Report on the operation of the *Police Complaints and Discipline Act 2016* (SA)

17 April 2020

By Gordon Barrett QC

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Letter of Transmittal

17 April 2020

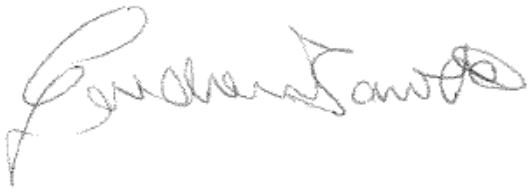
The Hon Vickie Chapman MP
Deputy Premier
Attorney-General
GPO Box 464
ADELAIDE SA 5001

Dear Deputy Premier

By letter dated 4 November 2019 you appointed me to undertake the review contemplated by section 48 of the *Police Complaints and Discipline Act 2016* (SA).

I have concluded the review of the *Police Complaints and Discipline Act 2016* (SA). Please find enclosed a copy of my final report and recommendations.

Yours sincerely



Gordon Barrett QC

List of Abbreviations

ACLEI	Australian Commission for Law Enforcement Integrity
ADP	Abbreviated Disciplinary Proceeding
AFP	Australian Federal Police
ALRM	Aboriginal Legal Rights Movement
CC Act	Crime and Corruption Act 2001 (Qld)
CCC	Crime and Corruption Commission
CMS	Complaint Management System
CoP	Commissioner of Police
CVR	Commissioner for Victims' Rights
DPP	Director of Public Prosecutions
IBAC	Independent Broad-based Anti-corruption Commission
IBAC Act	Independent Broad-based Anti-corruption Commission Act 2011 (Vic)
ICAC	Independent Commissioner Against Corruption
IIS	The Internal Investigation Section
JAMC	Joint Assessment and Moderation Committee
LECC	Law Enforcement Conduct Commission
LECC Act	Law Enforcement Conduct Commission Act 2016 (NSW)
LSC	Legal Services Commission
MOU	Memorandum of Understanding
MR	Management Resolution
OIC	Officer in Charge
OPI	The Office for Public Integrity
Parliamentary Committee	Crime and Public Integrity Policy Committee of the Parliament of South Australia
PASA	Police Association of South Australia
PCD Act	Police Complaints and Discipline Act 2016 (SA)
PCS	Professional Conduct Section
PDT	Police Disciplinary Tribunal
PO	Police Ombudsman
PSA Act	Police Service Administration Act 1990 (Qld)
QPS	Queensland Police Service
Regulations	Police Complaints and Discipline Regulations (2017) (SA)
Repealed Act	Police (Complaints and Disciplinary Proceedings) Act 1985 (SA)
SAET	South Austrlian Employment Tribunal
SAPOL	South Australia Police
TIC	Tasmanian Integrity Commission
Victorian Parliamentary Committee	Independent Broad-based Anti-corruption Committee of the Parliament of Victoria
VP Act	Victoria Police Act 2013 (Vic)

Introduction

The *Police Complaints and Discipline Act 2016* (SA) (PCD Act) received Vice Regal assent on 8 December 2016 and commenced operation on 19 April 2017 (*South Australian Government Gazette* 19 April 2017, page 1101).

Section 48 of the PCD Act requires the Minister, the Attorney-General, to cause a review of the operation of the Act to be conducted and a report to be submitted to her before the third anniversary of the commencement of the Act.

I was appointed on 4 November 2019 to undertake that review.

Background

Repealed Act

The PCD Act 2016 repealed the *Police (Complaints and Disciplinary Proceedings) Act 1985* (the repealed Act). Pursuant to section 16 of the repealed Act, complaints about South Australia Police (SAPOL) conduct could be made to the Police Ombudsman (PO). Complaints to SAPOL were investigated by the Internal Investigation Section (IIS) of SAPOL which was established under part 3 of the Act. The PO was established under part 2 of the Act. For the most part investigations into complaints of police misconduct were carried out by IIS albeit that IIS was required in a number of ways to liaise with the PO (section 25).

The PO had powers to oversee investigations by IIS (section 26). The PO had the power to require IIS to provide information about the progress of an investigation (section 26(1)(i)). The PO could require IIS to produce materials and to interview persons in relation to the investigation. The PO could give IIS directions about the conduct of an investigation (subsections (3)–(7)).

At the conclusion of an investigation by IIS, IIS was required to provide to the PO (via the Commissioner of Police (CoP)) a report on the investigation (section 31).

The PO had power to investigate certain complaints about police conduct whether they were complaints made directly to his or her office or complaints made to the police. Complaints to the police were required to be notified to the PO. The PO was empowered to undertake what was described as a "preliminary inquiry" (section 19(1a)). The PO could itself investigate what might be regarded as less serious complaints e.g. complaints which the PO for a number of reasons did not consider warranted an investigation (section 21(1)) complaints which could be resolved informally (section 21A) or complaints which might be resolved by conciliation (section 22).

The PO also had the power to initiate an investigation of his or her own. Section 22A permitted such investigations where the complaint raised matters of public interest or comment. Section 23 gave the PO a wider discretion to investigate complaints.

Where the PO undertook an investigation which required the use of persons with police training section 28(2) provided that he or she could engage the services of a police officer made available by the CoP (placitum (a)) or an officer from the police forces of the Commonwealth or another state or territory under arrangements made by or with the approval of the Police Minister (placitum (b)).

After the conclusion of an investigation by IIS of a complaint the CoP was required to forward a report to the PO (section 31). The PO would then assess the report and make recommendations to the commissioner about what action should be taken (section 32).

Upon completion of an investigation of a complaint by the PO, the PO was required to forward a report to the CoP, including recommendations as to actions to be taken in relation to the Police Officer complained about. If the CoP did not agree with the recommendations the matter was to be referred to the Minister (section 34).

If it was determined that charges should be laid against a police officer for breach of discipline the CoP would lay a charge. If the police officer did not admit the charge the matter would be determined by the Police Disciplinary Tribunal (PDT) (section 39). The PDT is constituted by a magistrate (section 37). If the PDT found the charge proved the PDT remitted the matter to the CoP for punishment (section 39(4)). The PDT could indicate its assessment of the seriousness of the breach to which the CoP was required to have due regard (section 39(5)).

Independent Commissioner Against Corruption Act 2012 (SA)

In 2012 Parliament passed the *Independent Commissioner Against Corruption Act 2012* (SA) (the ICAC Act). The ICAC Act commenced on 20 December 2012. The office of Independent Commissioner Against Corruption (ICAC) commenced operation on 2 September 2013. The ICAC Act provided a further avenue of complaints about the conduct of police officers. The Office for Public Integrity (OPI) was created by the ICAC Act. Its functions are set out in section 17 of the Act. While complaints about the conduct of police officers are not specifically referred to, the words of the section are clearly sufficient to include such complaints.

OPI is responsible to the ICAC (section 18).

The powers of OPI did not include the power to determine what action should be taken in relation to a complaint. There was only power to make recommendation to the ICAC as to how complaints should be dealt with. That was so unless the impugned conduct raised a potential issue of corruption in public administration which could be the subject of a criminal prosecution. In that case OPI could refer the matter to SAPOL (section 24(1)(b)).

Review of Legislative Schemes

On 30 October 2014 the then Attorney-General, the Honourable John Rau MP, requested the ICAC to undertake a review of the legislative schemes governing, amongst other things, complaints regarding the conduct of members of SAPOL.

On 30 June 2015 the ICAC published a review of legislative schemes which included 29 recommendations.

In the course of conducting his review the ICAC had regard to the disciplinary regimes operating in the Commonwealth of Australia, all Australian states and New Zealand. He set out in his report a summary of the regimes in those jurisdictions. He received submissions from numerous organisations within the state and from members of the public. He held public hearings.

I will focus on recommendations relating to complaints about, and reports of, alleged misconduct by police officers. “Complaints” are communications from members of the public. “Reports” are communications from police officers and other public officials who have a duty to report alleged misconduct of police officers.

At the risk of oversimplifying the ICAC’s findings in relation to the complaints about police, I summarise them as follows:

1. The operation of the three agencies receiving complaints and reports i.e. SAPOL, PO and OPI was unduly complex resulting in unacceptable confusion and delay.
2. While for practical reasons complaints about police should for the most part continue to be investigated by SAPOL (IIS), the external oversight of these investigations should be enhanced. Instead of oversight occurring after an investigation was completed the oversight should take place during the investigation.
3. Whilst the police commissioner should continue to impose sanctions on police officers found to have breached discipline, the ICAC should annually audit these sanctions and report on that audit to both houses of parliament.
4. Further assistance should be given to complainants to make complaints and to keep complainants informed about the progress of their complaints.

The principal recommendations of the ICAC were as follows:

1. The *Police (Complaints and Disciplinary Proceedings) Act 1985* (SA), should be repealed and replaced by a new Act embodying the recommendations in the report
2. The office of the PO should be abolished. Complaints and reports of misconduct by police should be directed to either OPI or IIS.
3. OPI should have enhanced powers to monitor, supervise and audit investigations by IIS. In particular OPI should be given unfettered access to the electronic management system used by SAPOL in its investigations into complaints.
4. There should be no resort to the minister in the event of disagreement between SAPOL and OPI
5. The processes of the PDT should be more aligned to contested disciplinary hearings than to criminal hearings
6. OPI should be empowered to make recommendations to SAPOL concerning training, changes in policy and procedure, or other proactive interventions where it identifies trends arising from complaints and reports.

Police Complaints And Discipline Act 2016 (SA)

In response to the recommendations made in the report of the ICAC the Attorney-General introduced into the Parliament the Police Complaints and Discipline Bill. The second reading speech took place on 6 July 2016. In large part the Bill, and in due course the PCD Act, reflected the ICAC recommendations. The Bill was assented to on the 8 December 2016 and commenced operation on 19 April 2017.

12 Month Review of the Police Complaints And Discipline Act 2016 (SA)

On 8 May 2019 the ICAC forwarded to the Attorney-General, the Speaker of the House of Assembly and the president of the Legislative Council a report of his review of the first year of operations of the Act (September 2017–September 2018). He presented the review exercising his powers under section 42 of the ICAC Act. In his foreword to the review the ICAC expressly acknowledged that his review did not purport to relieve the Attorney-General of her responsibility to commission the report to be prepared before the third anniversary of the commencement of the Act as provided for in section 48 of the Act. The ICAC made 18 recommendations for amendments to the Act. The ICAC discussed a draft of his report with the CoP and his senior officers. SAPOL supported 17 of the 18 recommendations, and did not suggest any other reforms.

The ICAC provided a draft of the report to the Police Association of South Australia (PASA) inviting comment. PASA elected to present submissions to this review.

Conduct of Section 48 Review

In early December I convened a meeting attended by representatives of ICAC, SAPOL, PASA and The Advertiser to discuss the modus operandi of the review. It was agreed that the parties present would prepare written submissions by the end of January 2020. I would provide by 6 March 2020 a draft of my review for distribution to the parties and they would present supplementary submissions by 20 March 2020. A final report would be ready to be delivered to the Attorney-General by 17 April 2020.

In January I met separately with OPI and IIS to observe aspects of their operations. At OPI I observed live supervision of investigations. At IIS I observed the operations of an allocation meeting.

Later I met separately with ICAC/OPI, SAPOL/IIS and PASA in an attempt to clarify the written submissions which had been made by each party and to narrow the scope of supplementary submissions.

The abovementioned meetings were attended by:

- The Honourable Bruce Lander QC, ICAC;
- Mr Michael Riches, Deputy ICAC;
- Mr Fraser Stroud, Director, OPI;
- Ms Emily Lyons, Manager, Evaluations, currently Acting Director, OPI;
- Assistant Commissioner Philip Newitt, Assistant Commissioner in Charge of Governance and Capability, SAPOL;
- Chief Superintendent Graham Goodwin, Officer In Charge, Ethical and Professional Standards Branch, SAPOL;
- Chief Inspector Paul Isherwood, Officer In Charge, IIS, SAPOL;
- Ms Laura Bruce, Solicitor, Office of General Cousel, SAPOL;
- Mr Mark Carroll, President, PASA;
- Mr Morry Bailes, PASA's Solicitor, Tindall Gask Bentley;
- Mr Samuel Joyce, PASA's Solicitor, Tindall Gask Bentley.

In early January I wrote to the Director of the Aboriginal Legal Rights Movement (ALRM), the President of the Law Society, the Chair of the Council for Civil Liberties (CCL), the Director of the Legal Services Commission (LSC), and the Commissioner for Victims Rights (CVR) inviting each of them to make any submissions they may wish to make. I followed up these letters with telephone calls in the days after the letters were sent. In due course I received written submissions from the LSC and the CVR. The Law Society indicated it would not make a submission. I had been given to understand that the ALRM and CCL may have difficulties in making submissions within the proposed timeframe. I have not received submissions from the ALRM or CCL but I have had regard to submissions made by the ALRM to the ICAC review in 2015.

I had a face-to-face interview with the Honourable John Sulan QC, the Reviewer of ICAC appointed pursuant to Schedule 4 of the ICAC Act. I had telephone interviews with:

- The Honourable Reginald Blanch AM QC, Acting Chief Commissioner, Law Enforcement Conduct Commission, New South Wales;
- Ms Michelle O'Brien, Chief Executive Officer, Law Enforcement Conduct Commission, New South Wales;
- Mr Alan MacSporran QC, Chairperson, Crime and Corruption Commission, Queensland;
- Assistant Commissioner Sharon Cowden APM, Ethical Standards Command, Queensland Police Service;
- Acting Assistant Commissioner Glen Horton, Office of State Discipline, Queensland Police Service;

- Superintendent Dale Frieberg, President, Queensland Police Commissioned Officers Union of Employees;
- Deputy Commissioner Katie Miller, Independent Broad-based Anti-corruption Commission, Victoria;
- Mr Sean Le Grand, Disciplinary Hearing Officer, Victoria Police;
- Mr Simon Smart, Magistrate in Charge, Police Disciplinary Tribunal.

I express my gratitude to the organisations and individuals who have assisted me understand their operations, to those who have made submissions, and to those who have taken part in discussions during the review.

I acknowledge with thanks the assistance throughout the Review of Mr Charlie Hamra of the Attorney-General's Department, and the administrative support of Ms Millie Yardley and Ms Tammy Connelly.

Operation of the *Police Complaints And Discipline Act 2016 (SA)*

A complaint of alleged misconduct may be made directly to SAPOL, either any police officer or police public servant, or to OPI, pursuant to section 10 of the Act. The complaint may be made orally or in writing. If the complaint is made orally the person or body receiving the complaint must reduce it to writing within 48 hours. The complainant may be required to verify the complaint in writing.

A report, as distinct from a complaint, is the means by which a designated officer, described in the Act a member of SAPOL, a police cadet, or a special constable, may report alleged misconduct by a fellow officer who is also described in the Act as a designated officer. A report is made pursuant to section 12 of the Act. The same section imposes an obligation on any designated officer to report any reasonable suspicion that a fellow officer has engaged in conduct that constitutes corruption, misconduct or maladministration in public administration. That report must be made within 7 days after the officer has formed the suspicion. It is a breach of discipline for an officer to fail to make such a report. As with a complaint from a member of the public, a report may be made to either the police or OPI. Reports to the police must be made to IIS.

Section 13 governs the actions which must be taken by those receiving a complaint or report. Complaints and reports must be referred to IIS as soon as is reasonably practicable, but in any event within three days after the complaint or report is received. (The three day limit causes difficultly where complaints or reports are received on weekends. ICAC suggested that three "business days" be substituted for three days. That recommendation is not opposed by anyone who made submissions to ICAC or to me.)

OPI may refer a complaint or report to ICAC instead of IIS if, pursuant to section 29 of the Act, it is satisfied that the complaint or report should be dealt with by ICAC under the ICAC Act or the PCD Act.

Section 13(5) requires the Officer In Charge (OIC) of IIS to record on its complaint management system (CMS) information about the complaint or the report which is required by the *Police Complaints and Discipline Regulations 2017* (SA) (the Regulations) (see regulation 6, schedule 2). That recording must be made as soon as reasonably practicable after receiving a complaint or report but in any event within seven days. The CMS is the electronic system to which OPI has unfettered access so that it may carry out its supervisory functions (section 6).

Conduct of Police Officers

The Code of Conduct for police officers is governed by the PCD Act and the Regulations..

I reproduce section 7 of the act:

7—Code of conduct

(1) The Governor may, by regulation, establish a code of conduct for the maintenance of professional standards by designated officers.

(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.

Three of the eight specific examples may arguably refer to conduct whilst not on duty they are:

(e) Standards for personal behaviour or dress
(f) Relations with the public or particular groups or organisations
(h) Public comment

Placitum (i) provides that the Governor may prescribe any other matter which he or she considers relevant to the maintenance of professional standards.

Schedule 3 of the Regulations sets out the conduct identified as necessary for the maintenance of professional standards. I set out the 12 heads of conduct (clause 1 is an interpretation provision).

2—Honesty and integrity (whether in the course of employment or otherwise)
3—Conduct prejudicial to SA police (whether in the course of employment or otherwise)
4—Performance of orders and duties
5—Negligence
6—Proper exercise of authority
7—Conduct toward public, designated officers in the department (at any time in respect of nominated personnel)
8—Conflict of interest
9—Improperly obtaining benefit or advantage
10—Confidentiality of information
11—Responsibility for property
12—Improper complaint
13—Foreign law

Three clauses of that code, clauses 2, 3, and 7, expressly refer to conduct occurring other than in the course of employment.

The ICAC has observed that conduct proscribed in the Code of Conduct which relates to conduct outside employment may be *ultra vires*. I will discuss this question in the context of ICAC Recommendation 5.

Roles of the Internal Investigation Section and Office for Public Integrity

Section 5 requires the CoP to constitute IIS within SAPOL to investigate complaints and reports alleging misconduct. IIS may also carry out other investigations into the conduct of police officers as required by CoP. The OIC of IIS is entitled to report directly to CoP. Members of IIS may also be required to undertake other police duties so long as there is no undue interference with the officers duties to IIS.

The investigation or assessment of complaints or reports by IIS is governed by subsections (14) and (15).

Section 8 governs the functions of OPI. OPI has no statutory power to investigate complaints or reports of police misconduct. The functions of OPI under the PCD Act are:

(a) to oversee the assessment and investigation of complaints and reports relating to designated officers; and
(b) to oversee the operation and enforcement of this Act; and

(c) to refer certain complaints and reports to the ICAC in accordance with this Act and the *Independent Commissioner Against Corruption Act 2012*; and
(d) such other functions as may be assigned to the OPI under this Act.

The roles of OPI and IIS are completely different. OPI has the statutory duty of receiving complaints and reports and, with the exception of matters it considers should be referred to ICAC, referring those complaints and reports to IIS for investigation. The office of OPI is located within the office of ICAC.

IIS is a section of SAPOL located in police headquarters. IIS carries out the investigations into complaints and reports it receives from members of the public or designated officers, and those referred to it by OPI.

Section 27 empowers OPI to give directions to police officers investigating complaints or reports. The CoP must ensure that any direction under the section is complied with. In addition to its referral role, OPI has the statutory function of overseeing the assessment and investigation of complaints and reports conducted by IIS. OPI's oversight role includes the power to reassess any assessment by IIS and substitute its own assessment (section 28).

Assessment by the Internal Investigation Section

Section 14 governs the assessment of complaints and reports by IIS. With the exceptions set out in subsection (2), IIS must assess whether there is disclosed alleged corruption which could be the subject of prosecution, or misconduct or maladministration in public administration. IIS must also assess whether, in its opinion, there are disclosed matters which should be referred to OPI, in which case IIS must notify OPI. IIS must also notify OPI of complaints and reports where there is a potential issue of corruption.

Section 15 empowers the CoP to decline to Act further even if IIS has made an assessment pursuant to section 14(1) that the complaint or report raises potential issues of corruption, misconduct or maladministration. Replicating 4 of the 5 exceptions set out in section 14(2) which do not require IIS to make an assessment of a complaint or report, the CoP may decline to take further action if the complaint or report (a) has previously been dealt with, (b) is trivial, or (c) is frivolous, vexatious or not made in good faith. In the case of a complaint only, not a report, placitum (d) provides that that CoP may decline to act if he or she is of the opinion that an investigation of the complaint is unnecessary or unjustifiable. So far, placitum (d) reflects placitum (e) of section 14(2), one of the exceptions not calling for an assessment by IIS. However, placitum (d) of section 15 continues as follows "… (including, to avoid doubt, where the alleged conduct of the designated officer concerned is not sufficiently related to the exercise, performance, discharge (or purported exercise, performance or discharge) of his or her official powers, functions or duties)".

Management Resolution of Complaints or Reports

Once IIS has made an assessment of a complaint or report and, if necessary, conducted an investigation, the resolution of the matter is in the hands of the CoP. I have already referred to the power of the CoP in section 15 to decline to act on a complaint or report once it has been assessed by IIS.

Part 3 of the Act empowers the CoP to resolve less serious complaints or reports by Management Resolution (MR). Conduct not the subject of complaint or report may also be dealt with by MR. The determination to proceed to MR is made by the CoP (section 16(1)). The types of complaints, and the procedures for dealing with them, are the subject of regulations (section 17(1)).

Section 17(2) sets out the principles to which the CoP may have regard in proceeding by way of MR. These principles are two fold; (1) the purpose of MR is to avoid formal disciplinary proceedings by dealing with the matter "as a question of education, and improving the conduct of the designated officer concerned", and (2) MR should be "conducted as expeditiously as possible and without undue formality".

MR is an important procedure under the Act, not least because a large proportion of complaints and reports are resolved in this way.

While the CoP must submit to OPI each determination he or she makes to proceed by way of MR, and OPI must approve each determination (section 16(3)), OPI has no role in supervising the conduct of matters which proceed by way of MR.

MR is dealt with by resolution officers appointed by the CoP (section 18(1)).

Section 18(2) provides that the resolution officer must:

- inform the designated officer of the complaint report or allegation;
- give the designated officer an opportunity to respond;
- explain to the complainant that the matter is proceeding by MR;
- give the complainant the opportunity to provide further information.

The resolution officer may attempt to resolve the matter by conciliation if he or she is of the opinion that there would be a benefit in so proceeding and if the complainant agrees to that course. By way of sanction, the CoP may provide counselling to the designated officer, or issue a reprimand.

Pursuant to subsection 4(c) and (d), the CoP may, subject to conditions, place restrictions or conditions on the work being undertaken by the designated officer or the powers granted to him or her (placita (a) and (b)).

With exceptions, information contained in the course of MR is not to be used in relation to a "prescribed determination" relating to the designated officer (subsection 8). A prescribed determination is defined in subsection 11 as being a promotion or transfer of the officer (placitum (a)) or the awarding of a medal or other accolade to the officer (placitum (b)).

At the conclusion of an MR the matter must be reported to IIS and the designated officer concerned. The result must also be recorded on the CMS. OPI has access to the CMS.

Section 20 requires the CoP to monitor and review the MR process although, as ICAC noted, there is no requirement to report to anyone on that oversight.

Formal Proceedings for Breach of Discipline

Where it has been determined that action is to be taken on a complaint or report (section 15) and where the matter has not proceeded by way of MR (Part 3) the complaint or report must be investigated (Part 4, section 21(1)).

The investigation is carried out by IIS, or, subject to directions of CoP, by an officer or officers not serving in IIS (section 21(14)). In practice such directions have been given to officers not serving with IIS to investigate matters which have arisen in outer suburban or country areas, or where specialist areas of investigation are required.

In the course of investigation a member of IIS may direct a designated officer "to furnish information, product property, a document or other records, or answer a questions that is relevant to the investigation" (section 21(5)).

Subject to exceptions, failure to comply with the direction may result in the designated officer being dealt with for a breach of discipline (subsections 10 and 12).

Before giving a direction pursuant to subsection 5 the investigator must inform the designated officer of the nature of the alleged conduct (subsection 7). That information need not be given to the designated officer if the IIS member reasonably believes that to do so would prejudice the investigation (subsection 9).

Where the CoP decides to commence proceedings for a breach of discipline he or she presents a notice of allegation to the PDT (section 22(1)). The PDT is constituted by a magistrate (section 33). Before presenting a notice of allegation the CoP must advise OPI of his or her intention to do so (section 22(3)). The CoP must have regard to any submission made by OPI relating to that notice.

On commencing disciplinary proceeds the CoP must provide the designated officer with a notice indicating the punishment the CoP would be likely to impose if the breach of discipline were proved (subsection 4). That notice must not be provided to the tribunal (subsection 5). Where a designated officer is charged with a criminal offence, or is served with a notice of allegation, the CoP may suspend the officer's appointment (section 23(1)). The suspension will be without remuneration if the CoP reasonably believes that to continue remuneration would bring SAPOL into disrepute (subsection 3).

The PDT hears the matter where the designated officer does not admit the allegations. The PDT will find the allegation proved if it is satisfied on the balance of probabilities that the breach of discipline has been committed (section 25(2)). Upon making such a finding the PDT must notify IIS of the outcome and remit the matter to the CoP for the imposition of sanctions (subsection 2). When remitting the matter to the CoP the PDT may indicate to the CoP its assessment of the seriousness of the breach. The CoP must have regard to any such indication (subsection 3).

Section 26 governs the sanctions which CoP may impose on a designated officer who has been found guilty of a criminal office in the courts, or has admitted a breach of discipline, or has been found by the tribunal to have breached discipline.

The sanctions range from termination of appointment to education or training (placita (d) to (m)). CoP must inform IIS of the sanction. IIS must record the sanction on the CMS.

Office for Public Integrity Oversight of Complaints and Reports

Part 5 (sections 27–31) governs the oversight by OPI of police investigations of complaints or reports. The day to day oversight is carried out by officers of OPI monitoring the entries on the CMS made by IIS officers during their investigations. The Act and Regulations require IIS officers to record each step in their investigations.

Section 27 empowers OPI to give direction to police in the course of their investigation. The police are required to follow those directions (subsection 5).

Section 28 empowers OPI to reassess a complaint or report conducted by IIS. It may substitute its own assessment, but must consult IIS before doing so (subsection 3).

Section 29 empowers OPI to refer a complaint or report to ICAC if it is satisfied that the subject matter should be dealt with by ICAC. Section 30 empowers ICAC to conduct its own investigation into complaints and reports. ICAC may of its own initiative investigate any complaint or report.

ICAC must advise CoP of any investigation into a complaint or report it is undertaking unless ICAC believes that to do so might prejudice the investigation (subsection 3).

ICAC must report to the President of the Legislative Council and to the Speaker of the House of Assembly annually before 30 September of each year on the number and general nature of sanctions imposed under section 26, the section dealing with police officers who have committed an offence or have breached discipline.

Review of the Independent Commissioner Against Corruption and Office for Public Integrity

Pursuant to section 2 of Schedule 4 of the ICAC Act the Attorney-General has appointed a reviewer to conduct annual reviews of the operation of the ICAC and to conduct reviews of relevant complaints. The reviewer receives complaints from members of the public about the operations of the ICAC and OPI.

Other Australian Regimes

In his Review of Legislative Schemes in 2014/15 the ICAC summarised the police complaints and integrity schemes operating in the Commonwealth and all the States in Australia. The regimes in the Commonwealth, Western Australia and Tasmania remain substantially unchanged since that time. I will briefly refer to the ICAC's summary of those regimes.

The regimes in New South Wales and Queensland have been the subject of inquiries which reported after the ICAC's Review of Legislative Schemes. In those jurisdictions there has been legislative change responding to those enquiries. In Victoria there has been a wide-ranging inquiry and report conducted by the Independent Broad-based Anti-corruption Committee of the Victorian Parliament (the Victorian Parliamentary Committee), but legislative change is not expected until the conclusion of the Royal Commission into the Management of Police Informants. I will refer in a little more detail to those jurisdictions, seeking to compare particular aspects of those regimes with aspects of the South Australian regime which have been the subject of submissions to me. I deal first with the jurisdictions where there has been no substantial change since 2015.

Commonwealth

Complaints alleging misconduct by the Australian Federal Police (AFP) officers may be made to the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity (ACLEI) or directly to the AFP. If the complaint alleges corruption, the matter must be referred to ACLEI. ACLEI will supervise the investigation of allegations of corruption if it does not investigate the allegation itself.

Allegations of less serious conduct are dealt with either by an internal AFP unit set up for that purpose or managerially. There is no external oversight of these matters, although complainants may complain to the Ombudsman.

Western Australia

Complaints alleging police misconduct may be made to the Corruption and Crime Commission, the Ombudsman or to Western Australia Police. There is a mechanism within Western Australia Police which involves an informal process aimed at resolving matters before a formal complaint is lodged. The informal process is not the subject of legislation. If a complainant is not satisfied by the outcome of an informal process, or if an allegation is of a serious nature, the matter proceeds to a formal investigation. The formal investigation is an examination akin to a trial. This process is subject to the oversight of the CoP, who is obliged to report certain classes of allegation to the Crime and Corruption Commission.

Tasmania

Complaints alleging police misconduct may be made to the Tasmanian Ombudsman, the Tasmanian Integrity Commission (TIC) or Tasmania Police. The TIC is controlled by a board which includes the Ombudsman, the Auditor-General and the State Service Commissioner.

The CoP is responsible for the internal disciplinary process within Tasmania Police. The TIC has special oversight over police and investigates serious police misconduct or misconduct by a commissioned officer.

The TIC can assume responsibility for an investigation which has been commenced by a CoP.

I now turn to the jurisdictions where there have been legislated changes since 2015 or where change is recommended.

New South Wales

In May 2015 Mr Andrew Tink AM was commissioned to review police oversight in New South Wales. Mr Tink delivered his report on 31 August 2015, just two months after the ICAC delivered his review of the legislative schemes in South Australia.

Mr Tink made 50 recommendations which resulted in the establishment of a new, single, civilian police oversight commission, which came to be called the Law Enforcement Conduct Commission (LECC). The announcement of the new commission was made by the Minister for Police on 26 November 2015. The Law Enforcement Conduct Commission Bill 2016 was introduced into the Parliament of New South Wales on 13 September 2016. Parts of the *Law Enforcement Conduct Commission Act 2016* (NSW) (LECC Act) commenced operation on the date of assent, 14 November 2016. The LECC commenced operation on 1 July 2017.

The principal effects of the LECC Act were to place in the hands of the LECC primary responsibility for investigating serious misconduct by police. Two of the three agencies which formerly received complaints, namely the Police Integrity Commission and the Inspector of the Crime Commission were abolished. That part of the jurisdiction of the Ombudsman dealing with police complaints was transferred to the LECC. Responsibility for investigating less serious police complaints was vested in the police, with limited oversight by the LECC.

In practice most investigations are conducted by the Police. In its annual report for the year 2018-19 the LECC indicated that it assessed 2547 complaints of which it was only able to fully investigate 49, or about 2%. The LECC conducted preliminary enquiries into a further 85 complaints and preliminary investigations into a further 73. The LECC seeks the consent of complainants to matters being investigated by the Police. Only a small percentage of complainants decline to give consent.

To whom complaints may be made

Complaints may be made to the LECC pursuant to section 35 of the LECC Act, or to the CoP pursuant to section 124 of the *Police Act 1990* (NSW) (NSW Police Act). A complaint to the CoP may be made anonymously (section 126(1) of the NSW Police Act).

Manner of making complaints

Identical provisions in section 36 of the LECC Act and section 125 of the NSW Police Act require that complaints be made in writing subject to allowance being made for non-written complaints if the receiving agency considers it appropriate.

Scope of conduct which may be the subject of complaint

Conduct the subject of the complaints regime is divided into misconduct, serious misconduct and serious maladministration. The definitions of police misconduct, serious misconduct and maladministration in section 121 of the NSW Police Act expressly have the same definition as in the LECC Act (sections 9, 10, and 11).

Section 9(1) of the LECC Act provides that misconduct is caught by the Act whether or not it occurs while the police officer is officially on duty. Subsection (4) defines “misconduct” by way of example. It reads

(4) **Examples** Police misconduct, administrative employee misconduct or Crime Commission officer misconduct can involve (but is not limited to) any of the following conduct by a police officer, administrative employee or Crime Commission officer respectively—

(a) conduct of the officer or employee that constitutes a criminal offence,

(b) conduct of the officer or employee that constitutes corrupt conduct,

(c) conduct of the officer or employee that constitutes unlawful conduct (not being a criminal offence or corrupt conduct),

(d) conduct of the officer or employee that constitutes a disciplinary infringement.

Section 10 defines “serious misconduct” as follows;

(1) For the purposes of this Act, ***serious misconduct*** means any one of the following—

(a) conduct of a police officer, administrative employee or Crime Commission officer that could result in prosecution of the officer or employee for a serious offence or serious disciplinary action against the officer or employee for a disciplinary infringement,

(b) a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force or the Crime Commission,

(c) corrupt conduct of a police officer, administrative employee or Crime Commission officer.

(2) In this section—

serious disciplinary action against an officer or employee means terminating the employment, demoting or reducing the rank, classification or grade of the office or position held by the officer or employee or reducing the remuneration payable to the officer or employee.

serious offence means a serious indictable offence and includes an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be a serious indictable offence.

Section 11(2) defines “officer maladministration”, as distinct from “agency maladministration”, as follows;

(2) For the purposes of this Act, ***officer maladministration*** means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct)—

(a) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or

(b) arises, wholly or in part, from improper motives, or

(c) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or

(d) arises, wholly or in part, from a mistake of law or fact, or

(e) is conduct of a kind for which reasons should have (but have not) been given.

Section 11(3) defines “serious maladministration” in the case of an officer as follows;

(3) For the purposes of this Act, agency maladministration or officer maladministration is **serious maladministration**—

(a) in the case of an agency—if the conduct involved is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or
(b) in the case of an agency or officer—if the conduct involved is of a serious nature and, although it is not unlawful—
    (i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
    (ii) arises, wholly or in part, from improper motives.

Disposition of complaints

Complaints may be made to both the LECC and the CoP, but the agency which then carries out the assessment and investigation of the conduct is governed by guidelines promulgated under section 14 of the LECC Act. Section 14(1) provides that the LECC and the CoP (and the Crime Commission) may enter written agreements which subsection (2) says may be guidelines. The guidelines prescribe the kinds of misconduct which will, and will not, be investigated by each agency. The guidelines may also provide which investigations will, and will not, be the subject of oversight, and where there is to be oversight, what arrangements will be put in place for such oversight.

If no agreement is entered into under section 14(1), subsection (3) provides that the LECC's opinion about guidelines is to prevail.

Guidelines between the LECC and the CoP (and the LECC and the Crime Commission) have been promulgated.

Upon receipt of a complaint by Police, section 130 of the NSW Police Act requires the CoP to notify the LECC of the complaint, if the guidelines require such notification. The guidelines prescribe most kinds of misconduct as requiring notification.

Subject to the guidelines, the CoP may, pursuant to section 131, investigate the matter, refer it to the LECC, or take no further action.

Guideline 5 prescribes certain matters that need not be investigated by the LECC or police.

Section 43 of the LECC Act requires the LECC to notify the CoP of complaints it receives.

Section 44 provides that the LECC may investigate the matter, refer it to the CoP or another agency, or take no further action.

In addition to the guidelines, section 51 provides that the LECC will only investigate conduct which is potentially serious misconduct or serious maladministration. The LECC may investigate other kinds of misconduct which are less relevant to the broad comparative exercise presently undertaken.

Hearings

The LECC conducts examinations for the purpose of investigating serious misconduct or serious maladministration (section 61 of the LECC Act). Pursuant to section 70 of the LECC Act, the examining Commissioner is not bound by the rules or practice of evidence and must conduct the examination with as little formality and technicality as is possible.

Hearings before the LECC may be conducted in public or in private (section 63 of the LECC Act).

Confidentiality

For the most part the examinations conducted by the LECC are held in private. In the 2018-19 year 78 hearings were held in private. None was held in public in that period.

The LECC is required to publish an annual report which mandates disclosure of, among other things, the Commissions compliance with the Government Information (Public Access) Act 2009. The Act includes several provisions which relate to the public interest in the disclosure of information held by government agencies.

Sanctions

Sanctions for misconduct are imposed by the CoP pursuant to section 173 of the NSW Police Act.

Oversight

The oversight powers of the LECC in relation to investigations by the CoP (or the Crime Commission) are set out in Part 7 of the LECC Act (section 98 ff.).

Pursuant to section 99(4), if there is disagreement between the LECC and the CoP as to which of the two agencies should conduct an investigation, the opinion of LECC is determinative (the same applies to the Crime Commission under section 100).

Section 101 provides that the LECC may monitor police investigations if it is of the opinion that it is in the public interest to do so. Sections 102 to 106 govern aspects of the monitoring.

Section 107 provides that the LECC "does not have a power of control, supervision or direction, and any such oversight is to be achieved by agreement".

The guidelines contain forms of oversight which may be exercised by the LECC. The terms of guideline 6 broadly reflect sections 100 to 105 of the LECC Act.

In practice the LECC oversight of Police Investigations takes place after the investigation is completed. The LECC may, and on occasions does, require the police to further investigate a matter if it is dissatisfied with the police investigation. In its 2018–19 annual report the LECC gave examples of its requiring police to conduct further investigations. LECC has the power to conduct its own investigation if dissatisfied with that conducted by the police.

Higher level oversight

Pursuant to Part 9 of the Act (section 120 ff.) the Governor may appoint an Inspector of the LECC. Section 122 sets out the functions of the Inspector which are to audit the operations of the LECC, and to deal with LECC misconduct matters. The Inspector also has the function to assess the effectiveness and appropriateness of the policies and procedures of the LECC.

Part 10 of the LECC Act provides for a parliamentary joint committee to oversee the functions of the LECC.

Data collection

There is no qualitative data collected about community satisfaction with the regime.

Queensland

In June 2016 the Parliamentary Crime and Corruption Committee presented its review of the Crime and Corruption Commission (CCC). Over the preceding year the Committee received 30 submissions and held 5 public hearings. The Committee made 29 recommendations. Between the presentation of the review and the introduction of the amending legislation, a Memorandum of Understanding (MOU) was entered into by the CCC, the Queensland Government, the State Opposition, the Queensland Police Service (QPS) and the two unions representing police officers, the Queensland Police Commissioned Officers' Union of Employees and the Queensland Police Union of Employees. The MOU dealt with the disposition of complaints. I will discuss that topic shortly. On 13 February 2019 the Minister for Police and the Minister for Corrective Services introduced legislation amending the *Police Service Administration Act 1990* (Qld) (PSA Act) and the *Crime and Corruption Act 2001* (Qld) (the CC Act). The *Police Administration (Discipline Reform) and Other Legislation Amendment Act 2019* (Qld) amendments principally related to the following reforms;

- Clarifying and simplifying the definition of police conduct which would be the subject of action
- Empowering the CCC to apply to the Queensland Civil and Administrative Tribunal (QCAT) to appeal all disciplinary proceedings, including decisions to take no action
- Increasing the CCC's ability to monitor the handling of complaints by the Queensland Police Service
- To establish a central disciplinary unit within the police department to conduct disciplinary proceedings
- To modernise sanctions which may be imposed for police misconduct.

To whom complaints may be made

Complaints may be made either to the CCC or the CoP (section 7.2 of the PSA Act). Section 37 of the CC Act imposes on the CoP a duty to notify the CCC upon receiving a complaint alleging police misconduct. Section 38 imposes a duty to notify the CCC of corrupt conduct. Section 40 says that exceptions to the duty of the CoP to so notify the CCC may be determined by the CCC issuing directions in that regard.

Manner of making complaints

There is no prescribed manner in which complaints may be made. Section 7.7(3)–(4) of the PSA Act provides that the CoP and the Chairperson of the CCC must ensure that a complaint is recorded as soon as possible on the appropriate electronic system.

Of the police complaints received by the CCC in 2018/19, 261, or about 19%, were received verbally by telephone. A slightly higher proportion, 23%, has been so received this financial year.

Scope of conduct which may be the subject of complaint

One of the principal recommendations of the Committee, and one of the significant aims of the PSA Act, was to clarify and simplify the definitions of conduct which would be the subject of disciplinary action. Corrupt conduct has a wide definition under section 15 of the CC Act.

Conduct which may be the subject of disciplinary action is described and defined in section 7.4 of the PSA Act as "Grounds for disciplinary action". Such conduct has a wide meaning ranging from being convicted of an indictable offence to contravening a direction of a superior officer. A contravention without reasonable excuse of a code of conduct also comes within the definition (section 7.4(1)(e)(ii) of the PSA Act).

The Code of Conduct means the Public Service Code of Conduct for Queensland.

Disposition of complaints

The disposition of complaints was included in the MOU entered into in October 2017.

The new QPS discipline system was the subject of a pilot begun on the 1 July 2018.

The legislation introduced into the Parliament in February 2019, and passed in October 2019, provides that the CoP has "primary responsibility" for dealing with complaints alleging police misconduct (section 41(1) the CC Act) and "a responsibility", as distinct from primary responsibility, to deal with complaints alleging police corruption which have been referred to him or her by the CCC (section 451(2) the CC Act).

Section 42 of the CC Act provides that the CoP must deal expeditiously with complaints that he or she considers most appropriate, subject to the monitoring role of the CCC.

Pursuant to section 42(3) of the CC Act, the CoP may take no further action if satisfied that certain exclusory criteria exist, i.e. frivolous vexatious etc.

The CCC has a primary responsibility for dealing with complaints involving corrupt conduct (section 45(1) of the CC Act).

The CCC is responsible for monitoring how the CoP deals with police misconduct (section 45(2) of the CC Act).

In practice complaints alleging serious misconduct are triaged and monitored by the Joint Assessment and Moderation Committee (JAMC) which includes representatives from the CCC and the QPS Ethical Standards Command. The JAMC meets every couple of weeks to evaluate the assessment of complaints and agree to a plan of action.

Most investigations of police misconduct are conducted by the QPS with varying degrees of monitoring by the CCC. Approximately 5–10% of investigations are conducted by the CCC.

Section 41 of the CC Act provides that the CoP has primary responsibility for dealing with complaints alleging police misconduct. The CoP also has responsibility, as opposed to primary responsibility, to deal with complaints alleging police corruption which have been referred by the CCC.

Section 46 of the CC Act governs the way in which the CCC conducts investigations and hearings into police misconduct including corruption. The CCC may conduct its own investigation or it may refer the matter to the CoP. It may, for a variety of exclusory reasons, decline to take action in relation to a complaint.

Hearings

A critical part of the framework which was the subject of the MOU was the Abbreviated Disciplinary Proceedings (ADP), the object of which was to expedite and simplify disciplinary proceedings. Following the signing of the MOU a pilot of the ADP was commenced in July 2018.

The bill incorporating the proposed new disciplinary framework was introduced into the Parliament in February 2019 and is now part 7 of the PSA Act (section 7.1 ff.). The introduction of the pilot program saw a reduction of 33% in the number of disciplinary matters requiring a formal disciplinary hearing.

Under this division, a police officer may, only with the agreement of the CCC, offer the subject officer a disciplinary sanction or professional development strategy (section 7.16). The subject officer may ask the CoP to make it such an offer (section 7.19). If the officer does not offer an abbreviated disciplinary proceeding, or if the offer is not accepted by the subject officer, the matter may proceed to a formal disciplinary hearing.

The formal hearing of disciplinary proceedings is conducted by a prescribed officer who must, pursuant to section 7.32, observe the rules of natural justice and act quickly with as little formality as is consistent with a fair hearing, is not bound by the rules of evidence, and may otherwise decide how the proceedings will take place, subject to following the CoP's guidelines promulgated under section 7.44.

Confidentiality

Disciplinary proceedings are generally held in private. Pursuant to section 10.2 of the PSA Act the CoP has a discretion to authorise the disclosure of any information that is in the possession of the Police Service.

Sanctions

The prescribed officer who hears the disciplinary proceeding imposes sanction if misbehaviour is proved.

Oversight

Section 47 of the CC Act governs the CCC's monitoring role for police misconduct. The CCC issues guidelines for the conduct of investigations by the CoP. Section 48 governs the Commissions monitoring role for corrupt conduct. Again, the CCC issues guidelines for such investigations.

In practice the monitoring is undertaken by the JAMC. In relation to allegations of serious misconduct the committee gives an early indication of the how the investigation should be conducted. Ultimately the CCC has the power to resume responsibility for an investigation (section 47(1)(c) and subsection (3) regarding police misconduct, and section 48(1)(d) and subsection (3) regarding corruption).

Higher level oversight

The functions of the CC are subject to audit and administrative review by a Parliamentary Commissioner whose functions are set out in section 314 of the CC Act. The Parliamentary /Crime and Corruption Committee has overall oversight.

Data collection

There is no collation of qualitative data to measure the public's level of satisfaction with the discipline regime.

Victoria

At the time of the publication of the ICAC's Review of Legislative Schemes on 30 June 2015, and at the time of the commencement of the operation of the PCD Act on 16 April 2017, the processing of complaints about police conduct was largely governed by the *annual report*

2013 (Vic) (VP Act) and the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act).

On 19 July 17, three months after the commencement of the operation of the PCD Act, the Victorian Parliamentary Committee self-referenced an inquiry into the external oversight of police corruption and misconduct in Victoria. The Victorian Parliamentary Committee conducted hearings, both public and closed, commissioned research and received 54 submissions. It published a 378 page report in September 2018.

While amendments were made to the VP Act and the IBAC Act in 2019 those amendments are not in response to the Committee's reports. That response is expected to be made at the same time as the response to whatever findings and recommendations are made by the Royal Commission into the Management of Police Informants.

The report of the Victorian Parliamentary Committee in 2018 made a number of key recommendations as follows;

- There be retained the Civilian Review model whereby the handling and investigation of complaints be shared between the Victoria Police and the IBAC.
- The existing system for handling complaints was unduly complex and had to be simplified.
- The IBAC gives greater priority to its functions of handling, investigating and overseeing police complaints.
- The resources of the IBAC be increased, with a new section to be created possessing new investigative and oversight powers to deal with police complaints.
- Unless there are exceptional circumstances, the IBAC, rather than Victoria Police, investigate allegations of serious police misconduct.
- There be collated high-quality data on the operation of the system.

To whom complaints may be made

Complaints may be made to Victoria Police pursuant to section 167 of the VP Act, or to the IBAC pursuant to section 52 of the IBAC Act.

Manner of making complaints

Pursuant to section 53 of the IBAC Act, complaints to the IBAC must be made in writing unless the IBAC determines that there are exceptional circumstances for a complaint to be made otherwise than in writing. This requirement is referred to in a note to section 167(2) of the VP Act. The VP Act does not stipulate the requirements for the manner of a complaint to Victoria Police by a person who is not a police officer or a protective services officer.

Scope of conduct which may be the subject of complaint

Pursuant to section 8 of the IBAC Act, the objects of the Act include;

> (a) … the identification, investigation and exposure of—
> (i) corrupt conduct; and
> (ii) police personnel misconduct;

And

> (e) [provision] for the IBAC to assess police personnel conduct.

Section 4 defines corrupt conduct in wide terms.

Section 5 defines police personnel conduct and misconduct. Police personnel misconduct in relation to a police officer is defined as

(a) …
  (i) conduct which constitutes an offence punishable by imprisonment; or
  (ii) conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or
  (iii) disgraceful or improper conduct (whether in the public officer's official capacity or otherwise);

Section 166 of the VP Act defines police personnel misconduct in the same terms as section 5 of the IBAC Act.

Disposition of complaints

Section 51 of the IBAC Act provides that complaints may be made to the IBAC about corrupt conduct. Section 52 provides that complaints alleging police personnel misconduct may also be made to the IBAC.

Upon receipt by the IBAC of a complaint, section 58 of the IBAC Act requires the IBAC to take one of three courses of action. It may

(a) dismiss the complaint or notification if there are grounds to do so (the criteria for dismissal are set out in section 67); or
(b) investigate the complaint or notification; or
(c) make a referral of the complaint or notification (to another agency).

For the purposes of a dismissal or an investigation of a complaint, sections 59A and 59B empower the IBAC to conduct a preliminary enquiry.

Section 73 of the IBAC Act governs the procedure upon a referral. I paraphrase subsections (1) and (2) as they apply to police complaints. The IBAC must refer a complaint to the CoP if two criteria are met; (a) the complaint relates to the duties and functions of a police officer and (b) "it would be more appropriate" for the complaint to be in investigated by the CoP rather than by the IBAC.

In practice about 2% of complaints are investigated by IBAC. The types of complaints more commonly dealt with by IBAC include allegations of corruption, excessive force and allegations of police cover up.

Section 60 of the IBAC Act provides that the IBAC may conduct an investigation into corruption but subsection (2) provides that it must not conduct an investigation unless it suspects on reasonable grounds that the conduct constitutes corrupt conduct. Section 64 provides IBAC with power to investigate police personnel misconduct.

Section 169 of the VP Act governs disposition of complaints made to Victoria Police.

Section 169(1) provides that the CoP must investigate such complaint "unless the subject-matter of the complaint could constitute a public interest complaint". A public interest complaint is defined in section 3 of the VP Act as meaning a disclosure that is determined to be a public interest complaint by the IBAC under section 26 of the *Public Interest Disclosures Act 2012*.

Sections 169 and 170 require the CoP to notify the IBAC of various aspects of the investigation.

Section 175 requires the CoP to investigate every public interest complaint which has been referred to it by the IBAC.

Hearings

Pursuant to section 129 and 130 of the VP Act contested disciplinary hearings are conducted by the CoP or someone authorised by him or her. Presently the hearings are conducted by a legally qualified Discipline Inquiry Officer of the Legal Services Department of Victoria Police. Pursuant to section 131 of the VP Act the hearing is to be conducted with as little formality as is appropriate and the rules of evidence do not apply. The hearings are presently conducted using an inquisitorial model. There is no prosecutor. The officer the subject of the disciplinary allegation is usually represented by a discipline advocate, and may be represented by any person other than a legal practitioner (section 131(1) of the VP Act). Some 50 to 60 hearings are conducted each year.

Confidentiality

Pursuant to regulation 51(3) of the *Victoria Police Regulations 2014*, the CoP or authorised person may determine that an inquiry is not open to the public. In practice, the time and place of an inquiry is not the subject of any public notice, nor any notification within Victoria Police. (See also Part 13 Division 1 of the VP Act for police information confidentiality.)

Sanctions

The person conducting the hearing imposes sanctions in the event that a charge is proved. The sanctions range from a reprimand to dismissal (section 132 of the VP Act).

There is a right of appeal from the disciplinary determination to the Police Registration Services Board (section 141 ff. of the VP Act). The appeal is a hearing *de novo* (section 144 of the VP Act). Some lower level sanctions are non-reviewable.

Oversight

Section 169 and 170 of VP Act require the CoP to provide information to IBAC upon receipt and investigation of a complaint. There is a corresponding requirement in section 57(3) of the IBAC Act. Regulation 61 of the *Victoria Police Regulations 2014* (Vic) provides details of the information to be provided.

There is no power given to IBAC to direct an investigation.

However, section 160 of the IBAC Act enables IBAC to request the CoP to take further, or alternative, action. Section 161 provides that if CoP does not adopt IBAC's requested actions CoP must report to IBAC in writing stating its reasons for not doing so.

Higher level oversight

IBAC is overseen by the Victorian Inspectorate and the Victorian Integrity and Oversight Committee.

Data collection

The Victorian Parliamentary Committee recommended that qualitative data be collated directed to determine public satisfaction with the complaints regime. The Governments response to that

recommendation, as with the Committees report generally, is awaiting the outcome of The Royal Commission into the Management of Police Informants. No such data is presently being collated.

Overview

Before turning to my recommendations I make some general observations which inform those recommendations and the reasons why I decline to make others.

The PCD Act governs an area of public policy which, by necessity, gives rise to a number of tensions.

A prominent tension arises from public concern that the PCD Act, like most others of its sort, establishes a regime in which police officers investigate allegations of misconduct by fellow police officers.

From the review of the regimes of the Commonwealth and other States conducted by ICAC in 2014/15 it is clear that every jurisdiction in the Commonwealth has, to a greater or lesser extent, a role for police investigation of complaints about police conduct. That remains the case in the three states where there are more recent legislative regimes (New South Wales and Queensland) and where there is a recent report recommending changes (Victoria).

In its report published in September 2018 the Victorian Parliamentary Committee reviewed Australian and overseas regimes in existence three years after the ICAC review. The Committee reported models of Police Complaints regimes ranging from what it described as the Internal Affairs Model, where complaints are dealt with exclusively within the police force, to the Civilian Review model, where there is independent oversight of police investigations, to the Civilian Control model where the investigation of complaints is conducted exclusively by an independent agency. The Committee found that the only example of the Civilian Control model was to be found in Northern Ireland. That regime was seen as the only appropriate model following the historic, endemic and troubled relationship between police and civilians. At the other end of the spectrum, the Internal Affairs model is becoming less and less common.

In between there were many iterations of the Civilian Review model. As a result of its extensive investigations, including public hearings, the Victorian Parliamentary Committee recommended changes to the Victorian regime. The changes represented a move further along the continuum towards, but stopping short of, the Civilian Control model.

The debate has been going on in South Australia for a long time. In its written submission to the ICAC's review of legislative schemes in 2015, the ALRM cited Recommendation 226 of the Royal Commission into Aboriginal Deaths in Custody. That recommendation included the following:

> *That complaints against police should be made to, be investigated by or on behalf of and adjudicated upon by a body or bodies totally independent of Police Services.*

In his published review in 2015 the ICAC referred to literature and enquiries dealing with independent investigation of complaints about police. In particular he referred to an article by Mr Matthew Goode of the Adelaide Law School published in the 1973 Adelaide Law Review[1]. In the article Mr Goode proposed the establishment of a Civilian Review Board.

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[1] Matthew Goode, "Administrative systems for the resolution of complaints against the police: a proposed reform" (1973) 5(1) *Adelaide Law Review* 55.

Both OPI and IIS say that from time to time complainants express disapproval of the fact that their complaints will be investigated by the police. The Honourable John Sulan QC, Reviewer of ICAC, told me that he too often heard that criticism.

The arguments for police investigation of complaints were also canvassed in the ICAC's 2015 review. The skills required for such investigations are quintessentially those possessed by police officers. While there are skilled investigators employed in other civilian areas of enquiry, police investigators are those most familiar with police systems. They are well suited to enquiring into allegations of police misconduct. In common with other professions there is a public interest in the police force taking responsibility for the maintenance of high standards of conduct. There is the practical reality that if investigations were to be undertaken by an independent agency, that agency would have to recruit and maintain its own cohort of investigators. The CoP can co-opt from his or her own workforce investigators who may also undertake other police work contemporaneously. Officers so co-opted can return to mainstream duties after co-option.

The ICAC recommended, and the Parliament accepted, that the new model for South Australia would retain the practice of the former regime wherein police officers conducted most investigations. No-one has submitted to me that that practice should change. I have not seen evidence which calls for such a change.

However, the ICAC recommendation, accepted by the Parliament, was that the system of oversight of the investigation of police complaints should be streamlined and significantly enhanced. Key to the enhancement of oversight was the proposed live and continuous monitoring of investigations. Whereas the former PO was effectively able to exert oversight only at the end of the police investigation of a complaint, the new regime permits continuous electronic monitoring and supervision. While the PO had the power to give directions to the police in relation to investigations, those directions could effectively only be given at the conclusion of the investigation. The new regime permits OPI to give directions during the investigation. While there have been a number of submissions to me which bear on the extent of oversight, none has suggested that there should not be independent oversight by OPI of police investigations into complaints.

The second tension inherent in the PCD Act is that which exists between OPI and IIS, between the monitor/overseer and the investigator. The PCD Act makes it clear that, of the two bodies, OPI has the ultimate power in two important aspects of the complaint handling process. OPI has no power to assess a complaint in the first instance. Unless OPI refers the matter to the ICAC, it must refer complaints it receives to IIS for assessment (section 10(2) and section 14). IIS assesses all complaints it receives. However, pursuant to section 28 of the PCD Act, OPI may reassess any complaint or report and substitute its own assessment. It may only do so after consultation with IIS, but it has the ultimate power in that sense.

The other aspect in which OPI has the ultimate power is in decisions about the course of the investigation of a complaint or report, once a matter has been assessed as requiring action to be taken, and as not appropriate for MR. Once an investigation is commenced OPI may give directions to the police carrying out the investigation and CoP must ensure that that direction is complied with. A direction must be in writing and it may only be given after consultation with IIS, but ultimately the direction must be complied with.

It is quite understandable that experienced police investigators would find unfamiliar and challenging the concept of being given directions by an outside agency. That is particularly so when those in a position to give directions are not necessarily experienced investigators. Some are but others are not.

While the concept of being directed may be unfamiliar and challenging the practice of continuous supervision during the investigation causes particular tension. While I will deal with this topic in more detail later, IIS is concerned about the blurring by OPI of the boundary between what it

describes as “investigations oversight” (i.e. monitoring of the investigator’s actions) and “investigative management” (requiring, suggesting or directing the investigator to take action). It is significant that in the period the Act has been operating, OPI has given only one direction to IIS. However one might describe the daily communications between OPI and IIS about the conduct of investigations, the fact is that, with that one exception, there has always been agreement between the two bodies as to how the investigations should proceed.

In his 12 Month Review the ICAC reported on some criticisms he made about the conduct of some investigations, but his report on the relationship between OPI and IIS reads as follows:

> *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 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 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.*

The ICAC said nothing different in his submission to me or in the conferences we have had.

For his part the CoP said in his submission to me

> *An effective system working appropriately*
>
> *5. From the outset I wish to formally recognise that the legislation and system generally work well. The Internal Investigation Section (IIS) of SAPOL works hard to manage the legislative framework and to undertake investigations within the prescribed framework. I commend their excellent work and commitment to supporting the disciplinary system. SAPOL engages in a robust relationship with the Office of Public Integrity (OPI) and the Independent Commission Against Corruption (ICAC). The involvement of an independent oversight body is welcomed, and although our organisations will not always agree, the role and functions OPI perform are acknowledged as an important aspect of modern law enforcement. If it is accepted that the purpose of an integrity oversight system is to ensure inappropriate behaviour is identified and addressed, it can be concluded that the system is generally working appropriately. The system is not broken, nor does it require wholesale change. Rather, recommendations made in this paper are provided with a view to improving what is largely an effective system.”*

While I have not conferred with the CoP personally, I have had conferences with Assistant Commissioner Philip Newitt (Assistant Commissioner in Charge of Governance and Capability), Chief Superintendent Graham Goodwin (OIC, Ethical and Professional Standards Branch), Chief Inspector Paul Isherwood (OIC, IIS), and members of IIS. No one said anything inconsistent with the sentiment expressed by CoP in that paragraph. That is notwithstanding that the CoP submits that it has recommendations to overcome what it sees as operational concerns. While IIS expresses concerns about aspects of OPI supervision, its criticisms are those which I have, and will, set out in this Review.

From my own observations I would describe the interactions between ICAC/OPI and CoP/IIS in carrying out their functions as professional and constructive. Insofar as there are tensions between them they appear to me to be manifestations of a system in reasonable balance.

I have had conferences with the President of PASA, Mr Mark Carroll and members of the firm of Tindall Gask Bentley, solicitors for PASA.

PASA makes submissions about its perception of the interactions between OPI and IIS, going so far as to submit that it suspects OPI is acting unlawfully giving informal directions which are not in writing. It submitted that OPI was becoming an investigator. PASA frankly acknowledges that it does not have first-hand knowledge of the interactions between OPI and IIS and is relying on anecdotal accounts. PASA also relied on submissions SAPOL made to the Crime and Public Integrity Policy Committee of the Parliament of South Australia (Parliamentary Committee).

PASA praises the increased use of MR which is introduced by the Act. Matters which formerly proceeded to disciplinary hearings are now resolved in a management context.

The operation of the Act gives rise, as did the repealed act, to tensions between CoP and PASA. PASA submits that there are sometimes delays in the MR processes. While the assessment by IIS of a complaint or report may be prompt, the carrying out of the MR may be delayed. Further, PASA submits that some sanctions imposed by CoP following investigations or hearings before the PDT, are "heavy handed". It criticises the imposition of several penalties and submits I should recommend limiting the sanction options. It submits that while there are regulatory caps on monetary sanctions, its members suffer great monetary loss when, for example, a demotion in rank is imposed. In such situations, the police officer suffers a greater penalty than would be imposed on a comparable civilian.

In a conference held after the written submissions were delivered, PASA gave examples of sanctions imposed which it submitted were disproportionate to the proved or admitted disciplinary breaches.

While it might be acknowledged that, on the limited information I was given, the individual sanctions cited do appear high, I was unable to make a judgement that the sanctions could be described as heavy handed, much less that there was a pattern of such sanctions. I note that section 32(3) of the PCD Act provides for an appeal to the District Court against sanctions imposed by the CoP.

Finally, the Act gives rise to another tension, this time between the competing claims of confidentiality in disciplinary processes and access to those processes. Section 45 of the Act makes provision for information about the processing of complaints and reports to be kept confidential.

Section 46 places limits on the publication of those processes. Effectively, publications must be authorised by the CoP, the ICAC, OPI or a court. In the ordinary course, publication of matters proceeding to prosecution in court will be permitted.

The Advertiser submits that South Australia is the only jurisdiction in Australia with what it describes as a "blanket suppression on the reporting of investigations into police disciplinary matters".

Its submission goes on thus: "this stymies promotion of public confidence in our police force and fails to meet the expectation of South Australians that they have a right to know about matters relevant to policing in their State".

The Advertiser submits that the PCD Act is more restrictive of publication than comparable legislation in other parts of Australia, and is more restrictive in relation to police officers than legislation governing other public sector employees.

ICAC publishes annually some details of sanctions imposed in relation to police officers but, as The Advertiser points out in its submission, the information is not very detailed.

There is one further topic which arises from an innovation of the PCD Act. Under the repealed Act complaints from the public were required to be reduced into writing by the complainant. Section 10 of the PCD Act mandates that complaints, as distinct from reports, must be able to be made orally.

Upon the PCD Act commencing operation on 4 September 2017, the number of complaints increased significantly from 1257 in the last year of the former regime, to 2406 in the first year of the new regime.

The ICAC said that in his view the increase did not represent a deterioration in the conduct of police officers. Rather, the increase was due to the greater ease with which members of the public could lodge their complaints. The table produced by the ICAC in his submission to me demonstrates the following: the percentage of complaints being lodged by telephone (54.7%) overwhelmed the percentage received by (hardcopy) (letter) (9%). Even adding the percentage lodged by email (7.7%) the telephone was by far the preferred method of communication. These were the figures in the first year of the operation of the PCD Act.

Interestingly, in the following two years (2018/19, 12 months; 2019/20, 7 months) the percentage of telephone calls decreased, along with the hardcopy letters, while the website and email communications have increased.

The ICAC takes the view that the significant use by members of the public of the oral complaint suggests that the PCD Act provides a much needed service.

IIS would prefer that complainants lodged their complaints in writing. They say that requirement might have the effect of encouraging complainants to give more serious consideration to the need to make a complaint. However, IIS says that it complies with section 10 of the PCD Act and accepts oral complaints addressed to it. SAPOL does not specifically recommend that the right to make an oral complaint be removed, but does firmly state its preference for complaints to be made in writing.

I am conscious of the difficulty some people have in reducing their thoughts to writing. That difficulty means that when they are forced to do so, they do not do so articulately. A small proportion of people are illiterate. There are difficulties enough for people for native English speakers, but the problems are compounded for people whose first language is not English.

It seems to me that there is something to be gained from receiving an oral complaint. It is an opportunity for the receiver to more thoroughly explore the gravamen of the complaint. In that way, there is the potential to record a better articulated complaint.

While I have not received any submission that the right of a complainant to lodge an oral complaint should be abolished, I have noted that some interstate regimes do require a complaint to be in writing. I would regard following their examples as a retrograde step.

It may be that as electronic communications become more commonly used, the oral complaints will become less common. That is certainly the trend in the table produced by the ICAC to which I have referred.

Submissions

Background to written submissions

As already mentioned the ICAC performed a 12 Month Review of the PCD Act in May 2019. The Review was tabled in the Parliament on 16 May 2019. The Review contained 18 recommendations for amendments to the Act. The ICAC had provided a draft of the Review to SAPOL and had conferred with SAPOL about its contents. SAPOL indicated its opposition to five of the recommendations. After the consultation ICAC withdrew two of the recommendations. ICAC indicated it proposed proceeding with the remaining three of the recommendations objected to. At that stage SAPOL did not propose any recommendations of its own.

The ICAC did not consult with PASA before the final draft was completed but gave PASA a copy of the Review and invited comments. PASA elected to await this review. PASA wrote to the Attorney-General on 19 July 2019 attaching its response to the ICAC Review. That letter and the attached response comprise annexure C to PASA's submission to me.

SAPOL made a submission to the Parliamentary Committee which raised more objections to the ICAC recommendations than had been raised with the ICAC. The ICAC addressed these objections when he appeared before the Parliamentary Committee. A transcript of the ICAC's evidence before the Parliamentary Committee addressing the SAPOL submission is appendix 6 to the ICAC's submission to me.

PASA also made a written submission to the Parliamentary Committee. In October 2019 the ICAC met with, amongst others, the President of PASA Mr Mark Carroll and PASA's solicitor Mr Morry Bailes to discuss the ICAC recommendations and objections PASA had to them.

On 6 November 2019 the ICAC wrote to Mr Carroll summarising their discussions and elaborating on the reason for the ICAC's recommendations. That letter is appendix 7 to the ICAC's submission to me. PASA's reply of 6 December 2019 is appendix 8.

In its submission to me PASA indicates that the bulk of its submission is to be found in its annexure C, that is, its letter to the Attorney-General on 19 July 2019 annexing PASA's submission in response to the ICAC's 12 Month Review.

I should add that at a meeting I convened with representatives of SAPOL, PASA, OPI and The Advertiser in December 2019 I indicated that if it suited the parties I would be happy to receive from any one of them any submission they had already made in 2019 but they would be welcome to add to any such submission.

I will proceed to summarise the submissions of ICAC, SAPOL, PASA and The Advertiser. I will then summarise the submissions each party has made about the 18 ICAC recommendations. SAPOL and PASA have helpfully dealt with each of those recommendations separately, following the ICAC numbering. The ICAC has made some additional recommendations. SAPOL, PASA, and The Advertiser have also made recommendations.

Submissions of the Independent Commissioner Against Corruption

The submission dated the 29 January 2020 has 8 appendices as follows:

> 1—The Review of Legislative Schemes of 30 June 2015, including 29 recommendations.
> 2—The 12 Month Review tabled on 16 May 2019, including 18 recommendations.
> 3—A letter of 22 February 2019 from the CoP to ICAC.

4—A letter of 7 March 2019 from ICAC to the CoP.
5—A letter of 12 April 2019 from SAPOL to the Parliamentary Committee.
6—Transcript of opening address of ICAC before the Parliamentary Committee.
7—A letter of 6 November 2019 from ICAC to PASA.
8—A letter of 6 December 2019 from PASA to ICAC.

The ICAC submission sets out the functions of the OPI. OPI is responsible to the ICAC under the ICAC Act. OPI's functions under the PCD Act are set out in section 8.

OPI is also responsible to the ICAC for the performance of those functions.

The ICAC submission sets out the Review of the Legislative Schemes undertaken by ICAC at the request of the then Attorney-General. The submission sets out the scheme of the Act (pages 2–6). The submission includes statistical information by financial year for the period 4 September 2019 to 21 January 2020. I reproduce those tables, together with the riders attached to them. (Pages 6–7 of the ICAC submission.) I add that the columns should be understood as follows: 2017/18 means the 10 months from September 2017 to June 2018, 2018/19 means that financial year, and 2019/20 means the seven months from July 2019 to January 2020.

TOTAL MATTERS RECEIVED BY THE OPI AND IIS

	2017/18	2018/19	2019/20	Total
OPI	1486	1665	1127	4278
IIS	504	644	408	1556
Total	1990	2309	1535	5834

POLICE COMPLAINTS AND REPORTS RECEIVED BY THE OPI

	2017/18	2018/19	2019/20	Total
OPI	1459	1655	1117	4231
IIS	27	10	10	47
Total	1486	1665	1127	4278

POLICE COMPLAINTS AND POLICE REPORTS RECEIVED BY IIS

	2017/18	2018/19	2019/20	Total
OPI	216	279	205	700
IIS	288	365	203	856
Total	504	644	408	1556

METHOD OF RECEIPT OF POLICE COMPLAINSTS AND POLICE REPORTS RECEIVED BY THE OPI

	2017/18	2018/19	2019/20**	Total
Telephone Call	814 (54.7%)	804 (48.4%)	413 (36.6%)	2031 (47.6%)
Website	395 (26.6%)	535 (32.1%)	458 (40.6%)	1388 (32.4%)
Email	115 (7.7%)	134 (8.0%)	163 (14.5%)	412 (9.6%)
Letter (hardcopy)	133 (9%)	153 (9.2%)	82 (7.3%)	368 (8.6%)
In person	29 (2%)	39 (2.3%)	11 (1%)	79 (1.8%)
Total	1486	1665	1127	4278

** While efforts have been made to ensure accuracy, these reports are taken from raw and unreconciled data and may be inconsistent with the yearly statistics that will be reports in the ICAC & OPI Annual Report.*

*** Please note that the method of receipt statistics for 2019/20 have been impacted by an issue which received significant media interest. Complaints relating to that issue were predominantly received in writing (via online form or email).*

The submission recites the ICAC's consultations with SAPOL concerning the review and attaches appendices 3 and 4 which are the exchanges of correspondence between the parties in February and March of 2019.

The submission then refers to the submissions made by SAPOL to the Parliamentary Committee on the 12 April 2019. That submission and ICAC's opening statement to the Committee are appendices 5 and 6.

In its submission to me ICAC addresses 4 of the issues raised by SAPOL in their submission to the Parliamentary Committee. Those issues are as follows.

The increase in complaints and reports about police officers

SAPOL submitted that there had been a significant increase in the number of complaints against police being recorded and actioned. It provided a table which supported that view. The table showed that the complaints about police from the public went from 882 in the 12 months before the commencement of the PCD Act in September 2017 to 2019 in the 12 months after the commencement.

In the conclusion of its submission to the Parliamentary Committee SAPOL submitted that, whereas in the rest of the western world the adoption by police of the practice of wearing Body Worn Video (BWV) had seen a reduction in complaints, this had not occurred in South Australia. In South Australia the new practice of wearing BWV coincided with the introduction of the new Act but complaints had significantly increased.

SAPOL attributed the increase in complaints to the assessment process adopted by OPI. It submitted "the only other factor has been the commencement of the OPI and the enthusiasm in which they receive and dispatch complaints, adding to them along the way".

SAPOL submitted that the increased workload on SAPOL had a significant impact on SAPOL resources.

As SAPOL acknowledged, the ICAC had expressly said in his then most recent annual report that the increase in complaints about police did not suggest that there was a deterioration in police behaviour. The ICAC repeated that information in his submission to me. He concluded that the principal reason for the increase is that OPI, unlike the former PO, receives complaints orally. The PO would only accept written complaints.

Section 10(4)(a) of the Act provides that a person wishing to make a complaint may do so in writing or orally. Section 10(5) requires the recipient to reduce the complaint into writing as soon as reasonably possible but in any event within 48 hours. Regulation 9 lists the information that must be recorded. Section 10(6) provides that the recipient may require the oral complaint to be verified in writing.

The ICAC observes that complaints about all other public officers in public administration may be made orally.

In practice OPI records the oral (usually telephone) complaints. It sends that recording to IIS for assessment along with a summary of the complaint and the issues identified in it.

The assessment process

Under the PCD Act OPI has no power to assess complaints. That power is vested in IIS alone. OPI must refer all complaints and reports it receives to IIS. The only alternative action which is available to OPI is to refer matters to the ICAC if it takes the view that that is the appropriate course.

The SAPOL submission to the Committee was that OPI should have a screening function such as was possessed by the former PO, pursuant to section 21 of the repealed Act. The PO could determine that an investigation of a complaint was not warranted if the complaint was (a) trivial; (b) frivolous or vexatious, or not made in good faith. The PO could also determine that no investigation was warranted if (c) the complainant had an insufficient personal interest or (d) in the circumstances of the case no investigation was necessary or justifiable.

OPI does not have those powers. Those powers have been given to IIS. Placita (c), (d) and (e) above have been replicated in section 14(2) of the present Act. Section 14(2) provides that IIS need not undertake an assessment of the complaint if any of those criteria are met. There are two further grounds upon which IIS need not undertake an assessment. They are (a) if the matter has already been assessed by IIS, OPI or ICAC; or (b) if the matter has been previously dealt with under the repealed Act or the *Police Act 1998*.

SAPOL submitted to the committee that any promise of efficiency in the new Act had failed to be realised. It submitted that IIS was required to listen to the audio tapes of the oral complaints. SAPOL considered that there was merit in the former PO requirement that complaints be in writing. It submitted that the additional workload undertaken by IIS had significantly increased its workload detracting from investigative resources.

In response to the SAPOL submission to the committee, the ICAC said that when he conducted the review of schemes in 2014/15 the then CoP made an emphatic oral submission that the assessment process should be in the hands of SAPOL not the oversight agency. ICAC said that he agreed with the then CoP. He still does agree with that position.

The ICAC submitted that to give the assessment process to OPI would detract from OPI's oversight function.

Management Resolution

In the conclusion of its submission to the Parliamentary Committee, SAPOL criticised the reach of the Code of Conduct for police officers. The submission was to this effect:

> *Unfortunately the Code of Conduct for police officers is so wide that simple administrative transgressions that in SAPOL's opinion should fall within a management/service delivery response, are brought within the disciplinary framework, with all the administrative process that entails. Albeit that the Act allows for 'Management Resolution', it is a disciplinary outcome, and all the reporting procedures apply. Whilst there is an ability to deal with these outside a disciplinary framework this is rarely done, and technically the ability of OPI to incorporate them into the disciplinary framework is correct.*

The ICAC submitted to the Parliamentary Committee, and reiterated in his submission to me, that insofar as IIS is assessing complaints and reports as being suitable for either investigation or MR, the two disciplinary paths open to it, without first assessing whether there arises corruption, misconduct or maladministration in public administration, it is acting outside its powers under the Act. It may be that complaints and reports which do not raise these issues should call for some police action, but that action is not within the purview of the Act, and should not be dealt with as if it is. In my discussions with the ICAC following the written submissions it was indicated that this practice is now much less frequent than was formerly the case.

The CoP has determined that MR is appropriate for alleged conduct which, if proved, would not result in: (1) termination of the officer's appointment; (2) suspension of the officer's appointment for any period; (3) reduction of the officer's rank, seniority or remuneration; or (4) the imposition of a fine.

The ICAC has no disagreement with the CoP's determination in that regard.

Live oversight

The function of OPI is to oversee the assessments and investigations conducted by IIS. IIS is required by the regulations to record on the CMS details of their investigations as they progress. OPI has access to the CMS. It conducts live oversight of the investigations. It is empowered to monitor and give directions about the conduct of investigations.

SAPOL submitted to the Parliamentary Committee that the regulations, and OPI's supervision, were excessive and unhelpful to the timely completion of investigations. SAPOL submitted that in the majority of cases it would be sufficient for OPI to wait until the completion of investigations before intervening.

That was the position which occurred in practice under the repealed Act. While section 26 of the repealed Act gave the PO power to require IIS to provide information about the progress of investigations, and to give a variety of directions to IIS, the PO had no ongoing access to the investigation. The PO had to make specific enquiries in the course of an investigation to carry out any monitoring. In practice the PO usually did not become involved in the investigation until it was completed.

The ICAC submitted to me that the practical inability of the PO to have any input into an investigation until it was completed was a failing in that system. The ICAC submitted that the information required by the Regulations to be entered by IIS on the CMS was essential to the effective supervision by OPI of investigations.

As mentioned before, the ICAC was, at the time of the Parliamentary Committee sittings, unaware of any continuing objection by SAPOL to its 18 recommendations in the 12 Month Review except for Recommendation 5. Following the deliberations of the Parliamentary Committee, the ICAC or his deputy, Mr Michael Riches, met with representatives of SAPOL on four occasions between July and December 2019 to receive evidence in support of its submissions to the Committee. At the time of making his original submission to me on 29 January 2020 the ICAC had not received any such evidence but on 7 February 2020 four examples of alleged excessive oversight were forwarded by SAPOL. Two of them post-dated the SAPOL submissions to the Parliamentary Committee in April 2019. In his supplementary submissions the ICAC provides his response to the complaints. I would not describe the reported oversight as excessive, but I reproduce the ICAC's supplementary submissions on this matter. I have not sought further comment on these matters from SAPOL.

> *I ask that you consider SAPOL's four examples in the context that the OPI has overseen 630 investigations of police conduct since 4 September 2017.*
>
> ***1. [Reference redacted]***
>
> *This example relates to a closed file in which the allegation was of excessive force by a designated officer which occurred in a hospital.*
>
> *The OPI requested a copy of the CCTV footage and requested the investigator upload a copy of the interview plan to IAPro prior to interviewing the designated officer.*

2. [Reference redacted]

This example relates to an active investigation of excessive force by a designated officer towards a detainee in a padded cell. The OPI advised IIS that this matter raised issues of a criminal nature.

The OPI asked the investigator to upload a draft statement of the victim. The reason for the request was the victim appeared reluctant to cooperate with the investigation. The OPI sought to ensure that all aspects of the incident were covered in the statement prior to the investigator meeting with the victim for signing. The OPI viewed the draft statement and made no further request.

The OPI on two occasions requested a copy of the interview plan be uploaded to IAPro prior to the designated officer being interviewed but that did not happen.

The OPI has subsequently met with IIS senior officers as a result of significant concerns arising out of the conduct interview.

The OPI has expressed the view that the investigator appeared under prepared, biased and supportive of the designated officer's version of events. The interview contained leading questions and lacked challenge.

As a result of the OPI's representations, a viewing of the CCTV footage by IIS officers, and a discussion about the investigator's interview approach this matter has now been referred for the criminal prosecution of the designated officer.

As a result of those communications IIS has also undertaken to provide refresher interview training to all IIS detectives.

3. [Reference redacted]

This example relates to a closed file in which the allegation was a designated officer had made a fraudulent claim for storage expenses. The designated officer maintained he had stored items at his brother's house and paid him for this service. The designated officer sought SAPOL reimbursement for storage costs to the maximum claimable.

The OPI requested that the investigator obtain a statement from the brother and any receipt.

The OPI also questioned the appropriateness of the investigating officer disclosing the identity of the reporter to the designated officer.

4. [Reference redacted]

This example relates to an active investigation in which the allegation was of an inappropriate relationship between a designated officer and a domestic violence victim and an allegation of harassment against a designated officer working in the prosecution section.

The OPI made the following requests:

• the progress report be uploaded to IAPro as required by the regulations

• details of what particulars of the allegations had been provided to the designated

officers in emails from the investigating officer when arranging the conduct interviews

• that the interview plan be uploaded to IAPro.

Following the conduct interview the OPI requested the investigator to clarify one point With the designated officer. The investigator responded "he had not considered it and would find out"

The issue was clarified by email between the investigator and the designated officer.

Comment

In my view the examples provided by SAPOL do not support SAPOL's submission that the OPI is managing rather than overseeing investigations. The OPI has appropriately contacted investigators in these matters in accordance with the expectations of `live oversight' under the PCD Act.

The submission then refers to the 12 Month Review and offers the 18 recommendations for my consideration.

In addition the ICAC makes four further recommendations. They have been numbered from 19 to 22.

I will discuss all recommendations separately.

Submissions of South Australia Police

SAPOL submitted that the purpose of the police complaints framework should avoid duplicity. Complaints should have clear outcomes and benefits. SAPOL sought to make suggestions which would better realise the public value of the framework.

SAPOL submitted that the PCD Act and the complaints framework generally worked well. SAPOL welcomed the independent oversight provided by OPI and said SAPOL and OPI had a robust relationship. SAPOL acknowledged that it did not always agree with OPI but the role and functions of OPI were accepted.

SAPOL submitted that the system was not broken, nor did it require wholesale change.

SAPOL sought to make recommendations with a view to improving what is largely an effective system.

SAPOL responded to each of the 18 recommendations made by the ICAC in his 12 Month Review and made eight recommendations of its own. I will deal with these responses and recommendations separately.

Submissions of the Police Association of South Australia

PASA set out the history of the development of the PCD Act including submissions it had made to the ICAC at the time of the ICAC's Review of Legislative Schemes in 2015. It also referred to its submission to the then Attorney-General regarding the Bill that was before the Parliament in 2016. Those materials are contained in annexures A and B to the PASA submission.

At the time of the ICAC's 12 Month Review of the operation of the Act in May 2019, PASA prepared a submission addressing the matters raised in the review. PASA provided a copy of its submission to members of Parliament, and in particular to the Parliamentary Committee. PASA annexes that submission together with a covering letter to the Attorney-General dated 19 July 2019 (annexure C). PASA indicated that the submission forming annexure C forms the bulk of what it presently wishes to convey.

PASA also annexes a letter of 6 November 2019 from the ICAC to PASA explaining some of the ICAC's recommendations (annexure D). PASA responds to the matters raised in that letter.

The first matter responded to relates to OPI's supervision of IIS investigations. ICAC had told PASA in his letter to them of 6 November 2019 that OPI had only ever given one direction to IIS pursuant to section 27(1). PASA submitted that while that may be the case it was aware anecdotally, and on the basis of the SAPOL submission to the Parliamentary Committee, that OPI had considerable involvement at the investigation stage and it gives directions during the course of so doing. PASA submitted that it was concerned about this practice if it was occurring in an informal way. PASA encouraged me to inspect correspondence between OPI and IIS to gain a proper understanding of how the two entities are interacting. In paragraph 82 of its submission to Parliament (annexure C, page 5) PASA sets out the documents and data which it submits the ICAC, OPI, CoP and IIS should release.

The second matter relates to the question of whether IIS should continue to undertake all assessments of complaints and reports. SAPOL had submitted to the Parliamentary Committee that OPI should undertake a screening process, undertaking an assessment of whether a complaint or report should be forwarded to IIS. PASA supported the ICAC's view that IIS should continue to assess all complaints and reports.

PASA also supported the ICAC's views about the inappropriateness of a designated officer being directed to answer questions during the investigation of a complaint or report when the officer exercises his or her right to silence.

PASA then responded to the ICAC's correspondence on the 6 November 2019 relating to the ICAC Recommendations 1, 4, 5, 6, 13, 15, 16 and 18. PASA maintained its submission in respect of each. I will deal with that aspect of PASA's submission when I deal with the 18 individual recommendations.

Under the heading "Testing and Proof of Allegations", the second stage of the process, PASA described itself as a very strong supporter of the PDT and the way it operates.

In relation to the third stage, "Imposition of Sanctions", PASA expresses two concerns.

The first is the indication that the Deputy Commissioner of Police is planning to introduce for use in the sanctioning process a document called an "organisation impact statement". In its annexure F PASA attaches a letter it wrote on 5 September 2019 to Deputy Commissioner Linda Williams on the topic. There is a corresponding letter dated the 1 October 2019 to Deputy Commissioner Linda Williams from PASA's solicitors Tindall Gask Bentley. The two letters concerned the proposed sanctioning of a particular police officer for breach of discipline. PASA, and the solicitors, complained that they had not seen the organisational impact statement and they objected to the Deputy Commissioner having regard to the document in the sanctioning process. Both letters also objected to the sanctions process pursuant to section 26 being described as "sentencing".

PASA submitted to me that I should consider recommending that regulations prescribe the documents that may be considered by CoP in the sanctioning process.

The second concern relates to the extent of sanctions which may be imposed pursuant to section 26 of the PCD Act. There are two aspects to this concern. The first relates to monetary penalties. PASA submits that while a reduction in remuneration prescribed in section 26(1)(h), and a fine pursuant by placitum (i), are capped by regulation 13 at $1250, members are having their salary increments reduced by several levels. The submission is that this is a much greater financial imposition than that contemplated by the Act and Regulations.

I note however that the PCD Act does contemplate such an outcome. Section 26(1)(f)(ii) provides for the following sanction "reduction in the member's rank (whether or not the loss of income resulting from the reduction exceeds the amount prescribed for the purposes of paragraph (h)…".

The submission on this topic concludes with the observation that, frequently, a member will receive several of the penalties provided for in section 26. PASA describes this practice as "heavy handed".

PASA submits that I should consider recommending that there be a limit to the kinds of sanction that may be imposed concurrently.

The last topic addressed in the PASA submission is headed "Confidentiality".

PASA submits that the confidentiality provided for in section 45 remain as it is. PASA submitted that the high level of complaints which are found to require no further action demonstrates that publication of such matters would cause undue hardship to the officers complained of.

PASA submits that the power of investigating police to compel answers from officers exacerbates the effect of publicity. It sometimes takes a long time to complete investigations and disciplinary hearing. Even if the outcome of the process is exoneration, the officers and their families have been exposed to abuse from social media outlets. PASA submits that to avoid this outcome the identities of Star Force officers are routinely supressed in the Coroner's Court and in other proceedings.

PASA submits that removing the confidentiality provision would deter both potential recruits to the police force and would deter complainants lodging complaints.

PASA submits that the public has the assurance of the independent role of ICAC and the independent supervision of investigation by OPI.

I will now turn to the submissions PASA made under cover of its letter to the Attorney-General on 19 July 2019. The letter and the attached submission are Annexure C to the submission to me. While PASA has enlarged upon that submission to me I understand PASA to adopt the contents of Annexure C as part of its submission.

In its covering letter to the Attorney-General of 19 July 2019 PASA indicated that it is strongly opposed to a number of ICAC's recommendations. It said it believed that if ICAC's recommendations were accepted the character of OPI would be fundamentally altered from an oversight body to an investigative body. In the process ICAC and OPI would be elevated over the relevant Minister and the Parliament.

PASA prefaced its attached submission with an Executive Summary.

PASA submitted that it suspected that there had been no improvement in delays in the resolution of complaints and reports since the introduction of the PCD Act. It submitted that ICAC/OPI should produce figures on that topic.

PASA submitted that ICAC should not have conducted its 12 Month Review and the ICAC Act should be amended so as to prevent ICAC doing so unless requested by the Attorney-General.

Relying on the submission made by SAPOL to the committee, PASA suggested OPI was confusing oversight with investigation.

PASA submitted that ICAC/OPI may be acting unlawfully in as much as it may be "reviewing" rather than "reassessing" assessments by IIS. It added that OPI may be adding grounds to complaints and reports. It may be "advocating" for complainants.

It submitted ICAC/OPI had not released details of the sorts of matters which were being dealt with by way of MR or investigation.

It submitted that "There should be a right of review to the [PDT] for sanctions imposed under s 18(4). The [PDT] should be vested with jurisdiction to set aside an outcome of [MR] on the grounds that the designated officer was not afforded procedural fairness or the procedures in Part 3 were otherwise not complied with." Section 18(4) is the section relating to sanctions the CoP may impose in the course of MR.

In the introduction which followed the Executive Summary PASA enlarged a little on the concerns there expressed. It indicated it represented 98.9% of members of SAPOL. It submitted that the time taken to finalise investigations was critically important to police officers. It submitted that although only 8% of complaints and reports proceeded to investigation it was unaware how many would not have proceeded that far if it were not for OPI's intervention. It submitted that figures for such matters should be released.

It submitted that if ICAC's recommendations were implemented the CoP's powers of control and the management of SAPOL would be so fundamentally altered that his or her position in SAPOL would be irredeemably undermined.

Before turning to its response to ICAC's 18 recommendations, PASA addressed a number of further topics.

It sets out why in its view the ICAC's 12 Month Review should not have been conducted. It submitted that the ICAC Act should be amended so as to prevent such a review. I do not believe that the remit of my function under section 48 of the PCD Act extends to commenting on that submission.

PASA then identified what it submitted were some problems with the operation of the system. I will pass over discussion about assessment because that will be discussed in the context of the ICAC Recommendation 6.

Under the headings "Reassessment" and "Our View", PASA presented a legal argument that the word "reassess" in section 28, the section empowering OPI to reassess an assessment by IIS and substitute its own assessment, does not permit OPI to conduct a "review" of the IIS assessment. In my respectful view that interpretation over-analyses what is involved in a reassessment. The whole purpose of the section is to empower OPI to do whatever is necessary to determine whether it should do nothing to interfere with the assessment of a complaint or report made by IIS, or whether it should reassess it and, if necessary, substitute its own assessment. Subsection (2) provides that OPI might only undertake a reassessment or substitute its own after consultation with IIS.

PASA raises another concern under the heading "Assessments and Reviews/Reassessments". The concern appears to be this. There are no guidelines about how IIS should go about conducting its assessment or OPI's reassessment. Section 14(3) provides that, subject to the Act, IIS may conduct the assessment in "such manner as the OIC of IIS thinks fit". Section 28 is silent about the manner in which OPI may conduct any reassessment.

Relying on the submission made by SAPOL to the committee that OPI "adds further grounds to the complaint" PASA concluded that OPI was conducting its own investigations during the assessment phase. PASA sought from the CoP and ICAC/OPI figures showing the average time taken by IIS to assess complaints and reports under section 14 and ICAC/OPI to carry out its oversight pursuant to section 28. It sought comparative figures for the regime under the repealed Act.

The submission then broke down into considerable detail the information it suggested the ICAC, OPI, CoP and IIS should provide.

Under the heading “Oversight of section 21 Investigations by IIS” PASA submits that the picture painted by the SAPOL submission to the committee strongly suggests that OPI is confusing the functions of oversight and investigation. It submitted ICAC, OPI, CoP and IIS should release full details for directions given by OPI to IIS.

The final submission before dealing with the ICAC recommendations was that the ICAC and OPI should “release its definition of ‘complaint’ so that the Parliament can understand whether this has any bearing on the extreme increase in the number of police complaints since the scheme came into force”.

I turn to describe each of the annexures to the submission.

Annexure A contains materials setting out PASA’s position around the time of the ICAC’s Review of Legislative Schemes in 2015. There is included correspondence between the ICAC and the then Attorney-General. There is a transcript of an appearance by representatives of PASA in a public hearing conducted by ICAC. The materials provide a useful background to PASA’s present submission.

Annexure B contains correspondence between PASA and the then Attorney-General in 2016 concerning the Bill then before the Parliament. This too is helpful background.

Annexure C contains the materials sent to the Attorney-General on the 19 July 2019 which forms the bulk of its present submission.

Annexure D is the letter from ICAC to PASA dated 6 November 2019 to which I have already referred.

Annexure E contains two letters. One is from PASA to the then Police Minister the Honourable A Piccolo dated 16 August 2014 which contained submissions about the PDT. The other is a letter of advice by Marie Shaw QC to PASA dated 17 March 2015 which relates to the PDT.

Annexure F contains the two letters addressed to Deputy Commissioner Linda Williams by PASA (5 September 2019) and Tindall Gask Bentley (1 October 2019).

Submissions of The Advertiser

The Advertiser submitted that while it does not seek to be free to publish whatever it wishes regarding investigations into police disciplinary matters, it believes there are failings and shortfalls in the existing framework which are not conducive to transparency, and what it describes as “the fundamental right to know” which the community in a democracy expects.

The Advertiser submitted that South Australia is the only jurisdiction in Australia with a “blanket suppression on the reporting of investigations into police disciplinary matters”. The Advertiser submits that as a result, public confidence in the police force is stymied.

When allegations of police misconduct have been investigated, section 46 of the Act limits publication of information to that which is authorised by the CoP, ICAC, OPI or a court. It is the experience of The Advertiser that authorisation is rarely granted unless the outcome of the investigation has been favourable to the police force or the officer concerned. If only exonerations are published, the public has a skewed perception of police conduct.

The Advertiser submits that no other public sector employees are afforded the same confidentiality. Their disciplinary matters are reported in workforce tribunals, accreditation boards or the courts.

The Advertiser illustrated its complaint about secrecy by reference to its attempts to obtain details of sanctions disclosed in ICAC's annual report 2018/19. The Advertiser attached to its submission the table from the annual report. I reproduce the table.

1 July 2018 to 30 June 2019: **Officer No.**	Breach of the Code of Conduct Police Regulations, 1999	Outcome
1	Criminal – Abuse of Public Office	Reduction in Rank / Transfer / Fine
2	Reg 20 Confidentiality of Information – Improper Release / Access	Fine

Officer No.	Breach of the Code of Conduct Police Regulations, 2014	Outcome
2	Reg 15 Performance of Orders / Duties – Disobey Orders Reg 21 Confidentiality of Information – Improper Release / Access	Fine
3	Criminal – Traffic	Fine / Recorded Reprimand
4	Criminal – Traffic	Fine / Recorded Reprimand
5	Reg 14 Conduct Prejudicial – Reflects Adversely	Fine
6	Criminal – Traffic	Fine / Recorded Reprimand
7	Reg 15 Performance of Orders / Duties – Disobey Orders Reg 21 Confidentiality of Information – Improper Release / Access	Fine / Recorded Reprimand
9	Reg 14 Conduct Prejudicial – Reflects Adversely	Reduction in Rank / Transfer
11	Reg 15 Performance of Orders / Duties – Disobey Orders	Recorded Reprimand

Officer No.	Breach of the Code of Conduct Police Complaints and Discipline Regulations, 2017	Outcome
8	Clause 6 Proper Exercise of Authority – Excessive Force	Fine
10	Clause 4 Performance of Orders / Duties – Failure to carry out a lawful order Clause 5 Negligence – Neglect of Duty	Fine / Recorded Reprimand / Training and Education

When The Advertiser sought details of the rank, branch and the specifics of the misconduct disclosed in the table, the request was passed between SAPOL and ICAC with each saying it was up to the other to release the details. Ultimately each refused to release the requested details.

The Advertiser submitted that the scarcity of accessible information compares poorly with interstate jurisdictions. As an example, The Advertiser attached, and I reproduce, a media release by the Queensland police from 6 November2019.

> *Police officer stood down, Crime and Corruption Commission*
>
> *myPolice on Nov 6, 2019 @ 8:23pm*

A 51-year-old male detective superintendent from the Crime and Corruption Commission (Police Group) has tonight been stood down from official duty with the Queensland Police Service and will be tasked to perform non-operational duties.

The officer is subject to an ongoing investigation into allegations of unauthorised access of confidential information.

In keeping with our commitment to high standards of behaviour, transparency and accountability, we have undertaken to inform the public when an officer faces serious allegations of misconduct.
This does not mean the allegations against the officer have been substantiated.

Information about the Queensland Police Service Integrity framework can be found at:https://www.police.qld.gov.au/corporatedocs/reportsPublications/other/Documents/QPS-ESC-Integrity-Framework.pdf

Information about compliments and complaints can be found at:https://www.police.qld.gov.au/online/ComplimentsandComplaints.htm[2]

The Advertiser submitted that publicity about complaints, and how they were processed, encourages public confidence in the process. The Advertiser said it was not seeking to access disciplinary hearings. It sought to publish "information regarding disciplinary matters that we become aware of".

It sought greater transparency. It submitted that there should be more proactive disclosure. It cited an observation by the Attorney-General that "above all, the public must retain confidence in our police officers and any changes to the [PCD] Act should have this at the forefront of reform".

Submissions of the Legal Services Commission

The LSC made a brief submission which indicated that in the 18 month period from 1 July 2018 to 31 December 2019 the LSC received 240 enquiries regarding police conduct. I reproduce the LSC's description of the nature of those enquiries: "The Commission receives a relatively small number of enquiries regarding complaints against police. These enquiries range between allegations of police not investigating matters where the client thinks they should, to inappropriate conduct including violence. Some clients simply suggest the police are corrupt. Some clients are trying to recover property seized by police. Other clients have already been through the police complaints process and are not satisfied with the result or process."

The LSC attached a chart showing the method by which enquiries were made. Overwhelmingly enquiries were made by telephone.

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2 https://mypolice.qld.gov.au/news/2019/11/06/police-officer-stood-down-crime-and-corruption-commission/

Submissions of the Commissioner for Victims' Rights

The CVR outlined her role under the *Victims of Crime Act 2001* (SA). In particular, she referred to the provisions of the Act which relate to the way in which victims should be treated. The CVR made particular reference to a requirement that victims should be informed about how any grievances they express are treated.

The CVR made specific reference to her support for ICAC Recommendation 13, which suggested that where there was a disagreement between OPI and SAPOL about whether a matter should be referred to the Director of Public Prosecutions (DPP), a matter should be so referred.

The CVR noted that many victims who deal with the police complaints process feel ignored and unimportant when raising concerns about interactions with police. Some feel that it is inappropriate for police to investigate behaviour of police, albeit with the oversight of the OPI. The CVR observed that if insufficient information is sought from a victim making a complaint, that will add to the victim's dissatisfaction with the process. The CVR submitted that victims often receive a bland legalistic response which they find difficult to process. She submitted that transparency, even if not the desired outcome, is important for victims.

The CVR submitted that it may be possible for victims making complaints to be asked when making their complaint whether they would agree to the matter being handled by way of education or managerial guidance to the officer concerned. Restorative meetings may in some cases help victims concerned. "Ultimately it is how the victim perceives their matter to have been managed and how the feedback is provided by SAPOL or OPI to demonstrate that due process has been applied." Despite the confidentiality requirements in the PCD Act, the CVR submitted that it might be appropriate in some cases for SAPOL or OPI to receive, and be given the opportunity to discuss, information that is the subject of a complaint or report.

The CVR made specific reference to one of the principles included in the Victorian Victims' Charter.

The CVR submitted that the confidentiality provisions at sections 45 and 46 of the PCD Act prevent victims accessing disciplinary proceedings in their civil suits.

The CVR submitted that other systems dealing with agencies and officials such as the Legal Profession Conduct Commissioner are more transparent and open with the determination of complaints. The CVR concluded that she was not opposed to police investigating police, but with appropriate assessment and referral as required. She said that live monitoring would enhance the system.

In her summary, the CVR recommended that particular attention be paid by those communicating with complainants the process and the outcome of complaints.

Recommendations

I now turn to the recommendations I make. I will first follow the numbering of the recommendations by the ICAC and SAPOL, then identify what I treat as recommendations being made by PASA and The Advertiser. PASA has not described its submissions in terms of individual recommendations, but in the interest of consistency I will characterise as recommendations submissions from PASA which appear to call for some legislative change.

In respect of each recommendation I summarise the positions of each of the ICAC, SAPOL, PASA and The Advertiser in their original submissions to me and their supplementary submissions.

> *ICAC Recommendation 1*
>
> *The PCD Act 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.*

The ICAC has unilateral power under section 23(2) of the ICAC Act to assess, or require OPI to assess, any matter according to the criteria set out in subsection (1). The ICAC has unilateral power under section 30(2) of the PCD Act to investigate any complaint or report other than one referred to it by OPI under section 29 if it is satisfied that it is appropriate to do so. The PO had a similar power pursuant to section 22A of the repealed Act.

The ICAC submits that while it has that power, OPI has no power where issues of conduct have been identified but are not the subject of complaint or report. The ICAC does not submit that OPI should assess or investigate the matter but should be empowered to refer it to IIS for assessment.

SAPOL opposes the recommendation. SAPOL submits that OPI has no corresponding power under the ICAC Act. It submits that the ICAC has not demonstrated circumstances in which OPI would need the power to initiate a matter on its own initiative.

It is true that OPI has no corresponding power under the ICAC Act, but the ICAC itself has such powers under section 7. In a conference after written submissions were made, examples were given by the ICAC of circumstances where such a power could have been appropriately exercised:

- Where an incident of potential corruption, misconduct, or maladministration is not the subject of a complaint or report, for example an incident reported in the media.
- Where in observing the BWV of an incident giving rise to a complaint or report, there was observed another incident, not itself the subject of the complaint, but which plainly required investigation. A specific example was given at the conference.

SAPOL submitted that if OPI were to be given such a power, there would need to be an understanding of what class or type of matter might be the subject of such a referral.

I am not sure why such an understanding would be necessary. The PCD Act does not permit the assessment or investigation of conduct which is not contemplated by section 14(1) of the PCD Act.

PASA opposed the recommendation for similar reasons to SAPOL, but added that any IIS officer observing conduct of a fellow officer which is potentially a breach of discipline is obliged to report such conduct. While that submission is sound, it overlooks the inability of OPI officers to do likewise.

In my view, it is appropriate that OPI have the power to identify of its own initiative matters potentially in breach of the PCD Act. In such a case, it would refer the matter to IIS for assessment in the usual way.

Review Recommendation 1

Amend the PCD Act to permit OPI to identify a matter on its own initiative for assessment by IIS or referral under section 29 to the ICAC.

ICAC Recommendation 2

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

Section 13(2) provides that OPI must as soon as reasonably practicable, but in any event within three days after receiving a complaint or report, refer the matter to IIS. This creates particular difficulties on weekends, especially on long weekends.

There is no opposition to this recommendation; it is reasonable.

Review Recommendation 2

Amend the section 13(2) timeframe to allow for 3 business days.

ICAC 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 or could be the subject of prosecution; or

(b) it raises a potential issue of misconduct or maladministration 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 examine it or having regards to all the circumstances of the case and 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 sections(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.

The ICAC submits that the amendment to section 14 is necessary for a number of reasons. The first is that the assessment process contemplated by section 14 should be the same as that applying to other public officers under the ICAC Act. Section 23 of the ICAC Act reads as follows:

> (1) On receipt by the Office of a complaint or report, the matter must be assessed as to whether—
>
> (a) it raises a potential issue of corruption in public administration that could be the subject of a prosecution; or
>
> (b) it raises a potential issue of misconduct or maladministration in public administration; or
>
> (c) it raises some other issue that should be referred to an inquiry agency, public authority or public officer; or
>
> (d) it is trivial, vexatious or frivolous, it has previously been dealt with by an inquiry agency or public authority and there is no reason to reexamine it or there is other *good* reason why no action should be taken in respect of it,
>
> and a determination made as to whether or not action should be taken to refer the matter or to make recommendations to the Commissioner.
>
> (2) The Commissioner may also assess, or require the Office to assess, according to the criteria set out in subsection (1), any other matter identified by the Commissioner acting on his or her own initiative or by the Commissioner or the Office in the course of performing functions under this or any other Act.
>
> (3) The Office or the Commissioner may, for the purpose of assessing a matter, by written notice, require an inquiry agency, public authority or public officer to produce a written statement of information about a specified matter, or to answer specified questions, within a specified period and in a specified form, verified if the written notice so requires by statutory declaration.
>
> (4) A person must not refuse or fail to comply with a requirement of a notice under subsection
>
> Maximum penalty: $10 000 or imprisonment for 2 years.

Pursuant to that section, OPI must assess all complaints and reports to determine whether there is raised a potential issue of corruption misconduct or maladministration in public administration or whether some other issue should be referred to another agency. As part of that same assessment OPI must determine, pursuant to placitum (d), whether, for a number of reasons, no action should be taken.

By comparison, section 14 of the PCD Act approaches the same process in a confusing and somewhat contradictory way. Subsection (1) replicates section 23(1)(a) to (c) of the ICAC Act, but instead of including the exclusory criteria (i.e. the reasons why no action need be taken) in the assessment process, section 14 places those considerations in subsection (2) and complicates the matter by saying that if any of the exclusory criteria apply, the assessment process contemplated by subsection (1) simply does not apply. From a linguistic point of view that is an unusual way to approach the matter. What is a consideration of the exclusory criteria under subsection (2) if it is not an assessment?

The second reason is that there has arisen a difference of opinion between OPI and IIS about the ability of IIS to take action on complaints and reports which do not raise issues of corruption, misconduct or maladministration.

The third reason relates to subsection (4). For no apparent reason, subsection (4) provides that only complaints, not reports, which fit the criteria of subsections (1)(a) or (c), must be notified to OPI.

SAPOL supports the proposed amendments to section 14.

PASA objects to only one aspect of the recommendation. It objects to the inclusion in the proposed placitum (d) of the words "and there is no reason to reexamine it". It objects to there being a capacity to reopen a matter which has already been dealt with.

In my view there should be such a capacity. There is good reason to have consistency between the two Acts in this respect, unless there is a reason to treat police officers more favourably than other public officers. In this instance there appears to be no such reason.

In its supplementary submissions, PASA submitted that police officers are not ordinary public officers and their discipline system is different and harsher than the regime in the *Public Sector Act 2009*. Even if that submission is correct, that is not, in my view, a sufficient reason to treat police officers more favourably than other public officers in this particular respect. If there is reason to reexamine a complaint against officers under the ICAC Act, then there should be the same capacity under the PCD Act.

In a draft of this review which I gave to ICAC, SAPOL and PASA for their consideration I suggested that the word "good" might be inserted before the word "reason" so that the relevant passage would read "and there is no good reason to reexamine it". I made that suggestion if the ICAC Act could be similarly amended.

In his supplementary submission the ICAC submitted that the word "good" should not be added to either the PCD Act or the ICAC Act. The absence of the word "good" in the ICAC Act, at least in this context, has not caused difficulties in the assessments under that Act since September 2013. The addition of the word "good" might lead to challenges about what amounts to "good reason". I accept that submission.

In my view, section 14 should be amended so as to repeal subsection (2) and incorporate a modified form of that subsection into subsection (1). My reasons for so recommending are as follows:

1. It is desirable to have consistency in that respect between the PCD Act and the ICAC Act;
2. The incorporation of the two subsections makes clear that a consideration of the exclusory criteria, presently in subsection (2), is part of the assessment process mandated in subsection (1). To repeat my rhetorical question, what is a consideration of the exclusory criteria in subsection (2) if it is not part of an assessment?
3. The incorporation of the subsections would make clear that action under the new Act may only be taken if the conduct raises the potential issues described in subsection (1)(a)–(c).

Review Recommendation 3

Amend section 14 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.

ICAC 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.

Section 15 empowers the CoP to decline to take further action in respect of a complaint or report even where IIS has assessed the matter as raising a potential issue of corruption, misconduct or maladministration in public administration. Presumably the power also relates to an assessment by IIS that the complaint or report raised some other issue that should be referred to OPI. The CoP may exercise that power for three of the "exclusory" reasons appearing in section 14(2) i.e. the conduct has been previously dealt with, or is trivial, frivolous, vexatious or not made in good faith.

Section 15(d) slightly amplifies the exclusory criteria provided for in section 14(2). I reproduce placitum (d).

> (d) in the case of a complaint—having regard to all the circumstances of the case, the Commissioner is of the opinion that an investigation of the complaint is unnecessary or unjustifiable (including, to avoid doubt, where the alleged conduct of the designated officer concerned is not sufficiently related to the exercise, performance or discharge (or purported exercise, performance or discharge) of his or her official powers, functions or duties).

This recommendation is a matter of disagreement in principle between ICAC on the one hand and SAPOL/PASA on the other. ICAC submits that while the power to sanction for proved misconduct under the Act always rests with the CoP, the scheme of the Act is that the assessment of alleged misconduct is a matter for the specialised IIS. Any assessment by IIS is subject to reassessment by OPI as part of its oversight function.

Section 15 gives the CoP the power to override an assessment by IIS that action, whether that be MR or investigation, should be taken in relation to a complaint or report. To get to that position, IIS must have determined that the complaint or report does not meet any of the exclusory criteria presently found in section 14(2) which would justify no action being taken. Section 15 empowers the CoP to decide the contrary, effectively frustrating the assessment by IIS or any reassessment by OPI. The CoP may decline to take action for any of the exclusory reasons considered by IIS under section 14(2) but in placitum (d), there is the additional exclusory ground, namely, the alleged conduct is not sufficiently related to the employment of the officer.

SAPOL opposes this recommendation on the ground that it was the intent of the Parliament to provide the CoP with the power to decline to take further action with respect of his employees. PASA submitted that the CoP is ultimately responsible for his members and for the control and management of SAPOL.

PASA adds two further arguments in opposition to this recommendation. The first is that there is always the corrective power in ICAC to take action if ICAC perceives corruption in the exercise of the CoP's power.

The second is that, as ICAC observes, the CoP has not exercised this power at all since the commencement of the Act.

While I see the force of the recommendation I conclude that there is presently no need to consider removing the power from the CoP in section 15.

Neither SAPOL nor PASA opposes ICAC's recommendation that if section 15 is to remain, placitum (d) should be amended to include reports. Presently, the provision applies only to complaints. While the words at the beginning of the placitum "in the case of a complaint" might suggest that Parliament, and the draftsperson, had given quite specific attention to the differentiation between "complaint" and "report", and the omission of "report" is not accidental, it is not apparent why, in this instance, a report should not be included.

Review Recommendation 4

Amend section 15(d) to include to refer to both complaints and reports.

ICAC Recommendation 5

Amend the definition of misconduct in the PCD Act to make it clear that misconduct under the Act 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.

ICAC submits that there is presently an inconsistency between the terms of the Act and some of the Regulations made pursuant to the Act. The PCD Act mirrors the ICAC Act in that misconduct by police officers, like misconduct of other public officers, must be misconduct committed "while acting in his or her capacity as a public officer".

In fact the definitions of corruption, misconduct and maladministration in public administration in section 3 of the PCD Act are expressly to have the same meaning as in section 5 of the ICAC Act.

Section 7(1) of the PCD Act empowers the Governor to establish a Code of Conduct for the maintenance of professional standards by police officers.

Regulation 7 provides that the Code of Conduct is that which appears in Schedule 3 of the Regulations.

Schedule 3 has three provisions which expressly relate to conduct outside the course of employment. I reproduce those provisions.

2—Honesty and integrity

A designated officer must at all times act with honesty and integrity, whether in the course of his or her employment or otherwise.

3—Conduct prejudicial to SA Police

A designated officer must not, in the course of his or her employment or otherwise, behave in a manner that—

(a) reflects or is likely to reflect adversely on SA Police; or
(b) is prejudicial to good order and discipline in SA Police.

7—Conduct towards public, designated officers in the department

A designated officer, in dealing with members of the public in the course of his or her employment, or in dealing at any time with designated officers, police medical officers or other persons employed in or performing duties or functions in the department—

(a) must not unlawfully discriminate against any person; and
(b) must not behave in an oppressive, offensive, abusive or insulting manner; and
(c) must be impartial and respectful.

Insofar as Regulations are inconsistent with the Act they are likely to be found to be *ultra vires*. Actions taken in relation to breaches, or alleged breaches, of regulations found to be *ultra vires* are taken without power.

ICAC originally recommended that to render the Code of Conduct enforceable the definition of misconduct in the Act be amended so as to include conduct other than conduct in the course of acting in the capacity of a police officer.

Originally both SAPOL and PASA opposed the amendment on the ground that police officers should not be the subject of a more extensive definition of misconduct than other public officers. However, their opposition at that time did not take into account the three types of conduct contained in the Code of Conduct which expressly relate to off-duty conduct, and the consequence that Regulations embodying those types of conduct might be *ultra vires*. Neither SAPOL nor PASA submitted that the three types of conduct should be liable to disciplinary action only if they occurred on duty.

In my draft review I recommended that the PCD Act be amended so as to include the conduct identified in clauses 2, 3 and 7 of the Code of Conduct.

In its supplementary submissions, SAPOL noted the recommendation without additional comment. ICAC and PASA made further and different suggestions.

PASA submitted that the definition of misconduct in public administration should be a variation of the definition in section 5(3) of the ICAC Act. Presently, the definition in section 3 of the PCD Act says that the words have the same meaning as in the ICAC Act. I reproduce PASA's suggested amendment to the PCD Act.

Misconduct in public administration" means—

(a) contravention of a code of conduct by a ~~public officer~~ ***designated officer*** while acting in his or her capacity as a ~~public officer~~ ***designated officer*** that constitutes a ground for disciplinary action against the officer; ***and***
(b) includes conduct of a designated officer when off duty so far as that conduct may affect his or her fitness to discharge his or her duties as a designated officer.~~; or~~
(b) other misconduct of public officer while acting in his or her capacity as a public officer.

The reasoning behind that suggestion arises from judicial pronouncements which suggest that misconduct outside employment will only fall within the ambit of a disciplinary scheme if it is such as may affect the police officer's fitness to discharge his or her duties as a police officer. In its original submission, PASA cited a number of authorities for that submission. In its supplementary submission, PASA emphasised the judgment of Burbury CJ in *Henry v Ryan* [1963] Tas SR 90. It

must be noted that in that case the learned Chief Justice referred to authorities which gave considerable scope to include into the disciplinary process conduct while not on duty.

In his supplementary submission, the ICAC suggested that the PCD Act be amended so as to include, generally, off-duty conduct identified in the Code of Conduct. The reasoning behind that suggestion is that my tentative recommendation would effectively require that the PCD Act be amended if there were to be future changes to the Code of Conduct proscribing further off-duty conduct.

Both submissions overcome the *ultra vires* difficulty, but the ICAC submission has the advantage of greater certainty. The drafters of the Code of Conduct have quite specifically identified the types of misconduct which should be the subject of disciplinary action even when committed off-duty. No one suggests that there has been a misidentification of those types of misconduct.

The PASA proposal would give rise to frequent issues of interpretation.

In my view it is preferable to amend the PCD Act to provide a definition of misconduct in public administration which includes misconduct identified in the Code of Conduct as applying "whether in the course of his or her employment or otherwise".

Review Recommendation 5

Amend the definition of misconduct in public administration in the PCD Act so as to include conduct identified in the Code of Conduct as applying whether in the course of employment or otherwise.

ICAC 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.

The ICAC submits that the oversight by OPI of assessments by IIS is insufficiently robust. Upon assessing the conduct identified in the complaint or report, IIS makes a determination about what, if any, action should be recommended. Although not strictly part of its assessment under section 14(1) IIS may take no action if any of the exclusory criteria in section 14(2) are met. Alternatively, IIS may recommend that the complaint or report be referred to MR under Part 3, or investigation under Part 4.

It appears that there has been a degree of misunderstanding between OPI and IIS as to OPI's powers under section 28 to reassess a complaint or report after IIS has made its assessment. In its supplementary submission SAPOL said that it has hitherto taken the view that section 28 empowered OPI to reassess the action IIS has recommended once IIS has characterised the conduct and determined that some action should be taken.

As a consequence of that understanding, IIS has complied to a high level with the view of OPI about the action which should be taken. That is consistent with the ICAC's report that where OPI and IIS have found themselves in agreement about the characterisation of conduct, but in disagreement about the recommended action to be taken, then IIS has ordinarily accepted OPI's view.

It is understandable that IIS should have taken the view that it did. The processes of characterisation of the conduct, and the recommendation as to action to be taken, are closely related to each other. Another reason is that Item 3 of Schedule 2 of Regulation 6 requires the recommended action to be transmitted to OPI.

OPI clearly has powers to supervise an investigation if that is the recommended action. It seems consistent with that function that OPI have some power over the determination to proceed in that way.

In its supplementary submissions SAPOL indicates that it does not oppose the recommendation, so long as there is no extension of the power of OPI to reassess and substitute its view "at any later point in time in the investigation i.e. at the conclusion of investigation when matters are considered for criminal/conduct review". I have confirmed with the office of ICAC that the proposal is limited to the assessment undertaken in accordance with section 14 of the PCD Act and the decision made at that time as to the recommended action to be taken. I do not intend the proposed amendment to have any different meaning.

In its original submission, and in its supplementary submission, PASA opposes this recommendation. It submits that the recommended change "would be a fundamental departure from the *Police Act* and the common law and [would remove] one of the most important aspects of the control and management of SA Police from the CoP. The CoP would cease to have control and management of SA Police in a true sense, because he would not have ultimate authority on how to manage the conduct of his Members."

In my view PASA overstates the consequences of the proposed change. Presently the overwhelming majority of complaints are dealt with by no action being taken or a referral to MR. The high proportion of matters being dealt with in these ways is occurring with OPI's concurrence. There is no reason to think that formalising what has hitherto been regarded by the CoP as being the effect of section 28 will change outcomes.

In my view it is appropriate, and consistent with the intention of the Act to provide a robust independent oversight of assessments and investigations, that the Act be amended to make clear that the oversight includes the recommended actions which follow from the assessment of the conduct.

Review Recommendation 6

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

The ICAC makes three recommendations (recommendations 7, 8, and 9) relating to MR.

Before dealing with the recommendations ICAC makes several observations about the operation of MR. He does not submit that OPI should have oversight of the conduct of MR. In fact he says that the MR appears to be working as intended, particularly following the assessment process. The observations are these:

- MR has been used where the assessment does not find that the conduct amounts to corruption, misconduct or maladministration in public administration. While it might be appropriate that there be some action taken by CoP as a proper function of management, the fact that the action is not being taken under the auspices of the PCD Act should be

recognised and communicated to the relevant parties. In a later submission the ICAC reported that examples of this happening have reduced.

- Resolution officers are inappropriately determining to take no further action during MR.

I turn to summarise the three recommendations.

ICAC 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 determination under section 16.

The ICAC recommends that section 7(1) be amended to remove the words "should" and "should not" and replace them with the mandatory "must" and "must not".

Neither SAPOL nor PASA opposes that recommendation.

Review Recommendation 7

Amend section 17 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.

ICAC Recommendation 8

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

Section 17(1)(b) provides that the Governor may make regulations for the procedures for dealing with the conciliation of complaints, but not reports. Section 18(3) empowers a resolution officer to attempt to conciliate complaints but not reports.

ICAC submits that in respect of both sections there should be added the power to deal with reports as well as complaints.

SAPOL does not oppose this recommendation although it does note that conciliation may be less appropriate in the case of a report than a complaint.

PASA is ambivalent about this recommendation. It submits that the legislation recognises that conciliation might be less appropriate in the case of a report which is filed by a police officer complying with his or her obligation to report a suspicion of misconduct by a fellow officer.

I see the force of these submissions. It may be that the scope for conciliation is less in the case of reports, but, as was pointed out in a conference with ICAC/OPI following the written submission, conciliation may be appropriate where, for example, there is some grievance between two police officers. Other plausible examples can be imagined. I see no harm, and possible good, in making reports amenable to conciliation.

Review Recommendation 8

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

ICAC 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 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, and investigation commenced.

Neither SAPOL nor PASA opposes this recommendation. It seems desirable to unequivocally empower the resolution officer to cease the MR and refer the matter for reassessment if new information suggests it is appropriate.

Review Recommendation 9

Amend section 18 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.

The ICAC makes three recommendations (10, 11, and 12) regarding investigations. Before doing so, he made observations about investigations. While he commends the carrying out by IIS of most investigations, he reports that there have been occasions where OPI has made written criticisms of some. He makes the specific criticism that there has appeared a tendency of IIS investigators to begin their task by obtaining a statement from the officer under investigation. In the course of obtaining the statement, the nature of the complaint or report is effectively disclosed. In criminal investigations, such a course would be inappropriate. The interview with a suspect would normally only occur after an investigator has interviewed witnesses and obtained other evidence.

Despite investigations under the PCD Act being related to alleged disciplinary breaches rather than criminal conduct, it seems to me that enquiries should generally be made in the same order. It is true that under section 21(7) of the Act an investigator must inform the officer of the nature of the conduct being alleged, but that requirement only applies where the investigator proposes giving the officer a direction of the sort contained in subsection (5). There is no reason to conduct an interview with the officer concerned at the beginning of an investigation. (In relation to a later recommendation, the inappropriate use of directions pursuant to subsection (5) is discussed.)

ICAC 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.

ICAC Recommendation 11

Section 21(2) be repealed.

The purpose of these two recommendations is to make a simpler and clearer connection between the amended section 14, the assessment section, and section 21, the section dealing with matters referred by IIS for investigation. Just as it is proposed to repeal section 14(2) and incorporate the exclusory criteria into an amended section 14(1), so it is proposed to repeal section 21(2) and assume that the processes of assessment and referral under section 14(1) have taken place. The exclusory criteria in section 14(2) do not need to be repeated.

SAPOL opposed recommendation 10, but only on the mistaken belief that the recommendation proposes excluding the power to delegate investigations to local service areas, i.e. police in local, usually country, areas. However, the words "subject to this Act" in section 21(1) leave room for the power of delegation in section 21(14). SAPOL supports recommendation 11.

PASA does not oppose the recommendation but correctly points out that the terms of the recommendation accidentally omit the words "in public administration" after each of the words "misconduct" and "maladministration".

Review Recommendation 10

Amend section 21(1) to read:

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

Review Recommendation 11

Repeal section 21(2).

ICAC 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.

SAPOL has a limited objection to this recommendation which is designed to achieve the reverse of recommendation 9, i.e. to enable the reassessment of a matter from investigation to MR if new information suggests the conduct is less serious than initially thought.

SAPOL submits that to require IIS to consult with OPI before taking such action adds an unnecessary layer of bureaucracy. PASA agrees with this recommendation provided that the CoP, via IIS, retains the ultimate discretion.

In my view, there is no reason why a reassessment down the level of seriousness should be treated differently from a reassessment up the level of seriousness. OPI should have an oversight role over each. The reassessment up or down is in the hands of IIS, but there should be OPI oversight. It adds little by way of bureaucracy, but maintains the important oversight role of OPI.

Review Recommendation 12

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

ICAC Recommendation 13

The PCD 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.

SAPOL and PASA originally opposed this recommendation on the ground that, in the event of disagreement between OPI and IIS as to whether a matter should be referred to the DPP, the view of IIS should prevail, because it is a part of the normal function of police prosecutors to determine whether a matter should be charged as a criminal offence.

The CVR supports this recommendation.

In its supplementary submission PASA said that it would not actively oppose this recommendation.

In its supplementary submission SAPOL maintained its opposition to this recommendation but submitted that if the change was made, it would be preferable to be clear that after the DPP has provided advice, the ultimate decision to lay, or not lay, a criminal charge remains with the CoP.

I do not see any need for there to be legislative clarification following advice by the DPP. The CoP has the ultimate decision to lay, or not lay, a criminal charge. Except for the power of the DPP to lay an *ex officio* indictment, only the CoP has the power to lay a criminal charge.

Review Recommendation 13

Amend the PCD Act so that if there is dispute between OPI and SAPOL 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.

ICAC Recommendation 14

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

SAPOL makes no comment on this recommendation. PASA originally submitted that the OPI, rather than ICAC or OPI, should be able to nominate the staff member of OPI to be present at the hearings, but it does not now actively oppose this recommendation.

In my view, it is reasonably clear that there is a drafting error in subsections (6) and (7). Subsection (6) provides that the OPI staff member may be nominated by ICAC alone, whereas subsection (7) provides that the staff member may be nominated by OPI or ICAC. The inconsistency should be removed. There is no obvious reason why there should not be a wider option available in subsection (7).

Review Recommendation 14

Amend section 35(6) to allow the OPI staff member who is permitted to be present may be nominated by OPI or ICAC.

ICAC Recommendation 15

The PCD Act 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.

ICAC submits that there is an odd aspect to the relationship between the ICAC Act and the PCD Act. If a matter is assessed as a raising a potential issue of corruption it may be referred by OPI to ICAC pursuant to section 29(1) of the PCD Act. Upon referral the matter will be taken to be a complaint or report received under the ICAC Act (section 29(2) of the PCD Act).

Pursuant to section 30(4) of the PCD Act the ICAC will be taken to have all the powers of a member of IIS.

Upon referral, the ICAC can choose to investigate the matter him or herself or refer the matter to SAPOL, or other law enforcement agency (section 24(1) of the ICAC Act).

The police investigating the matter will have the ordinary powers of investigation. Those powers are sufficient to carry out the criminal investigation into the allegations of corruption.

However, the complaint itself, or the criminal investigation of corruption, may raise concurrent issues of misconduct or maladministration. The ICAC submits that it is understandable and appropriate that the investigation of both criminal and discipline issues should be able to be conducted simultaneously. Section 24(5) of the ICAC Act permits such contemporaneous investigations.

Presently, the investigation of the complaint will be investigated as a referral under the ICAC Act. The investigating police will not have the powers given to IIS under the PCD Act. In particular, they will not have the powers given to IIS under section 21 of the PCD Act. Those powers include the power under section 21(5) to direct designated officers to answer questions.

Presently, the ICAC may decline to accept the referral of a complaint by OPI. OPI can then refer the matter to IIS for the investigation of all matters.

The ICAC submits that it would be better if the PCD Act was amended to ensure consistency of investigations between the ICAC and SAPOL.

SAPOL supports the recommendation. It says that where the ICAC allocates a matter to the CoP for investigation, the assigned IIS or other SAPOL investigator should have all the powers of IIS. That would ensure consistency in investigations.

PASA strongly opposes the recommendation. It submits that the recommendation is unnecessary and an inappropriate departure from fundamental rights. It describes the matter as a core issue for PASA and its membership.

PASA submits that the whole purpose of this recommendation is to give the investigators of criminal corruption allegations the coercive power of section 21(5) of the PCD Act. It submits that this recommendation is inconsistent with ICAC Recommendation 19, which is the recommendation that the coercive powers of section 21(5) should not be used by investigators until criminal investigations and/or proceedings have been finalised.

I see no inconsistency between the two recommendations. The ICAC Act clearly contemplates that there will be two contemporaneous investigations into criminal and conduct investigations. If the ICAC conducted such an investigation it would have the same powers as IIS including the coercive powers in section 21(5). The ICAC Act is silent about the question of whether the coercive powers should not be exercised until the completion of the criminal investigation.

The ICAC is recommending in his Recommendation 15 that there be a consistency of powers under the two Acts, but in Recommendation 19, where there are contemporaneous investigations into criminal and conduct matters, the use of the coercive powers should be deferred until the completion of the criminal matter. If both Recommendations 15 and 19 are accepted, then in my view, the concerns of PASA are met.

Review Recommendation 15

Amend the PCD Act 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 IIS in Part 4 of the PCD Act.

ICAC Recommendation 16

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

There has arisen a doubt about whether section 30 of the PCD Act permits the ICAC to exercise his powers under the ICAC Act in relation to referrals pursuant to section 29 of complaints and reports alleging misconduct or maladministration. There is no such doubt about the ICAC's ability to use his powers under the ICAC Act in relation to complaints and reports which allege corruption. The ICAC does not share that doubt but submits that section 30 should be amended so as to remove the doubt.

SAPOL opposes the recommendation, submitting that it has the potential to circumvent procedural controls contained in the PCD Act.

PASA opposes the recommendation, saying that, in its view, the recommendation is “a desperate power grab”.

While it is not explicit in section 30 that upon a reference to the ICAC of a complaint or report the ICAC may utilise powers under the ICAC Act, it is in my view implicit from the terms of sections 29 and 30 of the PCD Act. Section 29(2) provides that a complaint or report referred by OPI to the ICAC pursuant to subsection (1) will be taken to be a complaint or report received under the ICAC Act. Section 30(1) provides that the ICAC may investigate a matter referred to it pursuant to section 29.

Section 30(4) provides that in carrying out its investigation of a complaint or report, ICAC will be taken to have all the powers of a member of IIS. That subsection does not purport to limit the ICAC’s powers to those of the IIS. A very arguable interpretation of that subsection is that it assumes that the ICAC may exercise all its powers under the ICAC Act, but it explicitly confers the additional powers of IIS.

However, the argument that the ICAC may not use its ICAC powers in relation to allegations of misconduct or maladministration in public administration appears to arise from the absence of express provision that ICAC may use its powers under the ICAC Act for these investigations. It is not clear what procedural controls in the PCD Act would be lost if such a power was expressly provided for. There is in my view no basis for characterising the recommendation as “a desperate power grab”.

In my view the recommendation does no more than make explicit what is implicit in sections 29 and 30 of the PCD Act.

Review Recommendation 16

Amend section 30 to expressly provide that the ICAC can utilise powers under the ICAC Act to investigate misconduct and/or maladministration.

ICAC Recommendation 17

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

ICAC reports an argument that he is not empowered under the Ombudsman Act to exercise the powers of the Ombudsman set out in section 36A of the ICAC Act because the Ombudsman could never investigate a complaint or report about a police officer under the PCD Act. ICAC does not agree with that argument but submits that to remove doubt section 5(2) of the Ombudsman Act be amended so as to refer to the PCD Act.

Neither SAPOL nor PASA opposes this recommendation.

Review Recommendation 17

Amend section 5(2) of the *Ombudsman Act 1972* (SA) to refer to the PCD Act.

ICAC Recommendation 18

Amend the PCD Act to make clear that 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.

SAPOL does not support this recommendation. It submits that while the ICAC undoubtedly has power under section 24(2)(b) and (c) of the ICAC Act to investigate serious or systemic maladministration or misconduct in public administration, the investigation of non-serious or non-systemic maladministration or misconduct should remain with IIS. There is no demonstrated need for the ICAC to have the additional power.

PASA originally expressed a similar objection, consistent with its objection to Recommendation 16. In its supplementary submission, PASA modified its position, arguing that while it was appropriate for the ICAC to use the powers of the Ombudsman to investigate a potential issue of maladministration, there is no justification for it to investigate misconduct.

Nevertheless, PASA maintained its opposition to the recommendation on the basis that there may be unintended consequences of the proposed amendment. PASA submitted that it would be preferable to wait and see if an amendment were made necessary by a successful Supreme Court challenge to the ICAC's contention that, notwithstanding the contrary argument, the ICAC already has the power under the *Ombudsman Act 1972* (SA) to investigate complaints of misconduct and maladministration in public administration.

In my view it is preferable to clarify the uncertainty on this issue. It may be that the need for the ICAC to be able to use the powers of the Ombudsman to investigate maladministration and misconduct in public administration, as opposed to the serious versions of those behaviours, is slight. In practice it might be likely to arise only as a collateral investigation into allegations of corruption, but to avoid doubt and time-consuming challenge, there is in my view no reason in principle why the position should not be clarified.

Review Recommendation 18

Amend the PCD Act to make clear that the ICAC may use powers under the *Ombudsman Act 1972* (SA) for the purposes of exercising powers in relation to matters of misconduct and maladministration relating to a police complaint or report.

ICAC Recommendation 19

Amend section 21 to provide that while a designated officer is the subject of a criminal investigation or criminal proceedings an investigating officer cannot use the coercive power contained in section 21(5) in the PCD Act for the purposes of a conduct investigation, arising out of the same circumstances until the criminal investigation and/or proceedings have been finalised.

The ICAC noted a practice in IIS investigations where the investigator is enquiring into possible criminal conduct on the part of the designated officer. If, upon cautioning the officer, the officer refuses to answer further questions, the investigator directs the officer to answer using the powers contained in section 21(5) of the PCD Act. Section 21(6) provides that such a direction has the effect of a direction by the CoP. If the officer still refuses to answer, subsection (12) makes the officer liable to disciplinary action.

The ICAC submitted that that practice should not continue for two reasons.

The first is that if the designated officer is being interviewed before the investigation into conduct has begun, there is no power to give directions to answer.

The second reason is that the direction may be unfair. The designated officer cannot be sure that any answer given following direction will not be used in criminal proceedings. The ICAC says that he has seen evidence of directed answers being used in the process of a decision being made as to whether or not to charge the officer with a criminal offence.

The ICAC understands that directed answers have on occasions been given to the Professional Conduct Section (PCS) in the Ethical Standards Branch of SAPOL, the section that adjudicates on the evidence obtained by the investigation and advises IIS as to the appropriate course of action. Directed answers have been used to obtain derivative evidence tending to negate potential defences to a criminal charge. It is easy to see how difficult it would be for an investigator not to use directed answers in these ways. The ICAC considers that practice inappropriate, and submits that it is the experience of OPI that this approach is commonplace in the PCS adjudications on matters that involve both criminal and conduct allegations. The ICAC provided three examples.

The ICAC recommends that the Act be amended so as to prevent this practice. The submission is that section 21 be amended so as to provide that the coercive power in section 21(5) should not be used until any criminal investigation or proceedings have been finalised.

In its supplementary submissions, SAPOL opposes this recommendation. SAPOL says it has not been provided examples of directed answers being used for purposes associated with criminal prosecutions.

SAPOL submits that it would be potentially unfair to designated officers to defer investigations until the completion of sometimes very lengthy criminal proceedings. The unfairness to officers to which ICAC refers could be overcome if entirely separate criminal and disciplinary investigations were undertaken concurrently by different investigators. Different prosecutors could be given the task of adjudicating and, if appropriate, prosecuting proved conduct.

I appreciate the force of the unfairness point made by SAPOL, and the proposed solution, but I do not see the recommendation as requiring the deferral of disciplinary investigations until the conclusion of criminal proceedings. It is only the exercise of the coercive powers that is deferred. If disciplinary processes can be completed without the use of coercive powers, then there is no reason why they should be deferred.

PASA agrees with this recommendation.

In principle, I think that the recommendation should be made.

Review Recommendation 19

Amend section 21 to provide that while a designated officer is the subject of a criminal investigation or criminal proceedings an investigating officer cannot use the coercive power contained in section 21(5) in the PCD Act for the purposes of a conduct investigation, arising out of the same circumstances until the criminal investigation and/or proceedings have been finalised.

ICAC Recommendation 20

Amend section 29 to enable the ICAC to refer to the OPI a complaint or report received by the ICAC under section 29(1) of the PCD Act back to the OPI.

Section 13 to be amended to reflect the proposed amendment to section 29(1).

Pursuant to section 29, OPI may refer complaints and reports to the ICAC if in its view the complaint or report should be dealt with by the ICAC rather than IIS. There is no provision in the PCD Act for the ICAC to decline to accept the referral and to refer it to IIS instead. There is power in the ICAC Act for the ICAC to refer matters to IIS for investigation, but it may be that upon such a referral IIS would not have the necessary investigative powers referred to in section 21 of the PCD Act. That is because section 21(1) confers powers for the investigation of "each complaint referred to the IIS *under this Act*".

A corollary of that difficulty is that OPI has only powers to oversee complaints and reports investigated by IIS under the PCD Act.

The ICAC submits that section 29 should be amended so as to enable the ICAC to refer back to OPI matters referred to it under section 29(1). There would need to be a corresponding amendment to section 13, the section dealing with action to be taken by OPI on receipt of a complaint or report.

SAPOL and PASA make no submission on this recommendation.

Review Recommendation 20

Amend section 29 to enable the ICAC to refer to OPI a complaint or report received by the ICAC under section 29(1) of the PCD Act back to the OPI.
Amend section 13 to reflect the proposed amendment to section 29(1).

ICAC Recommendation 21

Amend the PCD Act to provide ICAC with the power to prepare and provide reports to Parliament relating to the oversight of assessments and investigations by IIS of complaints and reports received under the PCD Act.

The ICAC noted that there was no provision in the PCD Act which mirrored section 42 of the ICAC Act. That section empowers the ICAC to prepare reports on a number of his functions to, among others, the Attorney-General, the President of the Legislative Council and the Speaker of the House of Assembly. The ICAC submitted that it may be that he has the power to prepare reports because OPI is responsible to the ICAC, but to remove doubt, there should be express provision in the PCD Act to enable him to prepare reports relating to the oversight by OPI of assessments undertaken by IIS of complaints and reports received under the PCD Act.

SAPOL makes no submission on this recommendation.

PASA opposes this recommendation. It says "In circumstances where both the ICAC/OPI and the CoP currently provide annual reports to the Parliament there is no need for a further power to report on individual discipline matters and for the ICAC to be able to provide a running commentary on the OPI's oversight of the IIS."

I do not understand the ICAC to be proposing to make a running commentary on OPI's oversight of IIS. In my view there is no reason why the PCD Act should not reflect the ICAC Act in this regard.

Review Recommendation 21

Amend the PCD Act to provide ICAC with the power to prepare and provide reports to Parliament relating to the oversight of assessments and investigations by IIS of complaints and reports received under the PCD Act.

ICAC Recommendation 22

Amend or redraft section 27 to identify precisely the ambit of the power given to the OPI in relation to the directions it might give to the Commissioner, the IIS or a police officer assisting in an investigation or conducting an investigation for the IIS.

The ICAC submitted that the present terms of section 27 may be too wide. The scheme of the Act contemplates that OPI has the power of oversight in relation to assessments and investigations undertaken by IIS. If an assessment is made by IIS that a complaint or report may be dealt with by way of MR (and assuming OPI does not substitute its own assessment) OPI has no express power to oversee the MR which is then undertaken. In practice OPI does not oversee MR. The ICAC does not suggest OPI should have such oversight. The conduct of MR is regarded as being essential to the management function of the CoP.

Likewise the imposition of sanctions upon misconduct being found proved is regarded as an essential part of the CoP's disciplinary functions.

Despite there being no express power for OPI to oversee those functions, and despite such oversight not being exercised, the chapeau to section 27(2), the subsection specifying the directions OPI might give, is in these terms:

> Without limiting the generality of subsection (1), a direction may include—

ICAC submits that section 27 should be amended so as to identify precisely the ambit of the OPI's powers of direction.

PASA supports this recommendation although it maintains its opposition to recommendation 6, the recommendation which seeks to have section 28 amended so as to empower OPI to reassess/substitute the action IIS proposes once it has assessed and characterised the behaviour.

SAPOL also maintains its opposition to recommendation 6 and looks forward to further discussions on any proposed amendment to section 27.

I think there is good reason to attempt a more specific description of the directions OPI might give in the course of an investigation. Presently, section 27(1) is not limited to investigations. The reference to investigations in the section is only for the purpose of identifying the officer to whom the direction may be given.

In its present form, the section might be interpreted to empower OPI to give directions at almost all stages of assessment and beyond, including the conduct of MR and the imposition of sanctions. OPI does not exercise the power in these areas and does not seek to do so. No other part of the PCD Act envisages such powers being exercised. I leave for further consideration the terms in

which section 27 may be amended, but I recommend that the section be amended so as to avoid the wide interpretations which have been foreshadowed.

Review Recommendation 22

Amend or redraft section 27 to identify precisely the ambit of the power given to OPI in relation to the directions it might give to the Commissioner, IIS or a police officer assisting in an investigation or conducting an investigation for IIS.

SAPOL Recommendation 1

The PCD Act should be amended to require the triaging of complaints forwarded by OPI to SAPOL.

SAPOL noted that in its annual report of 2018/19 ICAC reported OPI as receiving 1665 complaints and reports, made up of the 1655 complaints and 10 reports. The PCD Act provides that, unless OPI refers matters to the ICAC, all matters must be referred to IIS for assessment. Unlike the role of the PO under the repealed Act, OPI undertakes no assessment itself. Unlike the PO, OPI has no power to determine that a matter need not be further assessed or investigated. The PO had such a power pursuant to section 21 of the repealed Act.

SAPOL submits that the assessment by IIS is a significant administrative function for which it received no additional funding when the present Act commenced. SAPOL estimates that upon receipt of a complaint or report an IIS detective will spend an average of 30 minutes making an assessment for presentation to a daily meeting of the IIS allocations committee which reviews the assessment for final assessment by the OIC of IIS.

SAPOL reports that in the calendar year 2019 IIS received 2216 complaints. Of these, 1587 (71%) were "immediately filed" by the allocations committee, by which I understand SAPOL to mean no further action was taken. Those determinations were all subject to oversight by OPI.

SAPOL estimates that, on average, the time taken for each of these complaints was 75 minutes: 30 minutes for the single detective's preliminary assessment, 30 minutes for administrative processing and 15 minutes preparing the letter of outcome to the complainant.

SAPOL submits that OPI should itself undertake a screening process before submitting a complaint or report to IIS for formal assessment. SAPOL suggested two alternative evaluations OPI might undertake. The first is to apply a threshold test considering "aspects such as seriousness, viability and any apparent breach of standards". Further, there should be a requirement that the complaint "be credible and plausible, and … contain information which, if proven, would likely result in the application of management resolution or warrant further investigation".

The second evaluation suggests adopting all, or part, of the words proposed by the ICAC's recommendations to amend section 14(1) of the Act by adding placitum (d). I describe these as "exclusory criteria", i.e. where a complaint has been dealt with previously, is trivial etc., or it is deemed unnecessary to further consider.

SAPOL annexed 7 examples of complaints made between November 2017 and January 2020 which it submitted plainly required no further action. I reproduce only one of them but I agree that this complaint, and the others, require no further action, beyond an answering letter.

March 2019. Complainant reported to OPI that the SAPOL 'undercover unit' at Sedan had continued to assault him with a muscle spasm generator.

SAPOL notes that in NSW the LECC Act gives the LECC the option to take no further action in respect to particular complaints.

I acknowledge the force of the submission made by SAPOL. There is a degree of double handing by OPI and IIS of matters which plainly require no further action beyond a letter to the complainant. The examples attached by SAPOL to its submission are cases in point. None of them calls for MR, much less investigation. Of the 2216 complaints handled by IIS in the calendar year 2019, 1587, or 71%, were determined to call for no further action.

I digress to say that while that figure is surprisingly high, the effort involved in considering those complaints, and replying to them, is not necessarily wasted effort. While I saw only a tiny number of such complaints during my visit to IIS, the response to them was in my view anything but wasted effort. Sometimes the response explained to the complainant the reason why the action complained of was necessary. As time consuming as such an exercise is, it seems to me that it is an opportunity to engage constructively with the community.

In its supplementary submission, SAPOL stresses the demand on resources made by those complaints which plainly require no action to be taken. I accept that there is a degree of double-handling. In effect, SAPOL submits that OPI should do the administrative work of recording the complaint, making the quick assessment that no action should be taken, "file" the matter, and write to the complainant. Instead, IIS is being called upon to carry out those functions. Whatever OPI has to do to refer the matter to IIS and oversee the assessment, is the degree of double-handling.

I accept that SAPOL makes its submissions in the interest of efficiency, but there are other interests, or considerations, to be put in the balance. If OPI took on the triaging function, OPI would lose the wholly oversight function it now possesses. A corollary of that loss is the loss of oversight of the triaging function. For a large number of complaints, the outcome is that no further action be required. There would be no oversight of the triaging of that large number of complaints. That is notwithstanding that OPI is ultimately responsible to the ICAC. In my view that would be an undesirable outcome.

PASA supports this recommendation, and adds that it disagrees with my observation that explaining the outcome of complaints to complainants is an opportunity for police to engage constructively with the community.

I maintain my view. While it may not be large number, I observed communications which usefully explained the reasons why the police officers complained about had acted as they did. The reasons for their actions might not have otherwise been obvious to the complainant or to anyone else. There may be some small advantage to the police force in those reasons being given by the police rather than the oversight body.

Review Recommendation 23

There be no amendments to the PCD Act to require the triaging of complaints forwarded by OPI to SAPOL.

SAPOL Recommendation 2

The PCD Act be amended to include a legislative requirement upon the OPI to provide specified complaint information at the time of referring complaints to SAPOL.

The submission in support of this recommendation has two aspects.

The first is SAPOL's stated preference for a legislative requirement that complaints be prima facie made by the complainant in writing, with the power to dispense with that requirement if necessary. SAPOL refers to that being the position in the NSW legislation. It is also the position in most, if not all, other Australian jurisdictions. While SAPOL states that that is its preference, it does not explicitly recommend that section 10 of the PCD Act be amended to remove the right of a complainant to make a complaint orally.

For reasons I have already discussed, I do not favour that position. The suggested deterrent effect of requiring complaints to be lodged in writing has the potential consequence of indiscriminately deterring both the legitimate and the less legitimate complaints. Further, I think that the taking of an oral complaint has the potential advantage of the complaint being better articulated.

The second aspect of this recommendation is that there be a legislative requirement that OPI provide specified complaint information at the time of reference to IIS.

Regulation 9 already sets out seven items of information which must be recorded in writing by the recipient of an oral complaint pursuant to section 10(5). It has not been suggested to me what further items should be added. None seems to me to be needed.

PASA supports SAPOL's recommendation and the reasons they give.

Review Recommendation 24

There be no amendments to the PCD Act or Regulations requiring written complaints or further information to be recorded about complaints being referred to SAPOL.

SAPOL Recommendation 3

Consideration be given to evaluating the point at which oversight is applied to investigations conducted by IIS.

Section 27 of the PCD Act empowers OPI to give directions in relation to investigations undertaken by the police. Regulation 6 and Schedule 2 of the Regulations prescribe the information which IIS must enter on the CMS to which OPI has unfettered access. Oversight at any stage of an investigation can, and routinely does, take place.

SAPOL puts its submission in two stages. Its primary submission is that OPI should not have ongoing oversight during the investigation, but should conduct a review at what it describes as the completion of a draft. Depending on what is actually meant by a draft, that recommendation is akin to, if not exactly the same as, the stage at which the PO conducted a review under the repealed Act. It is also the stage at which several interstate regimes propose a review by the oversight agency.

In its submission, SAPOL referred to the practice in New South Wales where the powers of direction by the LECC are much less prescriptive than is the case in the PCD Act, notwithstanding that the LECC has a number of powers to monitor in a number of specified ways (see section 101

of the LECC Act). The LECC may request information about an investigation (section 102). It may request information if it is satisfied that the matter is not being conducted in a timely manner (section 103). The LECC may request the police to take certain actions if it is not satisfied that a matter has been properly investigated (section 104). The LECC may request the CoP to review decisions concerning actions to be taken following a police investigation, including a decision to take or decline to take disciplinary action (section 105).

Nevertheless, there is explicitly no power of "control, supervision or direction" of any investigation. Oversight is explicitly to be achieved by agreement (section 107).

In the draft recommendation which I sent to the ICAC, SAPOL and PASA, I noted what I saw as a significant difference between the regimes in New South Wales and South Australia in that the LECC has the power to conduct investigations into complaints of police misconduct (section 44 of the LECC Act). Section 45(2) of the Act, in combination with section 51, envisages, although does not mandate, that the LECC, not police, will investigate only *serious* misconduct or maladministration.

After the distribution of my draft, I had telephone conferences with agencies from New South Wales, Queensland and Victoria. In particular, I spoke with Acting Chief Commissioner, the Honourable Reginald Blanch AM QC of the LECC. It appears that in practice, the LECC does not carry out all investigations of serious misconduct or maladministration. It is not required to. Rather, the legislation provides that the investigations it does carry out will only be those where serious misconduct or maladministration is alleged. In the financial year 2018–19 the LECC fully investigated 49 complaints, or about 2% of those assessed. The LECC conducted preliminary inquiries into a further 85 complaints, and preliminary investigations into a further 73 complaints.

Nevertheless, there remains the difference between the regimes in New South Wales and South Australia in that in New South Wales the LECC may conduct investigations into complaints of police misconduct and maladministration. In South Australia the ICAC may also investigate serious and systemic breaches but before doing so it must satisfy a threshold test, namely that it is satisfied that it is in the public interest to do so (section 24(2) of the ICAC Act).

SAPOL submits that the value of live oversight is not readily apparent. To that end, SAPOL submits that the powers of oversight vested in OPI by section 27 of the PCD Act be modified or repealed.

SAPOL puts an alternative submission in the event that the live oversight provisions are retained. It submits that, rather than OPI's oversight commencing at the outset of the investigation, the oversight is only activated when "established criteria" are met. It suggests that specified stages of an investigation might be identified at which oversight might be undertaken. These stages might be determined by, for example, time.

SAPOL is concerned that there is a blurring by OPI of the boundary between investigative oversight, which it describes as *monitoring* the investigator's actions, and investigative management, which it describes as *requiring, suggesting or correcting* the investigator's actions.

Further, SAPOL submits that the oversight provisions, with the corresponding requirement to load information to the CMS system, should be modified to respond to the relative seriousness of the allegation, bearing in mind the workload imposed on investigators.

In its supplementary submission, PASA is neutral about this recommendation, but emphasises its concerns about excessive oversight by OPI becoming what it describes as dictation. PASA repeats its submission that I should request copies of correspondence passing between OPI and IIS to determine whether its concerns are well founded.

I do not think it necessary for me to call for the correspondence. While SAPOL has expressed some concern about the level of oversight, those with the day-to-day experience of the operation of the regime have not raised their concerns to such a level that I should examine the issue in the detail that PASA calls for.

I bear in mind that interstate jurisdictions have struck a different balance from South Australia in the degree of independent oversight of police investigations. However, it remains the case that in those jurisdictions there is legislated a greater role for the oversight organisations to carry out their own investigations into police misconduct and maladministration.

I am of the view that live oversight of IIS investigations is an important part of the regime provided for in the PCD Act. It is that oversight which meets the objection to police investigating allegations of police misconduct.

I do not think it is appropriate to recommend that OPI's oversight powers be amended.

Review Recommendation 25

There continue to be live and continuous oversight of IIS investigations by OPI.

SAPOL Recommendation 4

The PCD Act be amended to nominate the OPI as the appropriate agency to engage with complainants.

SAPOL submits that in its view the responsibility for engaging with complainants should be an OPI responsibility.

Insofar as the view there expressed means that OPI should be the sole recipient of complaints from the public, I think that proposal unnecessarily restricts the avenues of complaint. Often the most convenient avenue will be the local police station. It may be that SAPOL did not mean to express that view.

Insofar as the view is that OPI should assess complaints, I take that recommendation to mean that the assessment by OPI should only be in respect of matters which require no further action. I have already made a recommendation in that regard.

The submission that OPI should communicate the outcome of an assessment to the complainant is supported by the argument that community trust in the system would be advanced by communicating with the independent agency. Almost all parties making submissions report feedback from complainants who indicate displeasure with the process of police investigating police. The submissions of the CVR also report such feedback. It must be acknowledged that if the investigating powers remain with police, that displeasure is unlikely to be removed by the outcome being communicated by the OPI.

In the draft recommendation which I sent to ICAC, SAPOL and PASA, I said that although ICAC/OPI had not yet had an opportunity to consider such a suggestion, I could see something to be gained by the proposal, and no independence lost by OPI. The communication to complainants by OPI of the outcome reflected the reality that OPI has had oversight of the assessment and investigation of the complaint.

PASA expresses no view on the draft recommendation.

The ICAC opposes the recommendation. He does so on a number of grounds. In its present form the PCD Act sharply distinguishes the respective roles of the three principal bodies involved in the handling of complaints about police conduct. IIS assesses, and if appropriate, investigates complaints including reporting the outcome of those complaints. OPI has exclusively the function of oversight. CoP has exclusively the function of imposing sanction if it is called for.

In the course of investigating complaints IIS has an ongoing obligation to report to the complainant (and, if appropriate, the designated officer) on the progress of that investigation (section 9(1) of the PCD Act). That ongoing reporting may include answering the complainant's questions. IIS is better placed to carry out that role. While OPI has oversight of the investigation, it does not have in its possession every detail of the investigation.

The ICAC further submits that it would be odd to require the entity not making the decision about an investigation to communicate the decision of the entity which did make it.

Transferring the task of communicating the outcome from IIS to OPI adds a level of additional work and runs the risk of miscommunication.

The communication by OPI of an outcome may tend to indicate that OPI endorses the outcome. The ICAC submits that in practice there are decisions with which OPI disagrees but which it concludes are not so unreasonable that it must intervene.

The ICAC disagrees with SAPOL's submission that the community's trust in the integrity of the police complaints system would be enhanced by OPI communicating what is in truth a police investigation. The ICAC submits that the trust is established not by OPI communicating the outcome, but by the robustness of the oversight that OPI conducts.

The ICAC submitted that there would be a practical difficulty in OPI explaining the many decisions by IIS that no action should be taken and the many decisions that a matter should be resolved by MR. OPI has no oversight over MR.

The above submissions are made in relation to decisions made by IIS. The ICAC accepts that the position may be different where OPI has reassessed an assessment by IIS and substituted its own assessment, whether that assessment be the characterisation of the conduct or, if review recommendation 6 is accepted, the recommended action to be taken. It may also be different if OPI has exercised its power to give IIS a direction in relation to an investigation. In these situations OPI would be communicating effectively its own decision rather than that of IIS.

On reflection I think I should revise the draft recommendation I made proposing that amendments be made to the PCD Act to require that OPI report the outcome of (all) complaints to complainants. Instead, I recommend that consideration be given to amendments to the PCD Act so as to require OPI to report the outcome of complaints to complainants where OPI has effectively substituted its own decision for that of IIS. I leave that recommendation imprecise because I can envisage situations where a substitution by OPI would not have the effect of an overall outcome becoming its own decision. For example, if OPI reassessed a complaint and substituted its own characterisation of the conduct but left unaltered the recommended action, then that part of the outcome in which the complainant might be most interested is a decision of IIS. Likewise, OPI might give a direction to IIS in relation to a conduct investigation which does not bear, directly at least, on the outcome.

In these examples, it would seem preferable for IIS to communicate the outcome.

Review Recommendation 26

Consideration be given to amendments to the PCD Act so as to require OPI to report the outcome of complaints to complainants where OPI has effectively substituted its own decision for that of IIS.

SAPOL Recommendation 5

The function and operation of the PDT be critically examined.

SAPOL submits that the proceedings before the PDT are unduly legalistic. That legalism encourages an adversarial attitude towards the proceedings which is not appropriate to a disciplinary process. As a result the proceedings are unduly protracted. The hearings themselves may not be lengthy but the delays caused by the adversarial approach are considerable. In the calendar year 2019, there was only one full hearing of a disciplinary matter but there are estimated to be about 30 at any one time awaiting a hearing. There can be delays of 12 months before a hearing is either conducted or resolved. The delays cause stress to the parties involved as well as considerable cost.

SAPOL submits that, consistent with the disciplinary nature of matters before the PDT, consideration be given to removing the requirement that the PDT be bound by the rules of evidence, and that the prosecutor's burden of proof be reduced.

PASA describes itself as a very strong supporter of the PDT. PASA notes that unless there are matters it is unaware of, the PDT has only found proved in a contested hearing the allegations in one matter in the last several years. It submits that the overwhelming number of matters are finalised in the Tribunal with the officer admitting the allegation. It submitted that there are usually only one or two contested hearings in the Tribunal each year.

That figure is confirmed by Mr Simon Smart SM, Magistrate in Charge of the PDT. With Mr Smart's authorisation, I spoke to an officer in the Registry of the District Court who has custody and control of the files of matters presently before the PDT. There were 17 pending matters. The officer who showed me the files confirmed what I was told by SAPOL, namely that at times there are up to 30 pending matters each year.

PASA submitted that the conduct of pre-trial conferences has been particularly useful in encouraging sensible resolution of matters.

PASA said that it regarded this system to be the best in Australia. It strongly supported maintaining the system in its present form.

So far as I can determine the PDT is the only tribunal of its type in Australia that is presided over by a Magistrate and which conducts its hearing conforming to the rules of evidence. That, in itself, is not an argument for reforming it.

SAPOL submits, however, that the formality of the proceedings contributes to an adversarial approach by officers appearing before it, and that adversarial approach contributes to costly and unwarranted delay.

The ICAC in his supplementary submission acknowledged that he did not have the daily insight of the PDT process compared to that of SAPOL and PASA, although an OPI representative has attended every sitting of the PDT since the inception of the PCD Act. Nevertheless, ICAC and OPI

are of the view that the PDT has not functioned efficiently. In the past it has usually only sat once every two months. The ICAC confirms that there are sometimes delays of 12 months before a hearing is either conducted or resolved.

The PDT carries out a fact-finding function and, in the event of finding wrong-doing on the part of a designated officer, the matter is referred to the CoP for sanction. In the other jurisdictions in Australia the fact-finding function in contested disciplinary proceedings is conducted by a senior police officer or a legally qualified adjudicator. None of the other jurisdictions requires the fact-finder to observe the rules of evidence. Each is required to observe rules of fairness described in a variety of ways. For example, section 7.32 of the Queensland PSA Act provides that the presiding officer must observe the rules of natural justice, act quickly with as little formality as is consistent with a fair hearing, and is not bound by the rules of evidence. In Queensland and Victoria there are time limits that are imposed on the disposition of contested matters.

It is reasonably clear that the resolution of contested matters referred to the PDT is taking longer than is desirable. Quite apart from the financial cost there is a human cost which cannot be ignored. Officers appearing before the PDT will inevitably be less able to carry out their duties while proceedings are on foot, even if they have not actually been suspended from carrying them out.

PASA submits that a significant proportion of officers ("the overwhelming number") admit the allegations. This submission by PASA is telling. The extent to which the delay in resolving matters in the PDT is a result of the formality of proceedings or is due to other factors is not clear. What is clear, however, is that a large proportion of matters are taking quite a long time to resolve by way of acknowledgement of wrongdoing.

In my view there is merit in considering the model of pre-hearing resolution of disciplinary matters which operates in Queensland. The manner in which the model came into operation may also be instructive.

I have set out in my discussion of the interstate models a more detailed account than I now do. In Queensland in 2017 an MOU was entered into by the CCC, QPS, the Queensland Government, the State Opposition and both police unions. The MOU resulted in the establishment of a new regime for the hearing of contested disciplinary matters. There was also established a new regime for the early resolution of those matters. The early resolution process was described as Abbreviated Disciplinary Proceedings (ADP). In 2018 a pilot project of the new regimes commenced. Legislation embodying the regimes was passed in 2019. By the time the legislation was passed, the parties to the MOU were satisfied with the effectiveness of what had been agreed. That applied to both the formal and the less formal proceedings. The introduction of the pilot program saw a reduction of 33% in the number of disciplinary matters proceeding to the more formal hearing.

ADP is a path available to officers who choose to resolve their matters quickly with the agreement of the CCC. In Queensland the process usually takes about 10 weeks. The CCC waives any right of appeal against the sanction imposed during the ADP. It appears that all parties involved in the process are satisfied with the effectiveness of the process.

If an ADP could resolve more quickly the matters which presently resolve before formal hearings before the PDT, the system in South Australia will have considerably improved.

Review Recommendation 27

There be established an abbreviated disciplinary proceeding along the lines of the abbreviated disciplinary proceedings operating in Queensland.

SAPOL Recommendation 6

The transitional provisions of the PCD Act be amended to clarify any ambiguity with regards to "reports" under the Police Act 1998.

SAPOL submits that the transitional provisions under the PCD Act omit to recognise that *reports*, as opposed to *complaints*, were not governed by the repealed Act, but by the *Police Act 1998*. The omission should be corrected. There is no objection to this recommendation.

Review Recommendation 28

Amend the transitional provisions of the PCD Act to clarify any ambiguity with regards to "reports" under the Police Act 1998.

SAPOL Recommendation 7

The tension between the SAPOL Enterprise Agreement 2016 and the PCDA concerning the reduction in rank for Senior Constables, Senior Constables First Class and Brevet Sergeants be resolved.

SAPOL submits that there is an arguable tension between South Australia Police Enterprise Agreement 2016 (the Enterprise Agreement) and the PCD Act. The CoP has disciplinary powers to reduce a member in rank under section 26(1)(f)(i) of the PCD Act. Clause 10 of the Enterprise Agreement provides for a progression in rank for Senior Constables, Senior Constables First Class and Brevet Sergeants upon fulfilment of criteria for progression. SAPOL submits that if a member is demoted as a disciplinary measure, but still meets the criteria for progression to his or her former rank, then it is granted that the member becomes entitled to immediate progression. SAPOL submitted that as a consequence of this possibility, the CoP has not imposed demotion on members of those three ranks. SAPOL submits that the Act be amended to address this tension.

At a conference following written submissions, PASA gave examples of officers of those ranks who had been sanctioned to demotion.

I do not have enough information to make a recommendation in this regard but I make these observations.

It would be incongruous if the CoP is deprived of a legitimate sanctioning option because of a presumably unintended consequence of the Enterprise Agreement.

If, as PASA submits is the case, officers of the designated ranks are being sanctioned by demotion in rank, which is not being immediately reversed under the Enterprise Agreement, then the CoP should be free to continue imposing the sanction. If there is a successful challenge to such a sanction, then a legislative change may be necessary.

If the CoP takes the view that a demotion in rank is an appropriate sanction, he or she may also presumably decline to grant the designated officer re-promotion. In that event the officer could take action in the appropriate workplace forum.

Review Recommendation 29

I make no recommendation to resolve the tension between the SAPOL Enterprise Agreement 2016 and the PCD Act.

SAPOL Recommendation 8

Confidentiality provisions under section 45 of the PCD Act are retained.

I will discuss this recommendation under the heading of the recommendation made by The Advertiser.

I have already described PASA's submissions relating to ICAC's eighteen initial recommendations. I will not repeat those matters.

I have discussed PASA's submissions and recommendations about the PDT in the context of SAPOL's recommendations.

I will discuss PASA's submissions and recommendations about confidentiality in the context of The Advertiser's recommendation.

PASA Recommendation 1

That Regulations be promulgated which prescribe the documents the CoP may consider during sanctions.

This recommendation arises from, or is at least triggered by, the suggestion by the Deputy CoP during the sanctioning of a particular police officer, that regard might be had by her to an Organisational Impact Statement. The proposed use of that document was the subject of letters to the Deputy CoP from the President of PASA dated 5 September 2019 and the designated officer's solicitors, Tindall Gask Bentley, dated 1 October 2019. Those letters are Annexure F to PASA's submission.

In my draft recommendation I observed that in the sentencing process in a court there is no prescription of the materials to which the court may have regard. I saw no need to require prescription in the disciplinary context.

In its supplementary submission PASA submitted that the sentencing process for criminal proceedings in a court and the sanctioning process for disciplinary proceedings are not comparable. In my view there is a useful comparison. In the sentencing process the penalties a court may impose are extremely serious. For a long time the Parliament has concluded that there should be no prescription of the materials to which a court may have regard. There is in my view no greater need for prescription in the disciplinary context.

I agree with PASA's supplementary submission that designated officers should have some certainty about what materials will be take into account. That is achieved in the individual case by the disclosure to the designated officer of the materials to which the sanctioning officer has regard.

Review Recommendation 30

There be no Regulations prescribing the documents to which the CoP might have regard in the sanctioning process.

PASA Recommendation 2

That limits be promulgated to the limit and types of sanctions which may be imposed in the sanctioning process.

This recommendation arises from the submission that heavy handed penalties are being imposed on police officers for breaches of discipline. At a conference with PASA following the written submissions examples were given of officers receiving demotion in rank resulting in considerable loss of income. While Regulation 13 caps monetary penalties for reduction of remuneration penalties imposed pursuant to section 26(h) of the PCD Act, and fines pursuant to section 26(i), the demotion in rank can cause financial losses which considerably exceed those sums and, indeed, exceed fines which might be imposed by a Court.

I am not in a position to comment on the fairness of the examples of sanctions submitted by PASA, but I have already noted that section 26(1)(f)(ii) of the Act specifically provides that the sanction for demotion in rank may be imposed notwithstanding that the financial loss exceeds the caps in the Regulations. There is also the avenue of appeal to the District Court against sanctions imposed pursuant to section 26.

I do not think that it is appropriate for there to be prescribed limits on the types of sanctions which may be imposed.

Review Recommendation 31

There be no promulgation of the types of sanctions which may be imposed in the sanctioning process.

PASA Recommendation 3

That there be introduced a right of review to the PDT for sanctions imposed under section 18(4) of the PCD Act. The PDT should be vested with jursidiction to set aside an outcome of MR on the grounds that the designated officer was not afforded procedural fairness, or that the procedure in Part 3 of the PCD Act was not otherwise complied with.

Section 16(1) empowers the CoP to determine the kinds of matters which may be resolved by MR by specifying the sorts of sanctions which would *not* be imposed. They are: termination of the officer's appointment; suspension of the appointment for any period; reduction of rank, seniority or remuneration; a fine. The sanctions that the CoP *may* therefore impose are those set out in section 18(4). They are as follows:

(a) impose a restriction on the ability of the designated officer to work in a specified position, or to perform specified duties, within SA Police;

(b) remove, or impose conditions on, any accreditation, permit or authority granted by SA Police to the designated officer;
(c) provide the designated officer with counselling;
(d) issue the designated officer with a reprimand.

The scheme for the imposition of sanctions is that the more serious sanctions cannot be imposed following MR. Matters calling for those sanctions may not be resolved by MR. There are already in place in Part 8 of the *Police Act 1998* (SA) provisions for review to either the South Australian Employment Tribunal (SAET) or the Police Review Tribunal from managerial determinations resulting in terminations or transfers of employment or declined promotions (sections 48, 52 and 55 of the *Police Act 1998* (SA)).

PASA submits that there should be a *de novo* merits review to the PDT for sanctions imposed following MR. The grounds for the review should be that the designated officer was not afforded procedural fairness, or the procedures in Part 3 of the PCD Act were not complied with. In my view the recommendation introduces an undue degree of litigation and complication into the lower level of sanctions which can be imposed following MR.

Review Recommendation 32

There not be introduced a right of review of sanctions imposed under section 18(4) of the PCD Act.

PASA Recommendation 4

The ICAC should release figures relating to

1. *The timeliness of the processing of complaints and reports.*

2. *The types of matters being dealt with as full investigations under Pt 4, or MR under Pt 3, and the manner in which they are resolved.*

PASA submits that it suspects that delays under the PCD Act have not improved from delays under the repealed Act. PASA frankly admits that it does not have firsthand knowledge of the extent of delays in the resolution of matters although it gave examples of individual delays. In para 6 of its introduction to its response to the ICAC's 12 Month Review PASA criticised the absence of data which would demonstrate the impact of the PCD Act on the disposition of complaints.

In my view, data of that sort would not be helpful for two reasons. The first is that one innovation in the PCD Act is the reference of large numbers of complaints to MR. That innovation has met with approval by the ICAC/OPI, SAPOL and PASA. If that resolution is regarded as a positive change then the timeliness of the process will be of secondary importance. The second reason is that there has been a significant increase in the number of complaints. The workload of the agencies receiving complaints has consequently increased. If the ICAC is right in attributing that increase to the ability of complainants to lodge their complaints orally, rather than a deterioration of police conduct, then in my view that increase in complaints is not to be lamented.

In a conference following written submissions, the ICAC/OPI provided data relating to the timeliness of resolving written complaints. The data was as follows: from 4 September 2017 to 31 January 2020, there have been 5801 complaints and reports lodged. The time to resolve them has been divided into the disposition on assessment as follows: NFA 55% (2 weeks or less); MR 33%

(a matter of weeks); investigation 11% (of which 56% less than 3 months, 27% 3-6 months, 14% 6–12 months, 3% 12-18 months).

I put these figures to SAPOL and PASA at conferences following written submissions. SAPOL thought that the figures were about right. PASA queried what was meant by "resolved" and gave several examples of delays outside those timeframes.

It would be helpful if data on timeliness of the resolution of complaints and reports could be collated, but in my view this submission raises a wider question.

The timeliness of the resolution of complaints and reports is an important indication of the efficiency of a complaints regime. Efficiency contributes to the community's satisfaction with the system, and also the satisfaction of the officers the subject of the complaints and reports.

However, timeliness is not the only important criterion. It is possible to evaluate the overall degree of satisfaction with the system. Considerations such as the adequacy of communications about complaints and the perceived fairness of the outcomes come to mind. At present, there is no reliable indication of how the operation of the Act is perceived in the community.

In September 2018 the Victorian Parliamentary Committee published a report following its inquiry into the External Oversight of Police Corruption and Misconduct in Victoria. The Committee devoted a chapter to the topic of the necessity of the complaints system to publish comprehensive and comprehensible data about police complaints.[3] It emphasised the importance of lessons which can be learnt from complaints and reports. It recommended that regular independent complaint surveys be conducted and published. Its recommendation in that regard is as follows:[4]

> *That IBAC and Victoria Police establish best practice standards and key performance indicators in relation to complainant satisfaction with their systems for receiving, handling, assessing, investigating and reviewing complaints and disclosures about police corruption and other misconduct.*
>
> *That IBAC and Victoria Police arrange for the conduct of regular independent complainant surveys, the results of which are publicly reported on their websites.*
>
> *That IBAC and Victoria Police use the results of these surveys to improve how they receive, handle, assess, investigate and review complaints and disclosures about police corruption and other misconduct.*

In respect of the second type of data sought by PASA, namely a breakdown of the types of conduct being referred to MR and investigation, and the outcome of those matters, it may be that this data would prove useful. A table of the sort appearing on pages 130 to 131 of the Victorian report may be considered as part of a more comprehensive statistical collation.

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3 "Complaints data: the need for best practice", *Inquiry into the external oversight of police corruption and misconduct in Victoria* (Parliament of Victoria, Independent Broad-based Anti-corruption Committee, September 2018 Report) Chapter 4, pages 107-138, 138.

4 Ibid page 138.

In its supplementary submission SAPOL reported that it is currently working to provide a corporate quarterly report to all staff which provides a breakdown of the outcomes of complaints which have been dealt with by way of MR and which have been the subject of criminal conduct investigations. It is intended that this quarterly report be published in the South Australian Police Gazette. I note that recent editions of the Police Gazette are not available to the public.

I think that that report would be useful in informing police personnel about how the system is working. If that report were disseminated more widely the public would also be better informed about how the system works. I do not understand the proposed report to contain information which would tend to identify any officer or police personnel who is the subject of those disciplinary processes. There is no reason why it should.

The supplementary submission indicated that SAPOL had no plan to establish a database which illustrated the matters I included in my draft recommendation, namely the incidence, timeliness, disposition of outcome of complaints and reports. SAPOL has no plan to measure the degree of public satisfaction with the process. SAPOL submitted that such a database and survey system would require additional expense, maintenance and a great deal of administrative work.

In his supplementary submission the ICAC submitted that PASA's suspicions that delays under the PCD Act have not improved from the delays under the repealed Act are unfounded. He submitted that the figures he showed me (and which I produced to SAPOL and PASA for their comment) showed that 88% of matters received under the new Act were resolved in a matter of weeks. That is a significant improvement on the former scheme.

The ICAC addressed the draft recommendation in two parts, the collation of statistics and the independent survey of complainants.

In respect of statistics, the ICAC said that monthly statistics about the number of complaints and reports received by OPI and IIS is published on the ICAC website. While OPI can provide details of the manner of receipt of complaints, and their general nature, ICAC was unsure of the purpose and use of such information and who would have access to it.

While OPI can provide statistics about the timeliness of resolution of matters in the form it gave to me, it is not in a position to report on the timeliness of resolution of IIS matters which are assessed as requiring no further action or which are referred to MR.

I accept that the two agencies may not have all the information required. That was the reason for recommending that there be a common database.

The ICAC pointed to a number of difficulties in the compilation of a common database including resource implications.

The ICAC submitted that further discussion and clarity would be required before he was able to express a concluded view on the recommendation.

In respect of the independent complainant survey the ICAC submitted that the proposal presented a number of difficulties. Surveys measure perceptions not necessarily the truth. They involve substantial undertaking, both in the planning and operational stages. The ICAC submitted that it is already known anecdotally that the public are generally dissatisfied with the process for the principal reason that, even with independent oversight, the system involves the police investigating police.

The ICAC was not sure that any benefit from such surveys would merit the cost implications. He submitted that further discussion was needed.

I acknowledge that the only Australian jurisdiction in which there has been a recommendation for the collation of such a database is Victoria. I have referred to the recommendation of the Victorian Parliamentary Committee. The Victorian Government has deferred responding to that Committee's recommendations pending the report of the Royal Commission into the Management of Police Informants.

I also acknowledge the difficulties referred to by SAPOL and the ICAC in resourcing and implementing such an undertaking.

It would be unsurprising if there was a view in the community that police should not investigate police irrespective of robust oversight. If that view is held then it is a matter for the Parliament to consider whether resources should be spent in devising a different system. None exists in Australia.

However, the object of collating data of the sort I have recommended is not only to gauge the community view on that question. There is a benefit to the system if complainants were given the opportunity to indicate whether their complaints have been dealt with promptly and whether they have had the investigation and resolution of their complaints explained to them sufficiently clearly and fairly. That feedback has the capacity to improve the handling of complaints, irrespective of who carries out the investigation.

Review Recommendation 33

Consideration be given by the ICAC/OPI and the CoP/IIS to the establishment of a common database which illustrates the incidence, disposition and outcome of complaints and reports, including the timeliness of resolution of complaints and reports and the degree of pubic satisfaction with the process

PASA Recommendation 5

That consideration be given to amending section 41(2) of the ICAC Act to make it clear that the ICAC has no power to conduct a review of a legislative scheme unless requested by the Attorney-General to do so pursuant to section 7(2) of the ICAC Act.

In my view it is inappropriate for me to respond to this recommendation. The remit of my review pursuant to section 48(1) of the PCD Act is to review the operation of this Act.

Review Recommendation 34

I decline to make a recommendation in response to the recommendation that consideration be given to amending section 41(2) of the ICAC Act to make it clear that the ICAC has no power to conduct a review of a legislative scheme unless requested by the Attorney-General to do so pursuant to section 7(2) of the ICAC Act.

Advertiser Recommendation

Section 46 of the PCD Act be repealed.

The CoP be required to release a statement upon an officer admitting breaching the PCD Act, or being found to have breached the Act, which includes: details of the misconduct; the officer's age, gender, rank, branch/section; the penalty applied; and any other details the CoP deems relevant.

Section 26 of the PCD Act be amended to include subsection (5) in the following or similar terms;

(5) The Commissioner must, as soon as is reasonably practicable, after action is taken under subsection(1), release a public media statement outlining details of the guilty officer's misconduct, their age, gender, rank, branch/sanction, the penalty applied, and any other details the Commissioner deems relevant.

The Advertiser submits that South Australia is the only jurisdiction in Australia with a blanket suppression on the reporting of investigations into police disciplinary matters. It submits that this stymies the promotion of public confidence in the police force and fails to meet the expectation of the public, who have a right to know about matters relating to policing in this State.

The Advertiser submits that when it reports publicly observed examples of alleged police misbehaviour it is unable to get updates on disciplinary investigations. It provided an email chain of enquiries it made about whether disciplinary proceedings had been taken in relation to a police officer who was filmed by a member of the public conducting an arrest of a woman in Hindley Street in 2017. The film appears to show the officer throwing the woman to the ground. Members of the public who viewed either the incident, or the film of it, claimed that unnecessary force was used by the police officer in the arrest. The email chain elicited no comment apart from a recitation of section 46 of the PCD Act.

The Advertiser acknowledged that in its annual report for 2018–19 the ICAC set out a table recording the number of police officers sanctioned for breaches of the Code of Conduct Regulations, but it submits that the table provided limited information about the conduct and the outcomes. When it sought further details, the request was passed between SAPOL and ICAC, resulting in no further details being provided.

The Advertiser attached a public notification by the Queensland Police Service of a senior officer being stood down while there was an investigation as to whether he had breached discipline by taking unauthorised access to confidential information. The notification contained this passage

In keeping with our commitment to high standards of behaviour, transparency and accountability, we have undertaken to inform the public when an officer faces serious allegations of misconduct.
This does not mean the allegations against the officer have been substantiated.

The Advertiser submitted that it was not aware of, and had been unable to find, legislation in other jurisdictions in Australia that are as heavily restrictive on the publication of information relating to police disciplinary matters as is the case in South Australia.

The Advertiser submitted that no other public sector employees are afforded such confidentiality with respect of their disciplinary matters. Many are conducted in workplace tribunals, accreditation boards, and courts, where hearings are open to the public and rulings and judgments are published. While sections 45 and 46 of the PCD Act are in the same terms as section 54 and 56 of the ICAC Act, which relate to other public sector employees, the ICAC provisions only apply to matters which are dealt with by the ICAC. Police disciplinary matters are dealt with exclusively under the PCD Act. There are other statutory regimes besides the ICAC Act which deal with the disciplinary proceedings relating to other professions. The Advertiser cited the example of a nurse

whose professional conduct hearing was conducted in the Health Practitioners' Tribunal. The Tribunal published a judgment which was publicly available.

SAPOL and PASA oppose the recommendation. The ICAC makes no submission.

SAPOL oppose the recommendation on a number of grounds. There is power in the CoP, ICAC, OPI, and a court hearing proceedings under the PCD Act to authorise disclosure if it is appropriate. Disciplinary proceedings are an internal process and officers subject to that process should not have their identities disclosed. Outcomes of the proceedings are reported in the ICAC annual report. Complainants are always informed of the outcome. In the case of some officers a report including details such as age, gender, rank etc. would identify them, even if their name was not published. The publication of proceedings may discourage officers from proactively admitting their breaches. Publicity may adversely affect the mental well-being of officers.

PASA opposed the recommendation on some of the same grounds but made additional submissions. It submitted that what it described as "the present regime of secrecy" should remain. It considered that the paramount consideration of maintaining public confidence in SAPOL required that the regime continue.

Several submissions assumed that officers' identities would be published. Reputations would be unduly prejudiced, particularly in the many cases where no action is to be taken in relation to a complaint. Officers are prejudiced by being liable to being questioned. Delays, even if they result in exoneration, take a toll on officers' health. Officers' families are affected. Recruits to the police force may be deterred.

In response to The Advertiser's submission about disciplinary proceedings involving other employees being published, PASA drew a distinction between those tribunals and the disciplinary processes for police. The PDT differs from the cited tribunals in that it is only a fact-finding tribunal. In the event of breaches of discipline being found proved by the PDT, the sanctioning function is undertaken by the CoP. In that situation a CoP sanction is a first instance employment decision. The comparable first instance employment decisions for other professions are kept confidential. The relevant comparison, PASA submitted, was between the other employees' appeals to the Fair Work Commission or the SAET and police appeals to the District Court, all of which are the subject of published judgments or reasons.

My researches have not found interstate legislation provisions in the same terms as sections 45 and 46 of the PCD Act. Neither SAPOL nor PASA has pointed to comparable legislation.

On the other hand, interstate jurisdictions have regimes which bear some similarity to South Australia. I have noted the practices in New South Wales, Queensland and Victoria. In New South Wales, most LECC examinations into alleged disciplinary breaches are held in private. In the year 2018–19, none was held in public. However, in that state the LECC must publish in its annual report its compliance with the *Government Information (Public Access) Act 2009 (NSW)*.

In Queensland disciplinary proceedings are generally held in private. The CoP has a general discretion to authorise the disclosure of any information in the possession of the Queensland Police Service. The notification of a pending disciplinary process annexed by The Advertiser demonstrates that the CoP takes a proactive approach in disclosing information about such processes, while maintaining the anonymity of the officer concerned.

In Victoria, the contested disciplinary proceedings are usually conducted in private.

In each of these states, there are legislative provisions relating to the confidentiality of information held by, or known to police, in the course of their employment (Part 14 of the LECC Act (NSW); sections 10.1–2 of the PSA Act (Qld); Part 13 of Div 1 of the VP Act (Vic)).

It therefore appears that there is an almost universal practice that the identity of officers who are the subject of disciplinary processes will be kept confidential. That practice is almost universally subject to there being a discretion in the CoP or some other agency to authorise publication. That is really the effect of section 46 of the PCD Act. Subsection (1)(a) protects the identity of the designated police officer. Placita (b) and (c) protect the identity of the complainant. Placita (d) and (e) protect the identity of the witnesses. Placitum (f) enforces the prohibitions made by either the CoP or OPI.

No part of section 46 would in my view prevent the disclosure of the specific information The Advertiser says it is being denied. It would appear to me that section 46 would not have prevented The Advertiser being given an update on whether a disciplinary process was being taken against the unidentified police officer filmed in Hindley Street. If it were thought that the disclosure might identify the officer to those who knew him then that limited disclosure might be weighed by the CoP against the public interest in knowing whether disciplinary proceedings were being considered. In my view nothing in section 46 would prevent more details of the outcomes of disciplinary breaches appearing in the ICAC annual report. No part of section 46 would in my view prevent the disclosure of the information contained in the Queensland media release.

Any difference between the approaches in South Australia and other jurisdictions is more likely to be the result of cultural differences.

If section 46 were to be repealed police officers in South Australia (and complainants) would be the only officers in the country who would be liable to have their identities disclosed. In my view, that position is untenable.

However, different considerations arise in relation to the second part of the recommendation by The Advertiser, namely that section 26 of the PCD Act be amended so as to require the CoP to disclose details of proved or admitted breaches of discipline. Section 26 relates to the sanctioning of an officer who has admitted a breach of discipline or where a criminal offence or breach of discipline has been proved.

The Advertiser has not drawn my attention to any legislation in Australia mandating such disclosures.

There are three observations to be noted about this recommendation. The first is that it is not proposed that the identity of the officer be disclosed. There would still be compliance with section 46. The second is that the disclosures would not relate to the large majority of complaints which result in the determination that no action should be taken, or that there should be a reference to MR. The third is that the recommendation is not concerned with allegations of breaches of discipline, but rather with proved or admitted breaches.

Once the identity of the officer, and anything tending to identify him or her, is not disclosed, the only objection of SAPOL which needs to be addressed is the submission that officers may be discouraged from proactively admitting their breaches. In my view that objection is largely removed by retaining the anonymity of the officer.

Once the identity of an officer is not disclosed, most of the objections of PASA are met. I do not accept the objection that it is necessary to the maintenance of public confidence in SAPOL that the regime remain exactly as it is. There is no evidence of a diminution in public confidence in the interstate regimes, particularly such as Queensland, where anonymised disclosure is broader than that which is proposed here. In the Queensland example cited by The Advertiser, the disclosure concerned the initiation of disciplinary proceedings, rather than the outcome of proved breaches of discipline.

In my view there is merit in this second part of the recommendation by The Advertiser. I would only modify the terms of the recommendation in two respects. I would preface the proposed

amendments by the words “Subject to this Act” so as to leave unaffected the terms of section 46 which protect the identity of the police officer, the complainant, and the witnesses. I would also delete the word “guilty” and insert after the word “officer’s” the words “proved or admitted”. I italicise those amendments in the recommendation I now make.

Review Recommendation 35

There be no repeal of section 46 of the PCD Act.
Amend section 26 of the PCD Act to include subsection (5) in the following or similar terms:

(5) Subject to this Act the Commissioner must, as soon as is reasonably practicable, after action is taken under subsection(1), release a public media statement outlining details of the officer’s proved or admitted misconduct, their age, gender, rank, branch/section, the penalty applied, and any other details the Commissioner deems relevant.

Conclusion

It is significant that the agencies with the closest connection to the day-to-day operation of the PCD Act report that it is working reasonably well. The ICAC/OPI and the CoP/SAPOL/IIS say that in slightly different ways. Each respects the role and professionalism of the other. That is significant because there are inherent in the Act tensions which would be likely to expose major disagreements. The ICAC/OPI have extensive powers of supervision over the investigation by police of complaints and reports. Police officers are experienced investigators, and that degree of supervision is challenging. In their submissions, each does express their disagreements, but I would not describe them as major. I have described the system as in reasonable balance.

The terms of the submissions by PASA would suggest that it has large criticisms to make of the supervision of investigations, but PASA acknowledges that it relies to a degree on anecdotal accounts and its interpretation of the position of SAPOL.

Comparisons with interstate regimes, particularly with those which have undergone reform since the implementation of the PCD Act, have been undertaken. The CoP has accurately observed that the supervision by the New South Wales LECC is less prescriptive than is the case with the ICAC/OPI in South Australia. That is also true of the Queensland and Victorian regimes. I have noted that in those jurisdictions the legislation strikes a different balance between the respective investigative roles of the independent body and the police on the one hand, and the supervisory role of the independent anti-corruption body on the other. The legislation empowers the anti-corruption body to investigate not only corruption but also serious maladministration and misconduct. The ICAC may also carry out such investigations but section 24 of the ICAC Act requires the ICAC to apply a threshold test before doing so.

I have taken the view that insofar as the interstate regimes envisage that police will investigate less-serious disciplinary matters and the anti-corruption body will investigate the more serious ones, the need for supervision of the former is less pronounced.

I do acknowledge that my interviews with the interstate agencies suggest that while the balance between the investigative roles appears to be struck differently from South Australia, in practice the difference is not so great. For the most part, although not exclusively, the investigation of serious maladministration or misconduct is conducted in the Eastern states by the police.

The CoP sought in his submissions to reduce the extent of live continuous supervision by the OPI of police investigations. He also submitted that to avoid double handling, the OPI should undertake a triage role so that OPI could itself determine that no action should be taken in respect of a complaint. The CoP also submitted that OPI, rather than IIS, should communicate the outcome of investigations to complainants.

I have taken the view that the extent of supervision should not be reduced. While I accept that the referral by OPI of all complaints and reports to IIS involves a degree of double-handling in the case of complaints which plainly call for no action, I think that the transfer of the triage process to OPI is undesirable. Such a transfer would mean that there is no supervision of that process.

With one exception I have not accepted the submission that OPI should communicate the outcome of investigations to complainants. I consider that difficulties would arise if the OPI was required to communicate the outcome of investigations which have been carried out by IIS. I have accepted that the situation is different if OPI has reassessed a determination by IIS and substituted its own assessment.

The CoP submitted that the formality of the processes of the PDT has resulted in an unduly adversarial approach taken by police officers who contest allegations of breaches of discipline. That approach has resulted in undue costs and delays in resolutions in that jurisdiction. The ICAC submits that the PDT is not operating efficiently. PASA supports the retention of the PDT in its

present form. I am not sure that the delays are due entirely to the formality of the processes of the PDT. I have not recommended reform of the PDT. However, I have recommended that there be established a less formal process for matters which need not proceed to a full hearing. The PDT conducts only one or two full hearings each year. As many as 30 matters in a year are resolved before a full hearing. There were 17 matters in the PDT's list on the day that I visited the Registry. PASA praises the early resolution processes of the PDT, but in my view there is merit in a less formal process to resolve most matters.

In Queensland in 2017 an MOU was entered into by the Crime and Corruption Commission, the Queensland Government, the State Opposition, the Queensland Police Service and the two unions representing police officers. The MOU included a less formal process for hearing contested matters. It also included a less formal pre-trial process known as Abbreviated Disciplinary Proceedings (ADP). The terms of the MOU were the subject of a pilot project beginning in 2018. In 2019 legislation formalised the process. The number of matters proceeding to a full hearing fell by about a third. Police officers facing allegations of a breach of discipline may be offered an informal resolution of the matter by way of ADP. If the officer accepts the offer, the matter proceeds along that path.

In the interests of increased efficiency, I have recommended that there be established an ADP along the lines operating in Queensland.

It has been reported in almost all submissions that there is a common and longstanding complaint in the community about allegations of police impropriety being investigated and, where proved, sanctioned by police. However in every jurisdiction in Australia, and for the most part overseas, investigations are conducted largely by police. There are practical reasons and reasons of principle why that is so. Police officers are especially qualified and the best resourced to carry out such investigations. In principle there is good reason to hold professional bodies responsible for maintaining high standards of conduct. The ICAC reports that most police investigations are carried out satisfactorily.

Some members of the community may never accept the investigation of complaints by police. The ways to build community trust include ready access to the complaints mechanism, robust independent oversight of investigation, timely resolution of complaints, good communication of the processing and outcome of complaints, and transparency in the system.

I have recommended that the ability of complainants to lodge their complaints orally should be retained. While I acknowledge that that ease of access does not occur in other jurisdictions I think it is essential that people should be able to make their complaints orally. In fact I think that that access has the potential advantage of the complaint being better articulated. I have made recommendations which strengthen in relatively small ways the robustness of independent oversight of investigations. Some recommendations merely make explicit what was implicit in the PCD Act. Others are designed to clarify ambiguities in the legislation. I have proposed a revised pre-hearing process for contested disciplinary hearings which may reduce the need for protracted pre-hearing processes and make for a more timely resolution of complaints.

I have made a recommendation which seeks to make the outcome of disciplinary processes better known to the public. The PCD Act is not as different from comparable legislation interstate as may at first appear, but there does appear to be a cultural difference between South Australia and some of the other jurisdictions in the public disclosure of disciplinary outcomes. I have recommended that anonymised disciplinary outcomes of investigations be made public.

It remains unclear what is the community's degree of satisfaction with the complaints system. I accept the observation of the ICAC that we probably already know that there might be a widespread view in the community that it is unsatisfactory that police investigate allegations of

police misconduct. I have already noted that that is the way in which complaints are handled throughout Australia. Further, there are persuasive reasons why that should remain so.

Nevertheless, much less is known about the community's satisfaction with other aspects of the system, several of which were touched on by aspects of the CVR in her submission. Complainants will be more likely to be satisfied with the system if their complaints are dealt with promptly, if they are kept informed of the progress of their complaint, and if the outcome is explained to them courteously and comprehensively. The wider public will be more likely to be satisfied if there is published enough material to make plain that complaints are dealt with in that way.

I have recommended that data be collated to gauge the community's satisfaction with the system. The Victorian Parliamentary Committee recommended that such data be collated. The Committee's recommendations will not be responded to by the Government until the completion of the Royal Commission into the Handling of Police Informants. I acknowledge that no other jurisdiction in Australia collates such information, but in my view this would be an area of public policy where it might be appropriate to be a leader.

Appendix: List of Recommendations

Recommendation 1: Amend the PCD Act to permit OPI to identify a matter on its own initiative for assessment by IIS or referral under section 29 to the ICAC.

Recommendation 2: Amend the section 13(2) timeframe to allow for 3 business days.

Recommendation 3: Amend section 14 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: Amend section 15 (d) to to refer to both complaints and reports.

Recommendation 5: Amend the definition of misconduct in public administration in the PCD Act so as to include conduct identified in the Code of Conduct as applying whether in the course of employment or otherwise.

Recommendation 6: Amend section 28 to provide that OPI may reassess and/or substitute its view of the recommended action determined by IIS.

Recommendation 7: Amend section 17 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: Amend section 18 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: Amend section 21(1) to read:

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

Recommendation 11: Repeal section 21(2).

Recommendation 12: A subsection be enacted to enable the officer in charge of IIS to determine following consultation with OPI to discontinue an investigation and to deal with the matter under Part 3 of the PCD Act or take no further action.

Recommendation 13: Amend the PCD Act so that if there is dispute between OPI and SAPOL 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: Amend section 35(6) to allow the OPI staff member who is permitted to be present may be nominated by OPI or ICAC.

Recommendation 15: Amend the PCD Act 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 IIS in Part 4 of the PCD Act.

Recommendation 16: Section 30 of the PCD Act 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 1972* (SA) to refer to the PCD Act.

Recommendation 18: Amend the PCD Act to make clear that the ICAC may use powers under the *Ombudsman Act 1972* (SA) for the purposes of exercising powers in relation to matters of misconduct and maladministration relating to a police complaint or report.

Recommendation 19: Amend section 21 to provide that while a designated officer is the subject of a criminal investigation or criminal proceedings an investigating officer cannot use the coercive power contained in section 21(5) in the PCD Act for the purposes of a conduct investigation, arising out of the same circumstances until the criminal investigation and/or proceedings have been finalised.

Recommendation 20: Amend section 29 to enable the ICAC to refer to OPI a complaint or report received by the ICAC under section 29(1) of the PCD Act back to the OPI.

Amend section 13 to reflect the proposed amendment to section 29(1).

Recommendation 21: Amend the PCD Act to provide ICAC with the power to prepare and provide reports to Parliament relating to the oversight of assessments and investigations by IIS of complaints and reports received under the PCD Act.

Recommendation 22: Amend or redraft section 27 to identify precisely the ambit of the power given to OPI in relation to the directions it might give to the Commissioner, IIS or a police officer assisting in an investigation or conducting an investigation for IIS.

Recommendation 23: There be no amendments to the PCD Act to require the triaging of complaints forwarded by OPI to SAPOL.

Recommendation 24: There be no amendments to the PCD Act or Regulations requiring written complaints or further information to be recorded about complaints being referred to SAPOL.

Recommendation 25: There continue to be live and continuous oversight of IIS investigations by OPI.

Recommendation 26: Consideration be given to amendments to the PCD Act so as to require OPI to report the outcome of complaints to complainants where OPI has effectively substituted its own decision for that of IIS.

Recommendation 27: There be established an abbreviated disciplinary proceeding along the lines of the abbreviated disciplinary proceedings operating in Queensland.

Recommendation 28: Amend the transitional provisions of the PCD Act to clarify any ambiguity with regards to “reports” under the Police Act 1998.

Recommendation 29: I make no recommendation to resolve the tension between the SAPOL Enterprise Agreement 2016 and the PCD Act.

Recommendation 30: There be no Regulations prescribing the documents to which the CoP might have regard in the sanctioning process.

Recommendation 31: There be no promulgation of the types of sanctions which may be imposed in the sanctioning process.

Recommendation 32: There not be introduced a right of review of sanctions imposed under section 18(4) of the PCD Act.

Recommendation 33: Consideration be given by the ICAC/OPI and the CoP/IIS to the establishment of a common database which illustrates the incidence, disposition and outcome of complaints and reports, including the timeliness of resolution of complaints and reports and the degree of pubic satisfaction with the process

Recommendation 34: I decline to make a recommendation in response to the recommendation that consideration be given to amending section 41(2) of the ICAC Act to make it clear that the ICAC has no power to conduct a review of a legislative scheme unless requested by the Attorney-General to do so pursuant to section 7(2) of the ICAC Act.

Recommendation 35: There be no repeal of section 46 of the PCD Act.

Amend section 26 of the PCD Act to include subsection (5) in the following or similar terms:

(5) Subject to this Act the Commissioner must, as soon as is reasonably practicable, after action is taken under subsection(1), release a public media statement outlining details of the officer’s proved or admitted misconduct, their age, gender, rank, branch/section, the penalty applied, and any other details the Commissioner deems relevant.