point – that you can allege one complaint about a course of conduct and particularise it, nail your colours to the mast and particularise it, and then the fact finder will decide, of that course of conduct alleged, which is made out and which is not. There's no need to break down – break them down into separate charges and I suspect – I suspect that if that point was taken before the Police Disciplinary Tribunal, it would probably succeed, that you can't lead conduct that's not charged. And my, my – my response would be, yes you can, particularly if it's part of the same course of conduct.

The focus on, on punishment, in my view is accompanied by a further focus – and this was very clear from the Police Association's submissions, and again I do not criticise them for it – but it's accompanied by a further focus on the rights and wellbeing of individual police officers who might be charged with a breach of regulations. Hence the requirement for the rules of evidence. Hence the requirement that criminal trial procedures be followed. Indeed, I didn't research this, sir, but it's my memory that until around 1998, the requirement was that those disciplinary matters be proved to the criminal standard of beyond reasonable doubt. But that – that was amended from my recollection. In my view, that is proof of the focus of that part of the Act, which is on the rights of individual police officers, as if he or she was a defendant in the criminal justice system.

Now, Mrs. Wilson's evidence – Julie Wilson's evidence last week, as regards her experience of being excluded from the Tribunal's proceedings, in my view, was illustrative of an incorrect focus. The Tribunal had a discretion to permit Mrs. Wilson to remain. Instead, following objections from those representing the police officers concerned, the Tribunal decided to exclude her from the hearing. In her evidence she described the hostility to her that she detected. In my opinion, this regrettable event illustrates a misguided focus on the perceived rights and needs of persons before the Tribunal and a failure to appreciate the true nature of the proceedings. It's time now in my view to focus on the purpose of disciplinary proceedings

against police officers, the protection of the public and the protection of the policing profession.

Now as regards the Police Association submissions, by its very nature, the Association will be concerned with the rights and privileges of its members. Now that's not a criticism on my part. That's its job. But this means it has a blind spot. There is a danger that they will not see very far past that role of protecting its members. In my view, PASA should appreciate that the Commissioner is to a large extent hamstrung when it comes to dealing quickly and efficiently with managerial and minor issues. Such issues can be the subject of protracted litigation before the Police Disciplinary Tribunal or proceedings with all of the trappings of a criminal trial. This is not of benefit to police officers or to the Police Force. The system in many ways is an anachronism. The Police Force, while it's a disciplined body, no longer operates in the 1950s. It's highly professional, it's well organised. Its management is highly qualified to manage. Its members should be accountable for their conduct in the same way, sir, that other callings and professions are, in the same way as nurses, doctors, psychologists, chiropractors who work under their own unique pressures and stresses just as members of the Police Force do. So to sum up, we are generally well served in this state by a Police Force with a reputation second to none. But the system of investigating police complaints and then dealing with the resulting disciplinary action is flawed. It takes too long, and it invites the public perception that it's not independent. A highly professional Police Force will welcome scrutiny, as the Commissioner of Police does. It will work on the impartial assessment of complaints and the impartial imposing of disciplinary sanctions. In my view the price of a good Police Force, as ours is, is vigilance and rigour to make sure that it stays that way. Commissioner, those are my oral submissions.

THE COMMISSIONER:

Thank you very much. At the present time you would agree I think that the process takes far too long.

MR. GRANT:

Yes.

THE COMMISSIONER:

Is that caused in part by the obligations of reporting to your office and your office reporting to the police and backwards and forwards?

MR. GRANT:

Yes, it's – it's – one of the main delays seems to be the need to go into fine detail on relatively minor matters, the – then the number of complaints that deal with basically minor matters, the workload that the Internal Investigation Section had to get through them all, the need to, you know, follow the process set out in the Act is the main contributor to the delays. I don't want to sound to be whinging about the – the resources of the office but the Ombudsman's office is undermanned in that regard. And that – I suspect it's because – partly because its future isn't certain and there's not a willingness to put resources into it for that reason.

THE COMMISSIONER:

I think you were present – well, you were present when the Police Commissioner gave his evidence and when PASA presented today and you would have heard me put to Commissioner Burns and PASA that the oversight agency should have a direct access to the police computer system relating to police complaints. Would you see that as being of benefit to the oversight agency?

MR. GRANT:

Yes, I would.

THE COMMISSIONER:

Would that obviate the need for a lot of correspondence between SAPOL and the – and the Omb – and your office, if you had that right?

MR. GRANT:

Yes, it would.

THE COMMISSIONER:

Yeah. Which would speed up the process?

MR. GRANT:

Yes.

THE COMMISSIONER:

Yes. And I also put to the Commissioner and PASA that perhaps the oversight agency would have the responsibility of auditing matters rather than the responsibility of dealing with each of them. Do you see any benefit in that?

MR. GRANT:

Of a, just a – yes – a general, just a, just an overview at random?

THE COMMISSIONER:

Yes.

MR. GRANT:

That would be of benefit, certainly.

THE COMMISSIONER:

Yeah. With a capacity to have access to the police systems without leaving a footprint.

MR. GRANT:

Yes.

THE COMMISSIONER:

Yeah. The next thing I suppose that needs to be explored, is where are those matters that are serious enough for investigation to take place where are those matters that are less serious that can be dealt with at a management level. Where is that level?

MR. GRANT:

That's –

THE COMMISSIONER:

Or demarcation, I suppose.

MR. GRANT:

That requires a lot of thought. I suppose the – that reference I made to the United Kingdom –

THE COMMISSIONER:

Yeah.

MR. GRANT:

– Act where you pose the hypothetical: look, if the conduct could be proved, what would the sanction – what would the appropriate sanction be?

THE COMMISSIONER:

So you look at it in hindsight. If –

MR. GRANT:

Yes.

THE COMMISSIONER:

– if this couldn't lead to demotion or any –

MR. GRANT:

Yes.

THE COMMISSIONER:

– significant penalty, it's dealt with at – at a management level.

MR. GRANT:

Yes.

THE COMMISSIONER:

Yeah.

MR. GRANT:

Or a minor – or as a minor matter.

THE COMMISSIONER:

Yeah. That would mean you have to identify a particular type of conduct that could give rise to demotion, et cetera?

MR. GRANT:

Yes.

THE COMMISSIONER:

And would that be reserved, in your opinion, to serious misconduct?

MR. GRANT:

For – the sanction of demotion and so forth?

THE COMMISSIONER:

Yes. Yeah, yeah.

MR. GRANT:

Yes. Yes.

THE COMMISSIONER:

Yeah.

MR. GRANT:

Because if not, then – if there were really severe sanctions then it should go before a tribunal.

THE COMMISSIONER:

Yeah. Since you've been the Acting Ombudsman, and tell me if you don't think this is an appropriate question for you to answer, what has been the most significant frustration in your office, for you?

MR. GRANT:

One of the most significant frustration is the delay and the following the – the steps set out in the Act. On two occasions I've decided to use the power to conduct my own investigation, as a way of cutting through the time taken. And that's – I think that's going to work very well. There's probably a limited – limited instances in which you can do that. Sometimes you can cut through by getting someone to come in and asking them questions. And it's also proved very handy to get documents from agencies that previously refused them when asked to do so.

THE COMMISSIONER:

Okay.

MR. GRANT:

Making a formal inquiry gives certain powers for production of documents and that's been useful.

THE COMMISSIONER:

Historically, your office didn't investigate anything, I think.

MR. GRANT:

No.

THE COMMISSIONER:

Yeah. So, that would be a significant change in culture for your office?

MR. GRANT:

Yes.

THE COMMISSIONER:

Yes. But do you think there are serious advantages in you being able to investigate matters?

MR. GRANT:

I think there are.

THE COMMISSIONER:

Yeah.

MR. GRANT:

In certain well-chosen instances where you can cut through and do things far more quickly than sending it out, you know, to go through the – the other type of system.

THE COMMISSIONER:

And if you had an audit role or if the oversight agency had an audit role I suppose it could do that for itself, it could decide which matters –

MR. GRANT:

Yes, you could.

THE COMMISSIONER:

– could be dealt with in that way.

MR. GRANT:

You could. Particularly, even more so if you had the – the resources such as investigators.

THE COMMISSIONER:

Yes. Is there a risk of the oversight agency becoming a captive of SAPOL?

MR. GRANT:

There's always that – there is always that risk. And there's another risk, sir, and that is that the – there are two risks. The oversight agency could become the captive of SAPOL over a period of time, but also the oversight agency can be – occasionally become the captive of the complainant –

THE COMMISSIONER:

Yeah.

MR. GRANT:

– as well and become incapable of looking at a – a matter in a purely impartial way.

THE COMMISSIONER:

Yeah.

MR. GRANT:

But that's – that's human nature.

THE COMMISSIONER:

Yeah. I don't know if you've had sufficient time in the office to answer this, but in your experience so far, have you – have you determined whether complainants in the main want the matter to go to the sort of formal hearing that exists under the present system?

MR. GRANT:

I – the, the complainants, they don't necessarily want severe sanctions, in my – in my experience thus far. Usually it's an acknowledgement that something untoward has occurred. And that there's – there's some sort of resolution of it. One of the difficulties and the – well, one of the most unsatisfying – unsatisfactory thing for complainants – you may have an allegation made that something occurred, and yet the evidence won't bear it out or it's denied by the police who are said to be involved. And it might be one person's word against two or three other people. That's usually going to result in it being unresolved. That's something – that's a – a source of great dissatisfaction for complainants of course. That something ends up not being resolved at all and they feel they've been [inaudible].

THE COMMISSIONER:

That's almost impossible to address, isn't it?

MR. GRANT:

It is.

THE COMMISSIONER:

Yeah, yeah. The – if the complainant considers that the evidence that has been adduced in

defence of the allegation is false, there's very little that you can do to make the complainant happy about it.

MR. GRANT:

Yes, that's right. They're never going to be happy in that, yeah.

THE COMMISSIONER:

No. And that's not obviated by having a tribunal hearing because the same result will arise.

MR. GRANT:

Yes. If it gets to – though, you know, there are cases of course where even though there's a denial, even from three police officers, that the circumstances might – there might be other circumstances which would point to the – to where the truth lies, that the complainant's version is the more probable one. My view would be that the Tribunal is better – a tribunal that is familiar with conducting disciplinary tribunals – is a better tribunal to get to deal with matters like that.

THE COMMISSIONER:

Yeah, yeah. In the last four years there have been only three matters that have gone to a final hearing, apparently, in the Tribunal. Do you know if your office has played any part in those matters?

MR. GRANT:

I don't know, sir. I'm not sure of the –

THE COMMISSIONER:

No.

MR. GRANT:

– not clear on the statistics.

THE COMMISSIONER:

No.

MR. GRANT:

Some – I’m just wondering whether some of those may have been ones, or how many of those might have been ones generated within the Police Force itself. By a complaint of one police officer against another police officer, such as sexual harassment or bullying and it’s gone before the Tribunal which we would know very little about.

THE COMMISSIONER:

Yeah, yeah. Now you’ve suggested that the office which you are acting in at the moment ought to be dissolved and do you see that the Office for Public Integrity ought to assume that role?

MR. GRANT:

Well, not – whatever it – I say there should be an oversight agency –

THE COMMISSIONER:

Of course.

MR. GRANT:

– which deals directly with police complaints.

THE COMMISSIONER:

And dedicated to police.

MR. GRANT:

And dedicated to police.

THE COMMISSIONER:

Yeah.

MR. GRANT:

What, where, how that fits in, I – I would have seen it as separate from the OPI but under the same umbrella as the – as the ICAC.

THE COMMISSIONER:

Okay. At the moment a complainant can go to three different places to make a complaint about police.

MR. GRANT:

Yes.

THE COMMISSIONER:

I – I put to the Commissioner and to PASA that perhaps all of the triaging should be done by police rather than the other two agencies, who could still receive reports. What do you think of that as a proposition?

MR. GRANT:

Well, the first thing about it, it would be highly efficient.

THE COMMISSIONER:

Mm.

MR. GRANT:

And if you're looking for efficiency only it would be the – the better way to go. The difficulty

may be public perception. The difficulty may be the reluctance on the part of the members of the public to go to the police in the first place. And it's hard to avoid the thought that you would need to have another agency that would take reports or complaints against the police. You would end up with at least two agencies, that being the Police Force itself, and the option of someone who doesn't want to go to the police, to go to the OPI.

THE COMMISSIONER:

Yeah. I think – I think there's a way around that. I think the public do need to be able to complain to an agency apart from SAPOL, because for the reasons you just mentioned, some people would not feel comfortable about going directly to SAPOL, but I wonder whether those complaints ought to be managed in a slightly different way, with less assessment done at the OPI level, but the initial assessment done by SAPOL –

MR. GRANT:

Yes.

THE COMMISSIONER:

– after reference back from OPI.

MR. GRANT:

Yes.

THE COMMISSIONER:

Do you think that would work?

MR. GRANT:

Yes.

THE COMMISSIONER:

Yeah. That would be more efficient I think.

MR. GRANT:

That's – that's what I would envisage –

THE COMMISSIONER:

Yep.

MR. GRANT:

– that OPI would, while they'd receive the complaint, wouldn't have very much involvement –

THE COMMISSIONER:

Yes.

MR. GRANT:

– apart from – it should take, it should not involve a great deal of time to make an assessment as to the type of conduct –

THE COMMISSIONER:

Yeah.

MR. GRANT:

– and where it would fit –

THE COMMISSIONER:

Yeah.

MR. GRANT:

– and what sanction should be applied.

THE COMMISSIONER:

Yeah. Unless it – unless it was self-evidently corruption –

MR. GRANT:

Yes.

THE COMMISSIONER:

– send it to – send it to SAPOL.

MR. GRANT:

Or seri – yes, or seri – you know, a serious matter.

THE COMMISSIONER:

Yeah, yeah. Yeah. What percentage of your office's time is taken up in correspondence with agencies in relation to matters rather than considering complaints and investigations and the like? Are you able to tell me that? You may not know the answer.

MR. GRANT:

It would be hard to quantify, sir –

THE COMMISSIONER:

Yeah.

MR. GRANT:

– but it – as I say it's a significant impact on time just to, you know, deal with other – just deal with correspondence from say OPI and from – from the ICAC. But that's something that in time will – in time will correct itself. There's a bit of a – there's a backlog at the moment but as an ongoing thing –

THE COMMISSIONER:

Is that reducing?

MR. GRANT:

I beg your pardon, sir?

THE COMMISSIONER:

Is that reducing, the backlog?

MR. GRANT:

It is, slowly.

THE COMMISSIONER:

Yeah.

MR. GRANT:

It's slowly.

THE COMMISSIONER:

Yeah. The present system rather assumes that SAPOL will carry out the investigation but that your office will make the assessment and recommendations.

MR. GRANT:

Yes.

THE COMMISSIONER:

Based upon assess – based upon the investigation. Do you see that as inefficient?

MR. GRANT:

I – it, it certainly would be more – more efficient if the police did the investigation and the assessment.

THE COMMISSIONER:

Yes.

MR. GRANT:

Whether that would be acceptable from the point of view of the public is another – is another question in my view because the police might make an assessment, I mean, I've seen assessments made by the police that I don't agree with –

THE COMMISSIONER:

Yes.

MR. GRANT:

– based on their assessment what weight can be attributed to certain matters and what weight can't.

THE COMMISSIONER:

But if the oversight agency had the – the power to overrule that assessment –

MR. GRANT:

Yes.

THE COMMISSIONER:

– that might satisfy –

MR. GRANT:

Yes.

THE COMMISSIONER:

– the public perception of –

MR. GRANT:

Yes.

THE COMMISSIONER:

– of independence.

MR. GRANT:

Provided there was a, you know –

THE COMMISSIONER:

Yeah.

MR. GRANT:

– an examination, a proper consideration given to it and a weighing – weighing up process –

THE COMMISSIONER:

Yes.

MR. GRANT:

– rather than just a quick – quick look.

THE COMMISSIONER:

Yeah. Do you see some advantage in the Police Commissioner being able to deal with behavioural matters more quickly than presently?

MR. GRANT:

Yes, I do.

THE COMMISSIONER:

Yeah.

MR. GRANT:

Yes.

THE COMMISSIONER:

Do they – do those sort of matters take up a lot of your office's time?

MR. GRANT:

Yes, they do.

THE COMMISSIONER:

And they inevitably lead to a managerial outcome?

MR. GRANT:

A managerial outcome. And that's, you know – the way the system works, it might be, and it's fairly common for there to be a disagreement between the recommendations made by the Ombudsman and the Police Commissioner – or, mainly the Police Commissioner's delegates are involved, down to sergeant level – but one might quibble and say, well look, no, this doesn't warrant managerial guidance. This is something that should be a matter of formal discipline and so there should be a charge laid. At the end of the day you might spend 18 months doing that and by the time it gets through the Police Disciplinary Tribunal and a recommendation made, you might end up with the equivalent of managerial guidance.

THE COMMISSIONER:

Yeah.

MR. GRANT:

You know, an unrecorded reprimand or counselling or something like that so in the end you wonder under that system what's achieved.

THE COMMISSIONER:

Yes, yeah. I will if you permit me to speak to you again before I conclude this review to obtain further information from you and further advice from you, if you wouldn't mind.

MR. GRANT:

Certainly, Commissioner.

THE COMMISSIONER:

Thank you. Mr. Riches, do you have any questions of –

MR. RICHES:

No, thank you, Commissioner.

THE COMMISSIONER:

Mr. Grant, I'm very grateful for the submission you made and for you coming today. It has been very helpful.

MR. GRANT:

Thank you sir.

THE COMMISSIONER:

Mr. Riches, I think that concludes the public hearings?

MR. RICHES:

Yes, Commissioner.

THE COMMISSIONER:

As I mentioned to PASA this morning, and Mr. Grant, and to the Commissioner, I will continue to speak to people who are interested in the outcome of this review and obtain further information from them and further advice from those who are interested so that I'm in a position to conclude on a system which is best served for the regulation of, or the oversight of complaints to – of police misconduct.

Thank you very much for your help, Mr. Riches.

Thank you.

ADJOURNED 12:27pm