

A TWELVE MONTH REVIEW OF THE

POLICE COMPLAINTS AND DISCIPLINE ACT 2016



ICAC·OPI

Independent Commissioner
Against Corruption
SOUTH AUSTRALIA

Office for Public Integrity



LIST OF ABBREVIATIONS

ACB	South Australia Police's Anti-Corruption Branch
CMS	Case Management System
CoP	Commissioner of Police
CSO	Crown Solicitor's Office
ICAC	Independent Commissioner Against Corruption
ICAC Act	<i>Independent Commissioner Against Corruption Act 2012</i>
IIS	South Australia Police Internal Investigation Section
DPP	Office of the Director of Public Prosecutions or Director of Public Prosecutions
NOA	Notice of allegations
OPI	Office for Public Integrity
Ombudsman Act	<i>Ombudsman Act 1972</i>
PDT	Police Disciplinary Tribunal
POMB	Police Ombudsman
LSA	Local Service Area
PASA	Police Association of South Australia
PCDA	<i>Police Complaints and Discipline Act 2016</i>
SA Police	South Australia Police



ICAC (SA) A Twelve Month Review of the
Police Complaints and Discipline Act 2016
May 2019

Level 1, 55 Currie Street
Adelaide SA 5000
(08) 8463 5173
GPO Box 11066
Adelaide SA 5001
icac.sa.gov.au

Contents

LETTERS OF TRANSMITTAL	2
COMMISSIONER’S FOREWORD	4
BACKGROUND	6
THE SCHEME	7
<i>Police Complaints and Discipline Act 2016</i>	9
<i>Police Complaints and Discipline Regulations 2017</i>	11
<i>Independent Commissioner Against Corruption Act 2012</i>	11
STATISTICAL SNAPSHOT	12
RECEIPT AND HANDLING OF COMPLAINTS AND REPORTS	15
Administration	16
Reports	17
Complaints	17
Own initiative	18
Receipt by OPI	18
Referrals from OPI to IIS	20
ASSESSMENT OF COMPLAINTS AND REPORTS	21
Assessment	22
Commissioner of Police declining to act	27
Definition of misconduct	28
IIS assessments	30
Reassessment by OPI	31
Recontacts	32
MANAGEMENT RESOLUTION	33
INVESTIGATIONS	37
IIS	39
Local Service Areas (LSAs)	40
Prosecution of designated officers	43
Police Disciplinary Tribunal (PDT)	44
THE INTERACTION OF THE ICAC ACT AND THE PCDA	45
Corruption	46
Misconduct or maladministration	48
RECOMMENDATIONS	53

Letters of transmittal

The Honourable Vincent Tarzia MP
Speaker of the House of Assembly

The Honourable Andrew McLachlan CSC MLC
President of the Legislative Council

In accordance with section 42(1) of the *Independent Commissioner Against Corruption Act 2012*, I present the report of my review of the first year of operations of the *Police Complaints and Discipline Act 2016*.

I have prepared this report for the purpose of informing Parliament of the issues identified since the Act commenced on 4 September 2017.

Section 42(3) of the *Independent Commissioner Against Corruption Act 2012* requires that the President of the Legislative Council and the Speaker of the House of Assembly lay the report before their respective Houses on the first sitting day after 28 days (or such shorter number of days as the Attorney-General approves) have passed after receiving this report.

Yours Sincerely,



The Honourable Bruce Lander QC
Independent Commissioner Against Corruption
8 May 2019

The Honourable Vickie Chapman MP
Deputy Premier
Attorney-General

In accordance with section 42(1) of the *Independent Commissioner Against Corruption Act 2012*, I present the report of my review of the first year of operations of the *Police Complaints and Discipline Act 2016*.

I have prepared this report for the purpose of informing Parliament of the issues identified since the Act commenced on 4 September 2017.

Section 42(3) of the *Independent Commissioner Against Corruption Act 2012* requires that the President of the Legislative Council and the Speaker of the House of Assembly lay the report before their respective Houses on the first sitting day after 28 days (or such shorter number of days as the Attorney-General approves) have passed after receiving this report.

Yours Sincerely,

A handwritten signature in black ink that reads "Bruce Lander". The signature is written in a cursive, flowing style.

The Honourable Bruce Lander QC
Independent Commissioner Against Corruption
8 May 2019

Commissioner's foreword

On 4 September 2017, the Office for Public Integrity (OPI) which is responsible to me for the performance of its functions, was given the statutory function of oversight of the assessment and investigation of complaints and reports relating to the conduct of South Australia Police (SA Police) under the *Police Complaints and Discipline Act 2016* (PCDA).

Section 48 of the PCDA provides that the Minister must cause a review of the Act to be conducted and a report provided to the Minister before the third anniversary of the commencement of the Act.

I have prepared this report for the purpose of informing Parliament of the issues identified during the first year of operations. This report of course will not relieve the Minister of his or her responsibility to cause the section 48 report to be prepared.

In my opinion minor amendments should be made to the PCDA to make it work better. I have made recommendations within this report regarding legislative amendments that in my opinion will assist in addressing these issues.

I have previously said that the PCDA is 'working tolerably well I think in part because of the spirit of cooperation between South Australia Police (SA Police) and the OPI'¹. I reiterate that view.

There are some ambiguities in the PCDA and in some respects there are tensions between that Act and the *Independent Commissioner Against Corruption Act 2012* (the ICAC Act) all of which need to be resolved. Operational experience has also informed the recommendations in this report.

I met with the Commissioner of Police and his senior officers to discuss a draft of this report. As a consequence of representations from SA Police I was persuaded to withdraw some recommendations that I had proposed in that draft report.

SA Police supports 17 of the 18 recommendations in this report disagreeing only in relation to Recommendation 5.

SA Police did not suggest any other recommendations.

I provided a draft copy of this report to the Police Association of South Australia (PASA) on 29 March 2019 inviting comment and an opportunity to meet.



1: Independent Commissioner Against Corruption Annual Report, 2017-2018.

The President of PASA Mr Mark Carroll contacted my office by email on 10 April 2019 providing me with a copy of a letter he had written to the Deputy Premier and Attorney-General, the Hon. Vickie Chapman MP on 5 April 2019, regarding the draft report. In that letter he said:

In our view, this demonstrates that, with respect to him, it is inappropriate for Mr Lander, on behalf of the ICAC and OPI, to undertake a review of this type.

As a result, the Police Association is now in a very difficult position. We either cooperate with Mr Lander to ensure our members' views are considered in a report to be tabled in the Parliament or, alternatively, make our opposition to this type of review plain and refuse to participate at the risk of the Parliament debating and making changes in which we have had no input on behalf of our members, as a significant stakeholder.

Had we been informed that a review of this type was to be undertaken we could have ventilated our concerns with you and avoided being placed in this untenable situation.

In the circumstances, we invite you to intervene in this matter. Now would seem an opportune time to announce an independent review into the PCDA by an independent judge from another state, so that the review can be properly conducted and all stakeholders' interests properly assessed.

I replied to Mr Carroll by letter on 11 April 2019 advising that because the PASA did not intend to comment on the draft report I would publish the report to Parliament in accordance with section 42(1) of the ICAC Act. I wrote to him again on 12 April 2019 providing references to my evidence before the Crime and Public Integrity Policy Committee given on 20 November 2018 in which I explained the purpose of the review.

We engaged in further correspondence and on two occasions in letters dated 17 April 2019 and 29 April 2019 I invited Mr Carroll to advise me of the recommendations with which he disagreed and the reasons for his disagreement. He has not responded to that request so I am unable to advise Parliament with which recommendations PASA takes issue.

In the meantime on 23 April 2019 the Deputy Premier and Attorney-General, the Hon. Vickie Chapman MP responded to Mr Carroll's letter of 5 April 2019 advising that it would be inappropriate for her to attempt to intervene to either stop or influence the ICAC in this matter.

I extend my appreciation to Mr Fraser Stroud, Director Office for Public Integrity and his team for their invaluable assistance in the preparation of this report.

Background

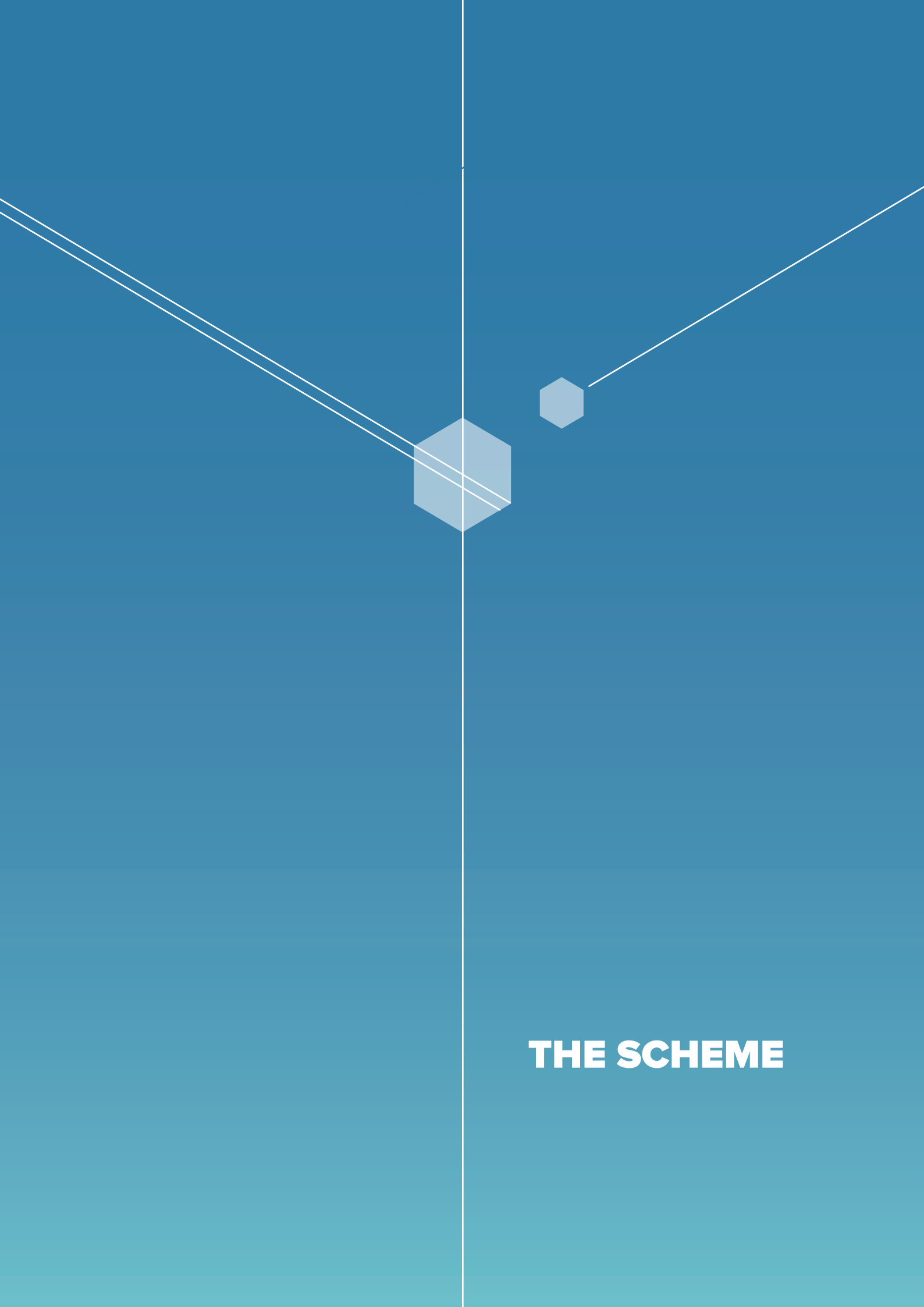
On 30 October 2014, the former Deputy Premier and Attorney-General, the Hon. John Rau MP requested I undertake a review of the legislative schemes that included the oversight and management of complaints regarding the conduct of police.

My review recommended changes aimed at resolving unnecessary complexity, duplication and delay in dealing with complaints and reports about police conduct, which could only be achieved by the repeal of the *Police (Complaints and Disciplinary Proceedings) Act 1985*, and the introduction of new legislation that provided more streamlined and effective processes for the resolution of complaints and reports about police, and the maintenance of discipline within the police force.

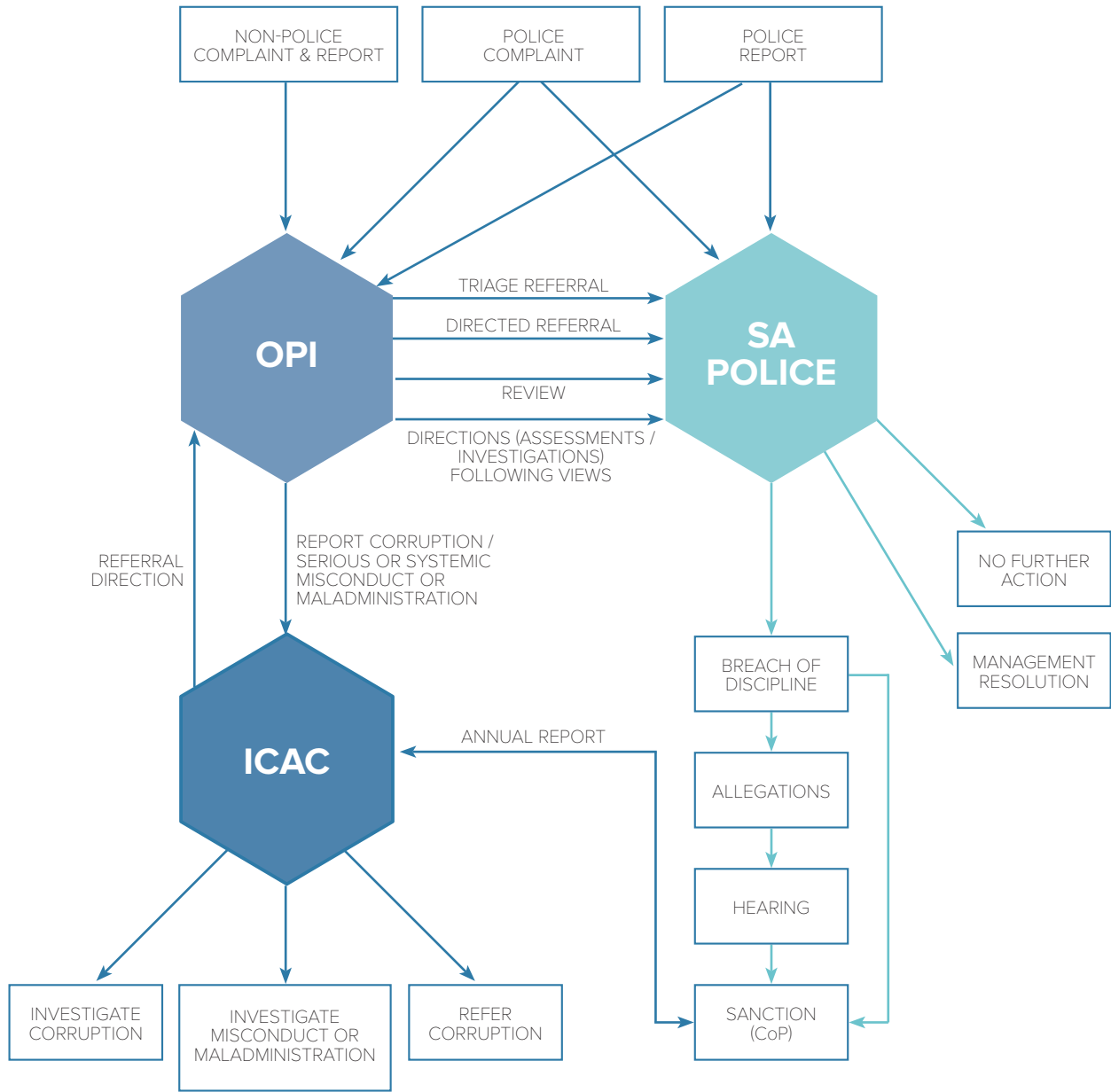
On 30 June 2015 I published that legislative review which made 29 recommendations.

The PCDA was Parliament's response to those recommendations. As a consequence, the office of the Police Ombudsman (POMB) was abolished and the OPI became responsible for the oversight of the assessment and investigation of complaints and reports about police.

While SA Police has always received complaints and reports about the conduct of its officers the new scheme makes SA Police a complaint handling agency responsible for receiving, assessing and resolving complaints and reports. The transition to this scheme has not always been a comfortable one for SA Police.



THE SCHEME



The scheme

Police Complaints and Discipline Act 2016

Prior to the commencement of the PCDA, the OPI sought advice on two occasions from the Crown Solicitor's Office (CSO) regarding the statutory construction and intent of the PCDA to ensure that operational functionality was consistent with the statutory requirements of the PCDA.

The PCDA relates to complaints and reports about the conduct of a designated officer which is defined in the PCDA to mean a member of SA Police, a police cadet or a special constable.

The PCDA is designed to ensure that complaints and reports relating to the conduct of designated officers are dealt with appropriately and expeditiously.

A complaint (from a member of the public) can be made about the conduct of a police officer to SA Police (either a police officer or a police public servant), or to the OPI.²

A matter will constitute a report under the PCDA where a designated officer reports the conduct of another designated officer in accordance with that officer's statutory obligations.³

All complaints and reports received, by either SA Police or the OPI, must be referred to the Internal Investigation Section (IIS) of SA Police within three days. IIS is the section of SA Police responsible for undertaking the assessment of complaints and reports and for carrying out investigations under the PCDA⁴. The only exception is if the OPI is satisfied that a complaint or report made to the OPI should be referred to the ICAC.⁵

The OPI does not have statutory function to undertake an assessment of police complaints or reports that it receives. Each complaint or report received or referred to IIS under the PCDA must be assessed by IIS.⁶

Whilst only IIS is able to undertake an assessment, the OPI can reassess and/or substitute its assessment for an assessment undertaken by IIS⁷ and the substituted assessment is deemed to be the assessment of IIS.

Where IIS assess a matter as not requiring action the officer in charge of IIS will write to the complainant or reporter and advise them accordingly.⁸

2: *Police Complaints and Discipline Act 2016* (SA) s 10(3).

3: *Ibid* s 12.

4: *Ibid* s 5.

5: *Ibid* s 29.

6: *Ibid* s 14.

7: *Ibid* s 28.

8: *Ibid* s 9.

If IIS is of the opinion action is required IIS must assess the conduct as to whether a potential issue of corruption, misconduct or maladministration in public administration has been raised.⁹

The PCDA provides that action may be taken by the designated officer receiving Management Resolution or the matter proceeding to an investigation.

The Commissioner of Police (CoP) has the power to determine the kind of matter that should be dealt with by way of Management Resolution. The CoP does that by publishing a determination which must be approved by the OPI.¹⁰

The kind of matter the CoP has determined should be dealt with by Management Resolution involves a consideration of the consequences of the conduct if the conduct were accepted or established. It is conduct that, if proved, would not warrant termination, suspension, demotion or other serious consequences.

If a matter is deemed as one that might warrant termination, suspension, demotion or other serious consequences it will progress to an investigation.

A complaint or report that is to be investigated will be investigated by IIS.¹¹ The OPI does not have power to investigate a complaint or report but does have the power to issue directions to IIS in relation to such investigations.¹²

If following an investigation allegations are substantiated, the matter may progress to the Police Disciplinary Tribunal (PDT). A notice of allegations (NOA) will be provided to the PDT and served on the designated officer.¹³ The OPI is able to make submissions to the CoP in regard to the NOA.¹⁴ However, those submissions are not binding.

The designated officer may admit or deny the allegations. If the allegations are not admitted the allegations will be heard and determined by the PDT. A representative of the OPI is able to be present at the PDT but has no role to play in such proceedings.¹⁵

Following an admission or a finding that the matter is proven, the CoP may impose on the officer any sanction of the kind mentioned in section 26 of the PCDA that the CoP thinks appropriate.

The OPI has no statutory function in the sanction process.

9: *Police Complaints and Discipline Act 2016 (SA)* s 14(1).

10: *Ibid* s 16.

11: *Ibid* s 28.

12: *Ibid* s 27.

13: *Ibid* s 22.

14: *Ibid* s 22(2).

15: *Ibid* s 35(6).

Police Complaints and Discipline Regulations 2017

The *Police Complaints and Discipline Regulations 2017* (the Regulations) play an important role in the level of information that is required in the SA Police Case Management System (CMS).

Section 7 of the PCDA provides that the Governor may by regulation establish a Code of Conduct for the maintenance of professional standards by designated officers. The Code of Conduct is contained in Schedule 3 of the Regulations.

Independent Commissioner Against Corruption Act 2012

The OPI might refer a complaint or report to the ICAC if satisfied that the matter is one that should be dealt with by the ICAC.¹⁶ In those circumstances the ICAC can give such directions to the CoP as the ICAC thinks fit.¹⁷ The intent of the PCDA is for the OPI to oversee conduct investigations. The scheme allows matters assessed as corruption under the PCDA, which are not referred to the ICAC to be investigated by SA Police under the oversight of the OPI.

Matters referred to the ICAC pursuant to section 29 of the PCDA raise questions as to the interaction between the PCDA and ICAC Act which should be addressed.

¹⁶: *Police Complaints and Discipline Act 2016* (SA) ss 13(3) and 29.

¹⁷: *Ibid* s 29(3).

Statistical snapshot

4 SEPTEMBER 2017 TO 4 SEPTEMBER 2018



2,406

TOTAL COMPLAINTS & REPORTS
ABOUT SA POLICE

2,019
COMPLAINTS

+

382
REPORTS

+

5

MATTERS RELATING
TO PROTECTIVE
SECURITY OFFICERS

RECEIVED BY

OPI

1,760
COMPLAINTS

+

28
REPORTS

RECEIVED BY

IIS

259
COMPLAINTS

+

354
REPORTS



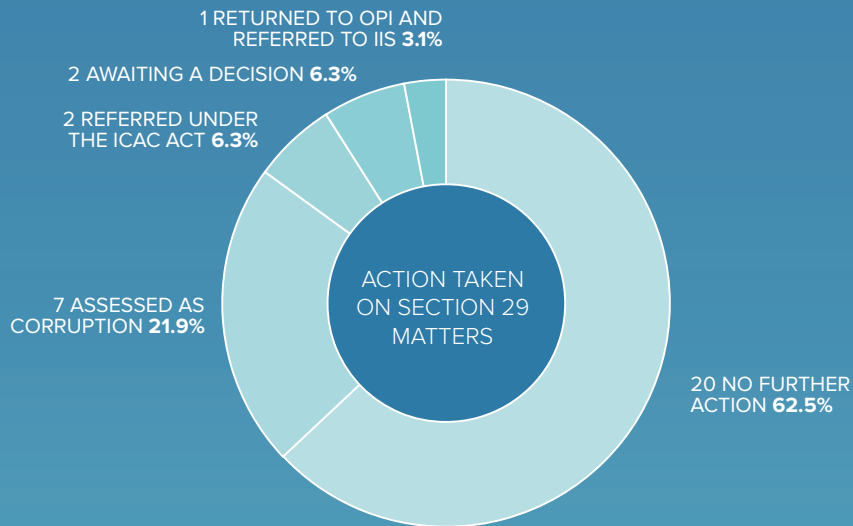
1,750

MATTERS REFERRED TO IIS



32

MATTERS REFERRED TO ICAC
(SECTION 29)



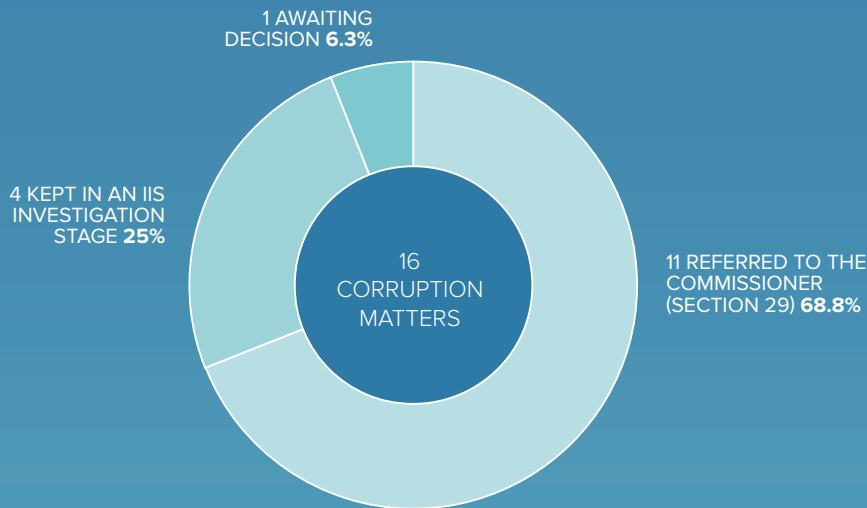
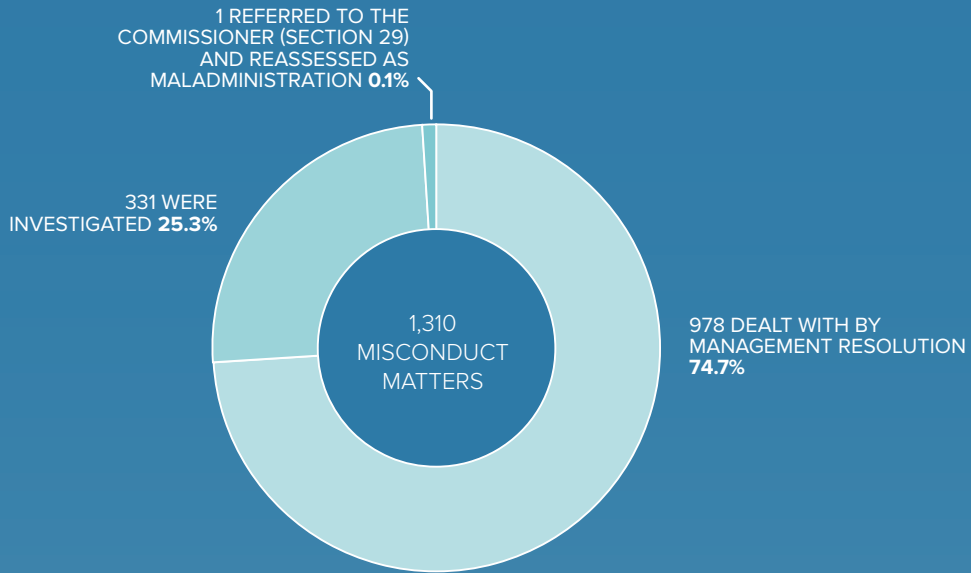
2,327

MATTERS REVIEWED BY OPI

1,001 + 1,310 + 16
NO FURTHER ACTION MISCONDUCT MATTERS CORRUPTION MATTERS

Statistical snapshot

4 SEPTEMBER 2017 TO 4 SEPTEMBER 2018



THE OPI
CONSULTED ON

142 MATTERS

THE OPI
REASSESSED

74 MATTERS*

*THE OPI STOPPED REASSESSING MATTERS WHERE IIS SENT 'NO CONDUCT' ISSUES TO MANAGEMENT RESOLUTION



**RECEIPT AND
HANDLING OF
COMPLAINTS
AND REPORTS**

Receipt & handling of complaints and reports

Administration

The PCDA requires the CoP to establish a CMS.¹⁸

The CMS must contain all information required by the PCDA¹⁹ and comply with any requirements in the Regulations.²⁰ Regulation 6 provides that the CMS must contain the prescribed information in Schedule 2 of the Regulations.

The CoP must ensure that ICAC and the OPI have direct and unrestricted access to the CMS for the purposes of both the PCDA and the ICAC Act.²¹

The scheme has enabled the OPI to record all complaints and reports regardless of whether they have been received by the OPI or SA Police.

The OPI accesses the SA Police CMS²² and electronically imports matters received by the SA Police into the OPI's own CMS.

As would be expected with a new scheme some administrative issues have required attention.

Appropriate technological arrangements have been created. However, the OPI and SA Police do not share the same complaint management system. Reliance is placed on the timing and the level of detail entered into the SA Police CMS by IIS staff. The OPI does not receive automatic notifications on the creation of a new matter or on any change to an existing matter. The OPI has had to adopt a vigilant approach to identify such changes.

I am grateful for the ongoing cooperation between staff within IIS and OPI in working productively to resolve administrative issues and for the solution focused approach being undertaken.

The OPI and IIS received 2,406 complaints and reports in the first year after the commencement of the PCDA between 4 September 2017 and 4 September 2018. This is significantly more than the number of complaints and reports received under the previous legislative scheme.

In the financial year 2016-2017 the POMB and IIS received 1,257 complaints and reports.

18: *Police Complaints and Discipline Act 2016* (SA) s (6)(f).

19: *Ibid* s 6(2)(a).

20: *Ibid* s 6(2)(b).

21: *Ibid* s 6(3).

22: *Ibid* s 22.

The OPI directly received 1,788 complaints and reports during the first 12 months of operations compared to the POMB who received 869 during the POMB's last financial year of operation.

The increase in complaints and reports does not necessarily indicate a deterioration in the conduct of SA Police officers.

The POMB required every complaint to be reduced to writing,²³ which meant that no complaints about police conduct were taken by telephone.

It was anticipated under the new scheme that the volume of complaints would increase as a result of OPI receiving complaints by telephone which has turned out to be the case.

The PCDA provides for members of the public and police officers to lodge their complaints or reports with either SA Police or the OPI. There is a discernible difference as to where these matters are lodged depending on whether they are a complaint or a report.

Reports

In the first year of operations a total of 382 reports were made by designated officers which would appear low given there are 4,948 designated officers employed by IIS.

Only 28 reports of the 382 were made to the OPI while 354 were made to IIS.

A question arises as to why so few designated officers choose to report conduct issues to the OPI.

Complaints

A total of 2,019 complaints were received in the first year of operation of which 1,760 were made to the OPI and 259 to IIS.

The OPI might be the preferred agency for complaints because SA Police has determined not to take a complaint over the telephone but there are no statistics available to establish this one way or the other.

The high number of complaints received by the OPI might also be explained by SA Police referring complainants to the OPI or the complainant not wanting his or her complaint dealt with by SA Police.

23: Police (Complaints and Disciplinary Proceedings) Act 1985 (SA) s 16(3).

Own initiative

Under section 30(2) of the PCDA the ICAC may on the ICAC's initiative investigate any other complaint or report other than one referred to the ICAC by the OPI if satisfied it is appropriate to do so.

The OPI however cannot initiate a matter of its own volition under the PCDA which has the potential to restrict action being taken by the OPI in circumstances where issues of conduct have been identified but are not the subject of a complaint or report.

RECOMMENDATION 1

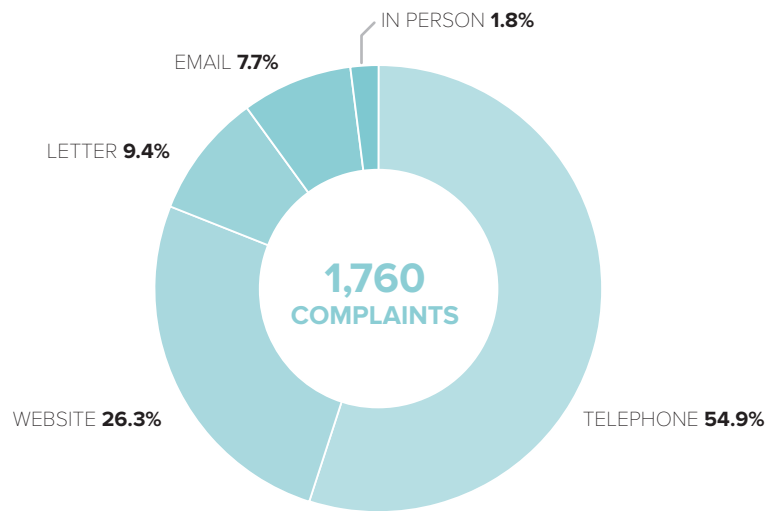
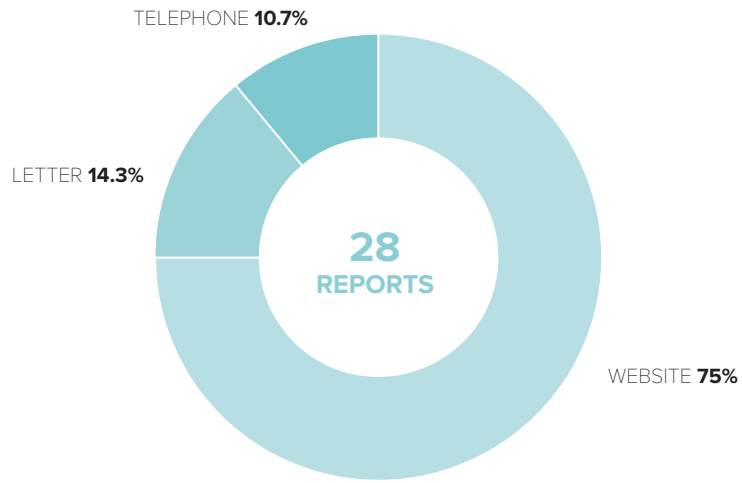
The PCDA be amended to permit the OPI to identify a matter on its own initiative for assessment by IIS or referral under section 29 to the ICAC.

Receipt by OPI

The majority of complainants contact the OPI by telephone. IIS has requested that when possible, the OPI obtain particular information that would benefit IIS in conducting an assessment. The OPI has adopted processes in relation to the receipt and registration of complaints in order to assist IIS in this regard.

Despite OPI officers explaining the nature of the scheme, some complainants express concern that their matter is to be assessed and possibly investigated by IIS even though the OPI will maintain oversight.

POLICE COMPLAINTS & REPORTS RECEIVED BY OPI



Referrals from OPI to IIS

The scheme of the PCDA is that complaints and reports will be assessed by IIS expeditiously which is appropriate.

However section 13 which governs the referral process requires review.

The OPI must as soon as reasonably practicable (but in any event within three days) after receiving a complaint or report, refer the complaint or report to IIS.²⁴

The referral from OPI to IIS is undertaken by an electronic secure file process which has proved successful throughout the first year of operations.

The OPI refers 99% of police matters it receives to IIS but the three day timeframe is difficult to meet, especially in relation to matters received over weekends and public holidays.

Moreover, the present timeframe makes it difficult for the OPI to seek further information or clarification about a complaint or report that lacks detail. The scheme would benefit from having the present timeframe amended to allow for a maximum of three business days which would not significantly compromise the expectations for disposal of the complaint or report.

Such an amendment would be consistent with the time frame in section 28(1) which is for '3 business days'.

RECOMMENDATION 2

Section 13(2) timeframe be amended to allow for 3 business days.

24: *Police Complaints and Discipline Act 2016* (SA) s 13(2).



**ASSESSMENT
OF COMPLAINTS
AND REPORTS**

Assessment of complaints & reports

Assessment

The manner and scope of the assessment process has been the focus of ongoing debate between SA Police and the OPI.

The OPI and SA Police agree that each complaint or report received by or referred to IIS under the PCDA must be assessed by IIS.²⁵

The OPI as part of its oversight function can reassess and/or substitute the assessment of IIS.²⁶

Each complaint or report received or referred to IIS must be assessed by IIS in such manner as the officer in charge of IIS thinks fit.²⁷ The OPI has no part to play in the initial assessment process.

The assessment process for IIS is in my view the same procedure the OPI must adopt in assessing a complaint or report under the ICAC Act²⁸ and that is whether the complaint or report raises a potential issue of corruption, misconduct or maladministration or raises some other issue that in the opinion of the officer in charge of IIS should be referred to the OPI.²⁹

Prior to the commencement of the PCDA complaints or reports received by the OPI relating to police officers were assessed by the OPI under section 23 and actioned under section 24 of the ICAC Act. The OPI had to assess whether the complaint or report raised a potential issue of corruption, misconduct or maladministration or raised some other issue that should be referred to an inquiry agency, public authority or public officer or was trivial, vexatious or frivolous, it had previously been dealt with by an inquiry agency or public authority and there was no reason to reexamine it or there was other good reason why no action should be taken.³⁰

The intention of section 23(1) of the ICAC Act is for the OPI to identify which matters raise those potential issues and which of those matters should be the subject of further action. Section 24 of the ICAC Act is then engaged.

25: *Police Complaints and Discipline Act 2016* (SA) s 14.

26: *Ibid* s 28.

27: *Ibid* s 14 (3).

28: *Independent Commissioner Against Corruption Act 2012* (SA) s 23.

29: *Police Complaints and Discipline Act 2016* (SA) s 14(1).

30: *Independent Commissioner Against Corruption Act 2012* (SA) s 23(1).

It is my view that the purpose of the assessment procedure in the PCDA is to ensure that complaints and reports about corruption, misconduct and maladministration that relate to the conduct of a designated officer should be dealt with in the same way as a complaint or report about those types of conduct that relate to any other public officer.

Section 23 of the ICAC Act is unambiguous. A matter is assessed as to whether it raises a potential issue of corruption or misconduct or maladministration in public administration or if there is good reason why no action should be taken on the matter.

Section 24 of the ICAC Act provides for the action that may be taken based on the assessment.

The assessment process under the PCDA is less clear.

Section 14(1) provides that each complaint or report received or referred to the IIS must be assessed. However section 14(2) provides:

- (2) *Subsection (1) does not apply to a particular complaint or report if—*
- (c) *the conduct that is the subject of the complaint or report is being, or has previously been, assessed by the IIS, the OPI or the ICAC; or*
 - (d) *the conduct that is the subject of the complaint or report has been previously dealt with under this Act, the Police (Complaints and Disciplinary Proceedings) Act 1985 or the Police Act 1998; or*
 - (e) *the matter raised in the complaint or report is, in the opinion of the officer in charge of the IIS, trivial; or*
 - (f) *the complaint or report is, in the opinion of the OIC of the IIS, frivolous or vexatious or not made in good faith; or*
 - (g) *in the case of a complaint—having regard to all the circumstances of the case, an investigation of the complaint is unnecessary or unjustifiable.*

It would seem therefore that the starting point must be whether the complaint or report is of a kind mentioned in section 14(2) and if it is it will not be assessed under section 14(1).

The starting point of the assessment process under the PCDA is to consider if there are reasons why no action is required on the complaint or report.³¹ Only if such reasons do not exist, is the IIS then required to assess whether the matter raises a potential issue of corruption, misconduct or maladministration in public administration.³²

It seems odd that the starting point is to determine whether the complaint or report should not be addressed before determining the type of conduct that is the subject of the complaint or report.

The present assessment process is unnecessarily confusing and has resulted in disagreement between the OPI and SA Police.

Section 14(1) of the PCDA should be amended to replicate as nearly as possible section 23(1) of the ICAC Act.

That would mean that all of the issues in the present section 14(2) are considered when making the assessment required by section 14(1).

There is another matter to be considered. IIS maintains that it can take action under Part 3 or Part 4 of the PCDA even if the matter is assessed as not raising a potential issue of corruption, misconduct or maladministration.

I disagree.

IIS' suggestion means that the PCDA is not limited to conduct that raises a potential issue of corruption, misconduct or maladministration but includes conduct of any kind. Further, that any complaint that is received by the IIS or by the OPI, which is not the subject of a decision to take no action, must be investigated by the IIS under section 21 of the PCDA even if, on an assessment, that complaint or report does not raise a potential issue of corruption or misconduct or maladministration in public administration.

That seems to me to be an extraordinary result.

Such a construction of the PCDA makes it difficult to understand why a complaint or report requires assessment against the definitions of corruption, misconduct or maladministration in the ICAC Act in addition to allowing the OPI to reassess and substitute the assessment of IIS, when any type of conduct can be addressed by the PCDA.

31: *Police Complaints and Discipline Act 2016* (SA) s 14(2).

32: *Ibid* s 14(1).

I suggest that Part 3 and Part 4³³ of the PCDA are to be engaged if a matter is assessed as raising a potential issue of corruption, misconduct or maladministration.

Such an amendment would resolve a point of contention between IIS and the OPI in relation to complaints and reports assessed by IIS as requiring action, even though they do not raise a potential issue of corruption, misconduct or maladministration in public administration under section 14(1) of the PCDA.

Section 14(4) of the PCDA presently provides that if a particular complaint is assessed as being a complaint referred to in section 14(1)(a) or section 14(1)(c) the officer in charge of IIS must in a manner and form determined by the OPI notify the OPI of that fact. For some unexplained reason section 14(4) does not refer to reports.

Section 14(4) should be amended to refer to complaints and reports.

I would propose section 14 be amended:

- (1) *Each complaint or report received by or referred to the IIS under this Act must be assessed as to whether –*
 - (a) *it raises a potential issue of corruption in public administration that could be the subject of prosecution; or*
 - (b) *it raises a potential issue of misconduct or maladministration in public administration; or*
 - (c) *it raises some other issue that should in the opinion of the officer in charge of the IIS, be referred to the OPI; or*
 - (d) *in the opinion of the officer in charge of IIS it is trivial, vexatious, frivolous or not made in good faith, it has been dealt with before and there is no reason to re-examine it or having regards to all the circumstances of the case an investigation of the complaint or report is unnecessary or unjustifiable and no action should be taken in regard to it.*

and a determination made as to whether or not action should be taken under Part 3 or Part 4 of this Act.
- (2) *Subject to this Act, an assessment under this section may be conducted in such a manner as the officer in charge of IIS thinks fit.*
- (3) *If a particular complaint or report is assessed as being a complaint or report referred to in subsection (1) (a) or (c), the officer in charge of the IIS must in a manner and form determined by the OPI, notify the OPI of that fact.*

33: Police Complaints and Discipline Act 2016 (SA) pts 3-4.

If section 14 were amended as suggested it would have the following effects:

- ▶ it would eliminate the present tensions between section 14(1) and section 14(2) as to which subsection dominates;
- ▶ it would be consistent with the ICAC Act;
- ▶ it would require IIS to determine at the assessment stage whether the particular matter assessed if it was not under section 14(1)(a) should be dealt with by way of Management Resolution or investigated;
- ▶ it would resolve the disagreement between IIS and the OPI as to whether action can be taken under the PCDA even if the matter is not assessed as raising a potential issue of corruption, misconduct or maladministration;
- ▶ it would address the drafting omission in the present section 14(4).

RECOMMENDATION 3

Section 14 be amended to read:

- (1) *Each complaint or report received by or referred to the IIS under this Act must be assessed as to whether –*
- (a) *it raises a potential issue of corruption in public administration that could be the subject of prosecution; or*
 - (b) *it raises a potential issue of misconduct or maladministration in public administration; or*
 - (c) *it raises some other issue that should in the opinion of the officer in charge of the IIS, be referred to the OPI; or*
 - (d) *in the opinion of the officer in charge of IIS it is trivial, vexatious, frivolous or not made in good faith, it has been dealt with before and there is no reason to re-examine it or having regards to all the circumstances of the case an investigation of the complaint or report is unnecessary or unjustifiable and no action should be taken in regard to it*
- and a determination made as to whether or not action should be taken under Part 3 or Part 4 of this Act.*
- (2) *Subject to this Act, an assessment under this section may be conducted in such a manner as the officer in charge of IIS thinks fit.*
- (3) *If a particular complaint or report is assessed as being a complaint or report referred to in subsection (1) (a) or (c), the officer in charge of the IIS must in a manner and form determined by the OPI, notify the OPI of that fact.*

Commissioner of Police declining to act

Section 15 of the PCDA provides that the CoP may decline to take further action in respect of a particular complaint or report even if it has been assessed by IIS as raising a potential issue of corruption, misconduct or maladministration.

The CoP has not invoked the powers in section 15 since the PCDA commenced. The powers are very wide and could, if exercised, frustrate both the IIS assessment and any OPI substituted assessment.

It is not entirely clear why the powers exist but it is a policy matter for Parliament upon which the CoP might wish to be heard.

However if section 15 is to remain in the PCDA section 15(d) requires amendment.

Section 15 refers to both complaints and reports in paragraphs (a) to (c). However, in the context of the CoP determining that in all the circumstances an investigation is unnecessary or unjustifiable paragraph (d) refers only to a complaint.

I see no reason for reports to be excluded from the considerations of the CoP under section 15(d) and propose if the section 15 powers are to remain the subsection is amended accordingly.

.....

·

· **RECOMMENDATION 4**

· Consideration be given as to whether section 15 should be repealed. If not

· section 15 (d) be amended to refer to both complaints and reports.

.....

Definition of misconduct

The PCDA defines ‘misconduct in public administration’³⁴ as having the same meaning as in the ICAC Act which means a designated officer could not engage in misconduct unless it occurred while acting in his or her capacity as a public officer.³⁵

Section 7(1) of the PCDA empowers the Governor by regulation to establish a Code of Conduct for the maintenance of professional standards by designated officers. Section 7(2) identifies the matters which a Code of Conduct might address:

- (2) *Without limiting the generality of subsection (1), a code of conduct may include provisions relating to—*
 - (a) *the performance of duties; and*
 - (b) *corrupt, improper or discreditable behaviour (including criminal conduct under foreign law); and*
 - (c) *drug and alcohol testing of members of SA Police and police cadets; and*
 - (d) *conduct towards other designated officers; and*
 - (e) *standards of personal behaviour or dress; and*
 - (f) *relations with the public or particular groups or organisations; and*
 - (g) *the use of official information or resources; and*
 - (h) *public comment; and*
 - (i) *any other matter that the Governor considers relevant to the maintenance of professional standards.*

Regulation 7(1) provides for a Code of Conduct for the maintenance of professional standards in Schedule 3 of the Regulations.

Regulation 7(2) provides:

- (2) *A designated officer who—*
 - (a) *contravenes or fails to comply with the code of conduct; or*
 - (b) *attempts, aids, abets, counsels or procures such a contravention,*
is taken to have breached the code of conduct.

34: *Police Complaints and Discipline Act 2016 (SA)* s 3.

35: **Misconduct in public administration** means—

- (a) *contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or*
- (b) *other misconduct of a public officer while acting in his or her capacity as a public officer.*

Clause 2 of Schedule 3 requires a designated officer to act at all times with honesty and integrity 'whether in the course of his or her employment or otherwise'. Clause 3 also refers to conduct 'in the course of his or her employment or otherwise'.

Clause 7 might also apply to conduct other than in the course of employment.

There is a tension therefore between the PCDA and the Regulations in relation to what might constitute 'misconduct' which has caused confusion. That has come about by adopting the definition of misconduct in the ICAC Act without having regard to the need to have conduct outside employment also subject to the Code of Conduct. If the conduct of the officer occurred outside of his or her capacity as a police officer it cannot be assessed as raising a potential issue of misconduct in public administration under the PCDA.

However, SA Police view the matter as misconduct because it raises a potential issue that is in contravention of the Code of Conduct provided in the Regulations.

It might be that the Regulations are *ultra vires* the PCDA but that does not need to be decided. Parliament could address the matter by amending the definition of misconduct in the PCDA.

I recommend that the definition of misconduct in the PCDA be amended to include conduct other than conduct while the designated officer is acting in his or her capacity as a public officer as prescribed in the ICAC Act.

The amendment will make clear that the PCDA applies to conduct of a designated officer regardless of whether or not the public officer is acting in his or her capacity as a public officer.

SA Police does not agree with my construction of the PCDA and does not support my recommendation.

RECOMMENDATION 5

Amend the definition of misconduct in the PCDA to make it clear that misconduct for the PCDA includes conduct other than while the designated officer is acting in his or her capacity as a public officer as prescribed in the ICAC Act.

IIS assessments

The officer in charge of IIS may conduct the assessment in any way that he or she thinks fit.³⁶

Whilst IIS utilises SA Police systems to obtain further information regarding complaints under assessment, IIS does not as a matter of course request any further information, detail or clarity from the complainant which may contribute to complainant dissatisfaction with the scheme.

While the PCDA does not expressly require the OPI to consider every complaint and report assessed by IIS the OPI could not exercise its statutory functions under section 28 of the PCDA without doing so. Therefore, the OPI reviews every assessment undertaken by IIS.

The documenting of the assessment process is crucial. Item 3 in Schedule 2 of the Regulations provides the information that should be included in the CMS by IIS for the assessment of complaints and reports.

Its purpose is to assist the OPI to review the assessment by having access to the information relied upon and the reasons for the decision and the recommended action. The Regulations also provide for the officer in charge of IIS to record if the officer in charge is in agreement with the determination.

IIS assessments do not comply with the Regulations. No reasons for decisions are provided in the assessment but rather a repetition of the known facts. There is no use of the relevant sections of the PCDA to clarify how the matter was assessed and some terminology used in the process is not relevant to the PCDA.

In other words SA Police does not comply with the Regulations.

This issue has been raised with IIS on numerous occasions but the practice continues.

Because of the lack of information provided by IIS, the OPI must conduct its own assessment of the complaint or report to ascertain if the matter should be the subject of consultation with IIS.

The result is a duplication of effort and work which would be unnecessary if IIS did what it is obliged to do. Consultations with IIS have shown from time to time that information raised by the OPI had in fact been considered in the first instance by SA Police, but not documented.

It is my view that SA Police should comply with the Regulations.

³⁶: *Police Complaints and Discipline Act 2016 (SA)* s 14(3).

Reassessment by OPI

The OPI has the power to reassess and/or substitute its assessment for the assessment of IIS.³⁷

IIS captures in the CMS their file allocation form which contains the IIS assessment and recommended action in regard to complaints and reports. The OPI reviews the IIS assessment and recommended action.

SA Police and the OPI have on occasions been in agreement with the assessment of the conduct but in disagreement with the recommended action.

The intent of the PCDA is that the ‘assessment’ relates to the conduct and not the recommended action which means the OPI does not have the ability to reassess in isolation the recommended action under section 28 of the PCDA. In my view this undermines the intent of the scheme in terms of the oversight of the OPI under section 28.

IIS have attempted to address this problem. During consultation, if the OPI has suggested a matter should be investigated in contradiction to the IIS view that Management Resolution is appropriate, IIS will ordinarily accept the OPI’s suggestion and proceed with an investigation.

Despite this level of cooperation legislative amendment is required in my view to enable the OPI to have the ability to reassess and/or substitute the recommended action as well as the assessed conduct.

RECOMMENDATION 6

Section 28 be amended to provide that the OPI may reassess and/or substitute its view of the recommended action determined by IIS.

³⁷: *Police Complaints and Discipline Act 2016 (SA) s 28(1)*.

Recontacts

The OPI is regularly contacted by dissatisfied complainants which it records as recontacts. Many issues lead to dissatisfaction including a complaint of lack of contact from IIS in regard to the complainant's version of events, a lack of explanation in outcome letters, or that the decision to take no action was so swiftly reached that IIS could not possibly have considered the matter appropriately.

The PCDA does not provide any formal process or avenue for dealing with dissatisfied complainants. There is no appeal or review process nor should there be.

On occasions, the OPI have referred recontacts to the ICAC under section 29 because the recontact includes a complaint about the conduct of officers within IIS. In such circumstances it would be inappropriate to refer the matter to IIS. In my view this is not the intended purpose of section 29 of the PCDA but this process has been utilised in such instances.

The IIS refers dissatisfied complainants to the OPI but that is not appropriate. The OPI is not an appeal body. SA Police must take ownership of their decision making and advise complainants of their reasons in reaching its determination.

A positive approach by SA Police is the use of a Victim Contact Officer who has called some complainants advising of the reasons for no action being taken. While this will not always appease a complainant it is progress in regards to complaint handling.

It has been the experience of the OPI that the central issue is and will remain that police are assessing and investigating complaints about police. This issue was discussed during the legislative review and referred to in my annual report.

I do not propose that the PCDA be amended to address dissatisfied complainants but mention this matter so that SA Police can consider the issue.



MANAGEMENT RESOLUTION

Management Resolution

As the title suggests matters deemed suitable for Management Resolution means that there will be no need for an investigation and formal disciplinary proceedings if the matter can be dealt with expeditiously and without undue formality. It is intended to improve conduct relating to poor behaviour, poor service delivery or other minor management issues.

Resolution Officers are allocated complaints and reports to facilitate the Management Resolution process under the PCDA.

The scheme anticipated a large number of matters would progress to Management Resolution, which appears to be supported by SA Police's statistics.

Seventy five percent of matters assessed as misconduct (978 matters) were referred to Management Resolution. Those matters amounted to 56% of the total number of matters assessed under the PCDA.

Management Resolution is an outcome which can be a consequence of the assessment of a matter or a decision reached regarding particular conduct during or at the end of an investigation. It is a statutory power and can only be exercised where the PCDA permits.

The PCDA does not provide the OPI with oversight of Management Resolution and therefore any power or functions in regard to it.

However, the PCDA amended the *Protective Security Act 2007* to provide the OPI with oversight of the Management Resolution process in regard to Protective Security Officers.

A number of observations regarding the Management Resolution process can be made.

As I have already mentioned earlier,³⁸ SA Police are sometimes using Management Resolution in circumstances where the conduct has been assessed as not raising a potential issue of corruption, misconduct or maladministration. I do not agree with this approach. The OPI has observed in such instances that the Resolution Officer will speak to the complainant but not the designated officer, presumably as there is no conduct to raise with him or her. That approach does not comply with section 18 of the PCDA and supports my view that the purpose of Management Resolution is to address disciplinary issues under the PCDA.

38: See, page 4.

There is no reason of course why SA Police cannot put in place procedures to address minor complaints that do not raise potential issues of corruption, misconduct or maladministration. However complainants, reporters and designated officers should be informed that the process is a management tool and not an exercise of any statutory power or function under the PCDA.

The scope of the Management Resolution process is very broad and generally appears to work as intended, particularly following the assessment process.

However, the OPI has observed that Management Resolution during or following an investigation does not appear to be conducted to the same standard as Management Resolution following assessment. Issues identified have included Resolution Officers determining to take no further action in the Management Resolution process despite the allegations being substantiated during the investigation.

The OPI has identified many instances where Resolution Officers at various stages of the Management Resolution process inappropriately conclude matters by way of no action. The OPI is not able to continue monitoring this process because there is no legislative provision to enable the OPI to take any action. Therefore it is an unknown if such activity continues.

Despite these comments I do not think the OPI should have the ability to oversee and give directions regarding Management Resolution. The intent of the PCDA is for the OPI to be satisfied a matter is appropriately assessed in the first instance and to reassess if it is not. If the matter is more serious it will be investigated and the OPI will have oversight.

The Management Resolution process is suitable for the less serious matters. Resolution of conduct at a managerial level should be the province of the CoP who should manage his/her own officers within this scheme.

Section 20 of the PCDA provides for the CoP to monitor and review all matters dealt with by Management Resolution with a view to maintaining proper and consistent practices. I would be interested to receive any information from SA Police in regard to the outcome of any review of the Management Resolution process during the first year of operations.

However, I suggest that Part 3 of the PCDA which deals with Management Resolution could be improved.

The CSO has advised that section 17(1) is ambiguous. The section provides that the Regulations may specify the kinds of complaints, reports and conduct that should or should not (rather than must or must not) be the subject of a determination under section 16.

Arguably this raises a question as to whether the CoP might retain a discretion to make a determination under section 16 in the face of any such regulations.

Section 17(1)(b) only refers to complaints but should refer to both complaints and reports.

Section 18(3) refers only to complaints and should also refer to both complaints and reports.

Part 3 does not provide a process whereby the matter can be escalated to an investigation if during the course of the process it becomes apparent that the matter is more serious than first appreciated and requires investigation.

RECOMMENDATION 7

Section 17 be amended to resolve any ambiguity that the CoP retains a discretion to make a determination under section 16 in the face of regulations that specify the kind of complaints and reports and conduct that should or should not be the subject of a determination under section 16.

RECOMMENDATION 8

Amend section 17(1)(b) to refer to both complaints and reports. The same amendment should be made to section 18(3).

RECOMMENDATION 9

Section 18 be amended to provide that if during the Management Resolution process information suggests that the assessment of the seriousness of the matter should be reconsidered such that it would no longer be appropriate to deal with the matter under Part 3 IIS must be advised immediately; the Management Resolution process should cease; and if a reassessment determines the matter should be investigated, an investigation commenced.



INVESTIGATIONS

Investigations

In my 2017-2018 Annual Report I said that ‘police should be able to investigate police, provided they do so transparently and appropriately and subject to the oversight of an independent body, which is able to monitor the way in which an investigation is carried out to ensure that the investigation has been carried out with integrity’.³⁹

The OPI is that independent body and is empowered to direct SA Police in its investigation of complaints and reports.

Investigations are conducted by IIS in accordance with section 21 of the PCDA, with the OPI having oversight and the power to direct IIS or a police officer assisting in an investigation on behalf of IIS under section 27 of the PCDA. The Regulations provide the timeframe for investigation progress updates to be entered into the CMS.

The purpose of any investigation is to search for the truth.

SA Police and the OPI should be seeking the same outcome, namely that allegations of conduct are investigated professionally and impartially and if substantiated appropriate action taken.

I also said in my annual report that not all investigations undertaken by SA Police into complaints and reports about police conduct are dealt with satisfactorily.⁴⁰ There have been a number of investigations and decisions made as a consequence of investigations about which Deputy Commissioner Michael Riches, senior OPI staff and I have expressed dissatisfaction in writing.

The intent of the PCDA is for the OPI to be involved in the ‘live’ oversight of investigations.

The practicalities of live oversight pose some challenges.

I have already mentioned that the CMS is not a shared system and no automatic notifications are provided to the OPI when changes are made to a file. Oversight is only ‘live’ when and if the investigation progress reports and work undertaken is uploaded to the CMS. It cannot be said that the oversight by OPI is ‘live’, but it is present.

It is not possible or indeed practical that all matters requiring investigation are investigated by IIS. Not all SA Police conduct matters relate to arrests in the inner city. As a result, matters are often referred to a Local Service Area (LSA) for investigation. On 5 July 2018, SA Police introduced a District Policing model. However, for the purposes of this report I will still refer to the term LSA.

Officers in LSAs do not have direct access to the CMS. They must forward their information electronically to IIS for that information to be uploaded.

For ease of reference the investigative oversight of matters will be separated into those dealt with by IIS and those by LSA.

39: Independent Commissioner Against Corruption Annual Report 2017-2018, p. 12.

40: Ibid, p.12.

IIS

IIS is constituted within SA Police to carry out investigations under the PCDA in relation to the conduct of designated officers. The officers are experienced detectives and their role is dedicated to this work. Most IIS investigations are undertaken appropriately.

The relationship between the OPI and senior officers in IIS is good and reflects the standards of courtesy and professionalism that would be expected from both agencies.

There have been, as would be expected, occasions where the OPI has disagreed with IIS regarding the manner in which IIS investigators have approached or undertaken an investigation. Differences of opinion can form part of such discussions with parties providing their views based on their experience.

As I have stated at the start of this section I have written to SA Police to express my dissatisfaction regarding certain investigations I have reviewed.

These discussions with SA Police have been ongoing in relation to issues of perceived bias in particular investigations. Bias is defined as ‘inclination or prejudice for or against one person or group, especially in a way considered to be unfair’.⁴¹ There are degrees of bias.

The OPI has raised issues with IIS in relation to its investigations and an investigative approach that seems to have been often taken. Every investigation needs to be considered separately and on its own merits. The OPI has identified a tendency for investigators to immediately request statements from the designated officers the subject of the investigation before the investigator has spoken to witnesses and before other evidence is obtained. The content of the investigators’ requests have been a cause of concern to the OPI in terms of the level of detail the investigator has provided to the designated officer regarding the allegation against him or her.

This process provides designated officers who are under investigation with a framework to structure their statement and an opportunity to counter the allegations being made rather than providing a free and unprompted account. This approach deprives the investigation of the opportunity of probing the designated officer’s account.

This in itself is a form of bias because it is a different approach taken to investigating members of the public. It is unlikely that public officers in similar disciplinary proceedings are afforded the same level of details regarding the allegations they face.

SA Police has listened to the OPI’s observations and is ensuring that the different approach taken by investigators to designated officers is monitored.

41: Oxford University Press, *English Oxford Living Dictionaries* (26 April 2019), see <https://en.oxforddictionaries.com/definition/bias>.

The OPI and ICAC also raised issues with SA Police in regard to the manner in which investigations have been undertaken by IIS in relation to senior officers within SA Police. As a consequence SA Police have formulated a protocol that is now utilised in all matters where the complaint or report relates to an officer of the rank of Inspector or above. This is a positive approach that should avoid similar issues resurfacing.

There appears to be a difference in the standard of investigation undertaken by IIS in comparison to matters dealt with at the LSA level which I will address below. SA Police appear to have formed the same conclusion because IIS is now retaining more conduct investigations and referring less to LSAs.

This is also a positive step by seeking to ensure that an investigation into the conduct of designated officers is of a high quality. However, IIS will need to be conscious of the increased workload placed upon its investigators and ensure this does not result in delay or compromise the quality of the investigative work.

Local Service Areas (LSAs)

The PCDA provides that a police officer not serving in IIS can assist IIS in conducting investigations or conduct investigations on behalf of IIS.⁴²

The OPI has concerns regarding the quality and timeliness of matters sent to LSAs. There is a recognisable difference in the standard between those investigations to those matters investigated by IIS.

The OPI has raised this issue with SA Police throughout the first year of operations. It is appreciated that LSA officers who are allocated such investigations must continue to undertake their daily duties in conjunction with the assigned investigation which might account for delays in concluding the matter.

The OPI has experienced difficulties in attempting to have 'live' oversight where the investigations are being carried out by LSAs. The investigating officers, in compliance with the Regulations, should provide fortnightly progress reports to IIS but compliance is rare. This creates a substantial administrative burden to both the OPI and IIS in following up LSA investigators.

Consequently, updates on LSA investigations are often drip fed into the CMS after repeated follow up. In the alternative, having received no updates a large upload of material is provided at one time which does not provide for efficient or effective oversight by the OPI.

42: *Police Complaints and Discipline Act 2016* (SA) s 21(14).

Some LSA investigations have been lacklustre, limited in their scope or lacked challenge. On occasion the complaint or report has not been investigated at all because the LSA investigator appointed determines to deal with the matter by way of Management Resolution or take no action. IIS have been active in their follow up of such matters when identified by the OPI.

In a number of matters IIS have agreed with the OPI that the original LSA investigating officer should be subjected to Management Resolution because of that investigating officer's failed investigative efforts.

The above comments are not applicable to all LSA investigations. Some officers have undertaken investigations with the diligence and commitment that would be expected.

SA Police's Anti-Corruption Branch (ACB) also undertakes a number of conduct investigations for IIS where the matters that have been assessed as misconduct but are of a serious nature or have potential to raise an issue of corruption.

Obtaining progress reports has been difficult on occasion because ACB does not have access to the CMS. There has been discussion between OPI and IIS about ACB's reporting. More recently progress has been achieved in that regard and ACB appreciates that they are required to provide progress reports in regard to such investigations in the same way as LSAs.

Both the ICAC and OPI continue to liaise with ACB on a regular basis in regard to matters being investigated under the PCDA and ICAC Act.

In any investigation the OPI is able, following consultation with the officer in charge of IIS, to issue a direction under section 27 of the PCDA. The section gives examples of the type of direction the OPI may provide.

However, at the conclusion of an investigation the OPI does not have the power to direct SA Police in relation to the proposed course of action that should be taken against the police officer. I am not making a recommendation that the OPI should necessarily have that power. There have been circumstances where the OPI and IIS have disagreed on the course of action to be taken. A decision may be needed to address the directions that the OPI can provide under section 27 of the PCDA.

In recommending the amendment of section 14 of the PCDA I provided my views regarding the provisions of section 21 of the PCDA. I suggest that section 21 should be amended if section 14(1) is amended as I have suggested.

I recommend that section 21(1) be amended:

- (1) *Subject to this Act, each complaint or report assessed under section 14 as raising a potential issue of misconduct or maladministration and recommended to be investigated under Part 4 of this Act must be investigated by IIS.*

I suggest that section 21(2) should be repealed.

Section 21(2) is in similar form to section 14(2) and indeed section 15. It is not clear why some of the paragraphs in section 21(2) have been included and in particular paragraphs (c) to (f).

IIS will have addressed the issues in paragraphs (c) to (f) at the time of the section 14(1) assessment.

If the intention of the subsection is to allow an investigator including IIS investigations to determine in the course of the investigation to bring it to a conclusion that could be more clearly expressed. Otherwise the paragraphs are unnecessarily repetitive.

I also recommend that section 21 be amended to provide a power for the officer in charge of IIS to determine following consultation with the OPI that an investigation be conducted or brought to an end. Such a determination should also allow that officer to determine that the matter be dealt with under Part 3 of the PCDA or in a decision that no further action is required.

This determination would not require a second assessment to be undertaken but would be based upon the investigation itself and the evidence obtained. It is commonly seen during investigations that the allegations made cannot be substantiated.

In such circumstances I would propose that the officer in charge of IIS advises the OPI of his or her intention to discontinue the investigation and considers any submissions provided by the OPI prior to his or her final determination.

RECOMMENDATION 10

Section 21(1) be amended:

Subject to this Act, each complaint or report assessed under section 14 as raising a potential issue of misconduct or maladministration and recommended to be investigated under Part 4 of this Act must be investigated by IIS.

RECOMMENDATION 11

Section 21(2) be repealed.

RECOMMENDATION 12

A subsection be enacted to enable the officer in charge of IIS to determine following consultation with the OPI to discontinue an investigation and to deal with the matter under Part 3 of the Act or take no further action.

Prosecution of designated officers

IIS and OPI/ICAC have disagreed in some matters as to whether a police officer should be charged with criminal offences rather than proceeding with disciplinary action.

SA Police seems to be influenced by reference to past unsuccessful prosecutions against police officers and consequently seem very reluctant to consider commencing criminal proceedings against a designated officer.

That is not a criticism. It is appropriate to have regard to previous experience in relation to prosecutions of designated officers.

It is accepted that reasonable minds will come to different views. However, the OPI and ICAC have reached different views as to whether the conduct of certain designated officers passed the criminal threshold and should have been dealt with in the courts. The PCDA makes no provision for the resolution of such differences.

The Director OPI and the Deputy Commissioner corresponded with SA Police and the CoP in relation to a number of matters. In regard to one matter, whilst disciplinary proceedings have been commenced, a further SA Police review has resulted in the matter being referred to the Director of Public Prosecutions (DPP) for consideration.

In another matter despite representations from the Director OPI, SA Police has determined not to proceed with criminal allegations or refer the matter to the DPP for such advice. The matter remains in the disciplinary jurisdiction. Interestingly the notice of likely punishment shows that termination of employment is not a considered sanction.

The PCDA needs to provide for circumstances where there is dispute between the OPI and SA Police as to whether a designated officer should be charged with a criminal offence.

I would have thought that the best person to resolve that issue would be the DPP.

RECOMMENDATION 13

The PCDA Act be amended that if there is dispute between the OPI and SA Police regarding a decision as to whether a matter involving the conduct of a designated officer should be referred to the DPP, the matter will be referred.

Police Disciplinary Tribunal (PDT)

The intent of the PCDA was to make proceedings before the PDT less formal. That is demonstrated by Part 4 and Part 7 of the PCDA. Part 4 speaks of a notice of allegation not a charge. The police officer is called upon to admit or deny the allegation rather than plead guilty or not guilty.

An OPI staff member is permitted to be present during any proceeding of the PDT. Section 35(6) provides that the OPI staff member must be nominated by the ICAC whilst section 35(7) provides that the person may be nominated by the OPI or ICAC.

There is no reason why the subsections should be inconsistent.

The person mentioned in section 35(6) should be able to be nominated by either the OPI or ICAC which would make section 35(6) consistent with section 35(7).

.....

·


· **RECOMMENDATION 14**

· Section 35(6) of the PCDA be amended to allow the OPI staff member who is

· permitted to be present may be nominated by the OPI or ICAC.

·

.....



**THE INTERACTION
OF THE ICAC ACT
AND THE PCDA**

The interaction of the ICAC Act and the PCDA

Corruption

The PCDA assumes that the ICAC will have the same powers in relation to designated officers as ICAC has in relation to other public officers when a matter raises a potential issue of corruption.

This is supported by the referral and assessment processes the PCDA provides. The OPI, on receipt of a complaint or report, is not required to refer the matter to IIS if it intends to refer the matter to the ICAC under section 29 of the PCDA.

The section 14 assessment process requires IIS to identify matters that raise a potential issue of corruption that could be the subject of prosecution and if so, under section 14(4) of the PCDA IIS must notify the OPI when such an assessment has been made.

The OPI has the power to reassess and substitute its assessment for the IIS assessment. This includes reassessing and substituting the IIS assessment if the OPI determines the matter raises a potential issue of corruption.

The OPI having been notified by IIS or having reassessed the matter will consider if it is satisfied that the matter is one that should be referred to the ICAC.⁴³

If the ICAC determines that a matter raises a potential issue of corruption that should be investigated by the ICAC the matter will be dealt with in accordance with Division 2 of Part 4 of the ICAC Act which provides for ICAC's powers of investigation into corruption.

The ICAC can choose to investigate the matter himself or herself, conduct a joint investigation with SA Police or refer the matter to SA Police or another law enforcement agency.

Discussions have taken place with SA Police regarding corruption investigations referred to them under section 24(1)(b) of the ICAC Act. In any corruption investigation of a police officer there is the potential for issues of misconduct or maladministration to arise.

It is understandable and appropriate that SA Police wish to undertake an investigation into issues which raise potentially criminal and discipline issues simultaneously.

43: *Police Complaints and Discipline Act 2016 (SA) s 29.*

In order to undertake such an investigation in a conduct matter the investigating SA Police officer utilises the powers under the PCDA, principally section 21 of the PCDA.

That section enables the investigating member to direct the designated officer to furnish information, produce property, a document or other record, or answer a question that is relevant to the investigation.⁴⁴

An issue arises as to whether a referral by the ICAC under section 24(1)(b) of the ICAC Act to SA Police to investigate corruption engages the provisions of the PCDA and allows SA Police to investigate associated conduct matters in accordance with section 21 of the PCDA.

It is a question of jurisdiction and power that must be carefully addressed.

If a complaint or report is made about a designated officer it must be addressed in the first instance under the PCDA. The PCDA recognises that some matters will need to be referred to the ICAC to be addressed under the ICAC Act. Once a matter has been referred to the ICAC the complaint or report will be taken to be a complaint or report under the ICAC Act.⁴⁵

If the ICAC then refers the investigation to SA Police under section 24(1)(b) of the ICAC Act the matter will be investigated as a referral under the ICAC Act and SA Police would not have the powers given to the IIS under the PCDA.

It is an odd result.

In practical terms it can be addressed where the ICAC does not intend to investigate the criminal conduct himself or herself by not accepting the OPI referral. However, it would be better if the PCDA were amended to ensure consistency of investigation between ICAC and SA Police.

One way of addressing this issue would be to provide in the PCDA that if the ICAC has referred a matter that raises a potential issue of corruption on the part of a designated officer the officer or officers appointed by the CoP to investigate that conduct would have all the powers of the IIS in Part 4 of the PCDA.

.....

RECOMMENDATION 15

The PCDA be amended to include a provision that if the ICAC has referred a matter that raises a potential issue of corruption on the part of a designated officer the officer or officers appointed by the CoP to investigate that conduct would have all the powers of the IIS in Part 4 of the PCDA.

.....

44: *Police Complaints and Discipline Act 2016* (SA) s 21(5).
45: *Ibid* s 20(2).

Misconduct or maladministration

If a complaint or report raises potential issues of misconduct or maladministration and not corruption on behalf of a designated officer the OPI may also refer the matter to the ICAC if satisfied it is appropriate to do so.⁴⁶

The ICAC could but would not be bound to deal with the matter in accordance with the ICAC's powers under the ICAC Act.⁴⁷

Section 30 of the PCDA provides alternative powers to those in the ICAC Act that the ICAC may use at the ICAC's discretion.

The first thing to notice is that section 30 could not be an appropriate source of power for a corruption investigation. The ICAC would not have any of the coercive powers that are available under the ICAC Act except those given by section 21 of the PCDA. Section 30 is likely therefore to only apply to matters that have been referred to the ICAC that raise a potential issue of misconduct or maladministration.

There is a point of contention regarding matters referred to the ICAC by the OPI under section 29 and the application of section 30 of the PCDA.

It has been suggested that only a complaint or report assessed as raising a potential issue of corruption and referred under section 29 of the PCDA enables the ICAC to use the ICAC Act.

In the alternative it has been suggested that if the complaint or report is not assessed as corruption, but as misconduct or maladministration, it cannot be investigated under the ICAC Act at all but must be investigated pursuant to section 30 of the PCDA.

It is my view that the ICAC is not restricted to the use of section 30 of the PCDA in investigating a complaint or report raising a potential issue of misconduct or maladministration but can use the powers given to the ICAC in the ICAC Act.

Section 30 is facultative and permits the ICAC, in the ICAC's unfettered discretion to investigate the matter under section 30. Section 30 does not purport to prevent the ICAC investigating any matter referred to the ICAC under section 29 of the PCDA using any other powers available to the ICAC under other legislation. Section 29(1) of the PCDA expressly contemplates the ICAC dealing with a matter under the ICAC Act.

46: *Police Complaints and Discipline Act 2016* (SA) s 29.

47: *Independent Commissioner Against Corruption Act 2012* (SA) s 24(2).

If a matter raises a potential issue of misconduct on the part of a designated officer and is referred to the ICAC he or she could deal with the matter under section 24(2)(a)(c) or (d) of the ICAC Act or investigate the matter using the powers given by section 30 of the PCDA, but only if satisfied 'that it is appropriate to do so'. That decision will depend on what the ICAC decides is appropriate in the circumstances of the particular matter.

It may be better to avoid doubt to state expressly what I think is implied in section 29 and section 30 of the PCDA.

RECOMMENDATION 16

Section 30 of the PCDA be amended to expressly provide that the ICAC can utilise powers under the ICAC Act to investigate misconduct and/or maladministration.

It is a rare occurrence, but it has occurred where the ICAC having received a complaint under section 29 has determined to refer the matter to the Commissioner of Police under section 24(2)(d) of the ICAC Act.

The same issue in regard to corruption referrals to SA Police has been raised. A referral by the ICAC to SA Police under the ICAC Act for investigation as to whether a designated officer has engaged in criminal conduct does not automatically enliven the PCDA. It has been argued that if a complaint or report is referred under the PCDA by the OPI to the ICAC, who has then exercised powers under the ICAC Act, then the PCDA are not engaged. If that is the case SA Police may not be able to exercise powers under the PCDA to conduct a misconduct investigation in conjunction with a corruption investigation that has been referred to SA Police under the ICAC Act.

In relation to issues of maladministration the *Independent Commissioner Against Corruption (Investigation Powers) Amendment Bill 2018* is presently before Parliament. If passed, the issues I raise below will be resolved but until such time investigations under maladministration should be carried out under the ICAC Act.

In my view, the provisions of the ICAC Act must be relied upon because the PCDA does not provide any procedure or any powers of investigation for ICAC or indeed any other authority, including IIS or the CoP, to investigate maladministration.

If the matter raises a potential issue of maladministration then it must be dealt with by referring the matter to the Ombudsman (s 24(2)(a)); or by referring the matter to the CoP with or without directions or guidance (s 24(2)(d)); or if it is deemed serious or systemic by ICAC, exercising the Ombudsman's powers if satisfied that it is in the public interest to do so.⁴⁸

The ICAC is bound by any statutory provisions governing the exercise of those powers.

It has been argued that because of the provisions of section 5(2) of the *Ombudsman Act 1972* (the Ombudsman Act) the ICAC cannot exercise the powers of the Ombudsman under section 36A of the ICAC Act because the Ombudsman could never investigate a complaint or report about a designated officer under the PCDA.

I disagree with that argument but I feel I should explain why and why I think the PCDA should be amended.

Section 5(2) of the Ombudsman Act:

- (2) *This Act does not apply to or in relation to—*
- (a) *any complaint to which the Police (Complaints and Disciplinary Proceedings) Act 1985 applies; or*
 - (b) *any matter to which that Act would apply if the matter were the subject of a complaint under that Act.*

Section 5(2) of the Ombudsman Act is not a statutory provision that governs the exercise of the Ombudsman's powers. It restricts the Ombudsman's jurisdiction to investigate some administrative acts by exempting a complaint made under the legislation repealed by the PCDA from the operation of the PCDA even if that complaint also relates to an administrative act.

Although it does not say so, because the provision relating to the predecessor to the PCDA was overlooked when the PCDA was enacted, I think the intent is that section 5(2) of the Ombudsman Act applies to both a complaint and report made under the PCDA.

Section 5(2) of the Ombudsman Act should be amended to refer to the PCDA.

48: *Police Complaints and Discipline Act 2016* (SA) s 24(2)(b).

Section 5(2) of the Ombudsman Act addresses jurisdiction. It excludes the jurisdiction to which it relates but that does not mean that the ICAC cannot invest the Ombudsman with the excluded jurisdiction by a referral under section 24 of the ICAC Act.

Section 24 of the ICAC Act invests the ICAC with the power to confer a jurisdiction upon the Ombudsman when the Ombudsman would otherwise not have jurisdiction. The Ombudsman has no jurisdiction to investigate maladministration. He only has jurisdiction to investigate administrative acts. If the argument were right that the ICAC could not confer any jurisdiction on the Ombudsman except the jurisdiction he already has that is plainly wrong.

If it were otherwise, maladministration could not be investigated under the PCDA or the ICAC Act.

An argument that ICAC is unable to exercise the powers of the Ombudsman because of the provisions in section 5(2) should be rejected because it confuses jurisdiction and power.

Section 24 of the ICAC Act gives the ICAC jurisdiction to investigate serious or systemic misconduct or maladministration. The powers of investigation are given in section 36A(2) of the ICAC Act.

The fact that the Ombudsman cannot investigate misconduct or maladministration, if that is the effect of section 5(2), does not mean that the ICAC cannot exercise the powers of the Ombudsman to carry out those investigations.

The ICAC's power to carry out an investigation is not dependent in any way upon the Ombudsman having jurisdiction to carry out such investigations. The Ombudsman does not have jurisdiction to investigate misconduct or maladministration under the Ombudsman Act unless and until the ICAC invests it with that jurisdiction pursuant to section 24(2) of the ICAC Act.

That does not prevent the ICAC from exercising the powers of the Ombudsman under section 24(2)(b) or (c). If the effect of section 5(2) of the Ombudsman Act was as the argument claims, ICAC could never exercise the Ombudsman's powers in relation to the conduct of any public authority or public officer.

The ICAC’s jurisdiction to investigate misconduct or maladministration arises out of section 24(2)(b) or (c) of the ICAC Act.

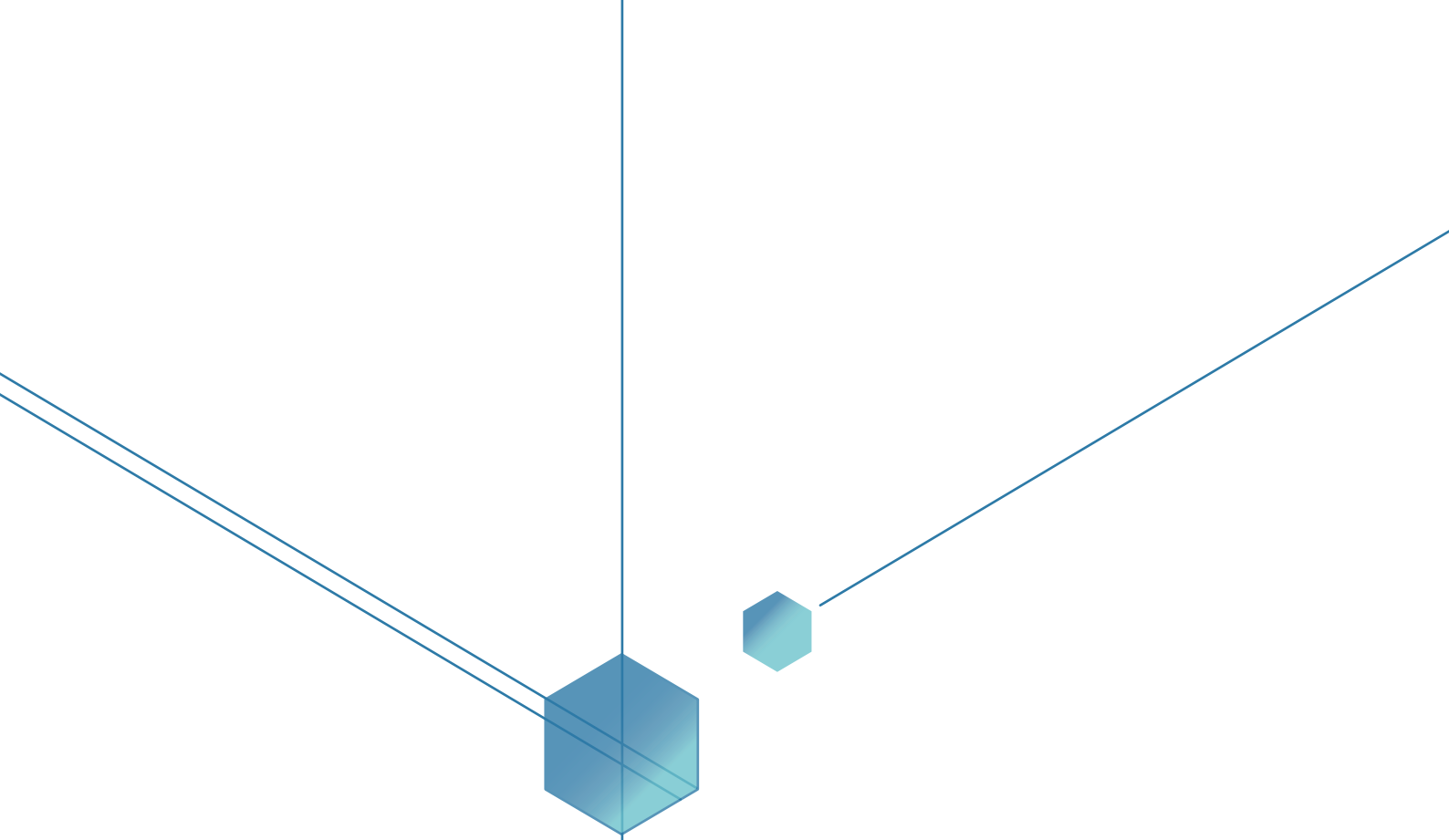
Once that jurisdiction has arisen the ICAC exercises the powers of the Ombudsman but is not invested with the Ombudsman’s jurisdiction.

RECOMMENDATION 17

Amend section 5(2) of the Ombudsman Act to refer to the PCDA.

RECOMMENDATION 18

Amend the PCDA to make clear the ICAC may use powers under the Ombudsman Act for the purposes of exercising powers in relation to matters of misconduct and maladministration relating to a police complaint or report.



RECOMMENDATIONS

Recommendations

RECOMMENDATION 1

The PCDA be amended to permit the OPI to identify a matter on its own initiative for assessment by IIS or referral under section 29 to the ICAC.

RECOMMENDATION 2

Section 13(2) timeframe be amended to allow for 3 business days.

RECOMMENDATION 3

Section 14 be amended to read:

- (1) *Each complaint or report received by or referred to the IIS under this Act must be assessed as to whether –*
 - (a) *it raises a potential issue of corruption in public administration that could be the subject of prosecution; or*
 - (b) *it raises a potential issue of misconduct or maladministration in public administration; or*
 - (c) *it raises some other issue that should in the opinion of the officer in charge of the IIS, be referred to the OPI; or*
 - (d) *in the opinion of the officer in charge of IIS it is trivial, vexatious, frivolous or not made in good faith, it has been dealt with before and there is no reason to re-examine it or having regards to all the circumstances of the case an investigation of the complaint or report is unnecessary or unjustifiable and no action should be taken in regard to it*

and a determination made as to whether or not action should be taken under Part 3 or Part 4 of this Act.
- (2) *Subject to this Act, an assessment under this section may be conducted in such a manner as the officer in charge of IIS thinks fit.*
- (3) *If a particular complaint or report is assessed as being a complaint or report referred to in subsection (1) (a) or (c), the officer in charge of the IIS must in a manner and form determined by the OPI, notify the OPI of that fact.*

RECOMMENDATION 4

Consideration be given as to whether section 15 should be repealed. If not section 15 (d) be amended to refer to both complaints and reports.

RECOMMENDATION 5

Amend the definition of misconduct in the PCDA to make it clear that misconduct for the PCDA includes conduct other than while the designated officer is acting in his or her capacity as a public officer as prescribed in the ICAC Act.

RECOMMENDATION 6

Section 28 be amended to provide that the OPI may reassess and/or substitute its view of the recommended action determined by IIS.

RECOMMENDATION 7

Section 17 be amended to resolve any ambiguity that the CoP retains a discretion to make a determination under section 16 in the face of regulations that specify the kind of complaints and reports and conduct that should or should not be the subject of a determination under section 16.

RECOMMENDATION 8

Amend section 17(1)(b) to refer to both complaints and reports. The same amendment should be made to section 18(3).

RECOMMENDATION 9

Section 18 be amended to provide that if during the Management Resolution process information suggests that the assessment of the seriousness of the matter should be reconsidered such that it would no longer be appropriate to deal with the matter under Part 3 IIS must be advised immediately; the Management Resolution process should cease; and if a reassessment determines the matter should be investigated, an investigation commenced.

RECOMMENDATION 10

Section 21(1) be amended:

Subject to this Act, each complaint or report assessed under section 14 as raising a potential issue of misconduct or maladministration and recommended to be investigated under Part 4 of this Act must be investigated by IIS.

RECOMMENDATION 11

Section 21(2) be repealed.

RECOMMENDATION 12

A subsection be enacted to enable the officer in charge of IIS to determine following consultation with the OPI to discontinue an investigation and to deal with the matter under Part 3 of the Act or take no further action.

RECOMMENDATION 13

The PCDA Act be amended that if there is dispute between the OPI and SA Police regarding a decision as to whether a matter involving the conduct of a designated officer should be referred to the DPP, the matter will be referred.

RECOMMENDATION 14

Section 35(6) of the PCDA be amended to allow the OPI staff member who is permitted to be present may be nominated by the OPI or ICAC.

RECOMMENDATION 15

The PCDA be amended to include a provision that if the ICAC has referred a matter that raises a potential issue of corruption on the part of a designated officer the officer or officers appointed by the CoP to investigate that conduct would have all the powers of the IIS in Part 4 of the PCDA.

RECOMMENDATION 16

Section 30 of the PCDA be amended to expressly provide that the ICAC can utilise powers under the ICAC Act to investigate misconduct and/or maladministration.

RECOMMENDATION 17

Amend section 5(2) of the Ombudsman Act to refer to the PCDA.

RECOMMENDATION 18

Amend the PCDA to make clear the ICAC may use powers under the Ombudsman Act for the purposes of exercising powers in relation to matters of misconduct and maladministration relating to a police complaint or report.

Level 1, 55 Currie Street
Adelaide SA 5000
(08) 8463 5173
GPO Box 11066
Adelaide SA 5001
icac.sa.gov.au



