

If calling please ask for
Michael O'Connell



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Hon Bruce Lander QC
Independent Commissioner against Corruption
GPO Box 11066
Adelaide SA 5001

Dear Commissioner Bruce Lander,

Re Complain against Police – ICAC consultation

I refer to your current inquiry into the mechanisms for dealing with complaints against police. First, I apologise for the delay in my submission by this letter, which is due to my absence from South Australia for work and private commitments. Secondly, in the past six or so months my one staff and I have been overwhelmed with requests for submissions and comments on matters affecting victims: their needs and rights, as well as undertaking my legislated functions. Thirdly, a television reporter alerted me to your public consultations.

Please note that I have most often enjoyed a good working relationship with the Police Ombudsman (formerly Police Complaints Authority) and the South Australia Police; albeit that we have not always agreed on 'outcomes'.

That said, I have received a sufficient number of grievances over a decade or so that suggest some victims feel ignored and unimportant when raising complaints about their treatment. Such feelings are not confined to the police complaints process; however, the majority of complaints are against police then prosecutors. Some complaints are against magistrates or judges. I also receive complaints about media treatment of victims and their families in addition to complaints about staff in non-government organisations. As explained below, my authority and capacity to deal with victims' complaints is constrained by section 16A of the Victims of Crime Act 2001.

Victims should be treated with respect and dignity. They are entitled to be told about the existing complaint mechanisms. It is fundamental human decency to tell victims in a sensitive and timely manner how to go about making a complaint and, as appropriate, why something has not happened as it should.

I have seen and read excellent examples of work by police and other public officials as well as the Police Complaints Authority that demonstrates genuine commitment to helping establish the truth and providing some remedy for violations of victims' rights. The Police and the Police Complaints Authority have, for instance, permitted me to accompany a victim to a reconciliation meeting. The Police and the Police Ombudsman have embraced the concept of 'apology' as a remedy (see section 16A of the Victims of Crime Act 2001).

My direct dealings with both have, however, been impeded at times because of the law prohibiting exchange of information whilst a complaint against police is under investigation. The appointment of a victim-liaison officer among the Police Internal Investigation Branch staff is an initiative to alleviate my concern that victims had no-one to help them attain information about the progress of investigations into complaints against police. Similarly, in spite of the resource constraints, staff for the Police Ombudsman have endeavoured to keep victims informed, as appropriate.

Some victims, however, are not getting the service they deserve. It is, for instance, an imperative that not only is provision made to keep victims informed but, moreover, that victims are kept informed. It is vital that complaint mechanisms afford victims the right to tell their stories and to be listened to or heard. Victims are thrust into the criminal justice system that many find daunting and overly legalistic. They discover a contest between the state-as-prosecutor and a citizen-as-accused, which is governed by laws to protect accused right to procedural justice at the expense of establishing the truth.

Victims are entitled to complain about their treatment. In so doing, the process should not replicate that of the adversarial criminal justice system, except of course when the complaint gives rise to criminal proceedings against the accused public official.

Victims who are not satisfied with their treatment (who feel their rights have not been respected) should be able to attain and given clear guidelines on how to complain, regular up-dates on the investigation of their complaints and a full explanation on the outcome. Throughout the process, victims should be treated with utmost respect, compassion and dignity – mindful always of their personal circumstances and the effects of crimes. They should not be treated as a nuisance, or similar.

No complaint mechanism in South Australia provides for reparations, such as an apology, restitution or compensation. Pursuant to the Correctional Services Act, a public official who misuses information about victims kept on the Victim Register can be prosecuted and be liable to a penalty of up to \$10,000. It seems to me that the Criminal Court hearing such prosecution might on finding the charge proved order the offending public official to pay restitution by way of monetary compensation to the victim (section 52 of the Criminal Law (Sentencing) Act 1988). In England and Wales some complaint mechanisms do provide for financial compensation for complaints (that is aggrieved people). The Parliamentary Ombudsman can recommend financial compensation as a remedy and has done so in favour of a victim after an inquiry into that victim's complaint. The Ombudsman can also recommend changes in policies and practice and other remedial action.

Against this backdrop, I point to my role that is often likened to a victim-ombudsman, albeit that my functions are broader than traditionally associated with an ombudsman. Section 16A of the Victims of Crime Act 2001 that allows me, as Commissioner for Victims' Rights, to consult a public official or public agency on the treatment of a victim and, if in my opinion, that official or agency has not treated the victim in accordance with the Declaration Governing Treatment of Victims, I can recommend the official or agency make a written apology to the victim. Should the official or agency not comply with my recommendation, I can report such to Parliament.

To-date, although I have formally given 'notice of consultation', I have not had to formally recommend an apology. The Police and the Police Ombudsman have determined an apology is from their perspective appropriate remedy on several occasions known to me. Although the apologies have mostly appeared genuine, I am aware of an occasion where the apology itself was, in my view, unsatisfactory.

There is no limitation of time regarding the lodgement of victims' complaints, which differs from law pertinent to the Police Ombudsman's authority. Occasionally, victims have complained after being informed that they cannot complain to the Police Ombudsman as the 'limitation of time' for such complaint has expired. It is important that the limitation of time does not become an obstacle to attaining access to justice and a shield to protect those who violate victims' rights. It is important also that the complaint process does not unduly impact the rights of accused police officers. Thus, a balance should be struck; and, in reaching that balance it is my view that equal consideration should be given to victims' interest, accused officials' interest and the public interest.

Trust and transparency are central if a balance is to be struck. There should be more openness and public reporting with respect to the determinations of complaint authorities. Those that seek help from authorities such as the Police Ombudsman and those who believe in the institution as necessary to protect innocent police and to protect aggrieved citizens, including victims, should know how the process is working. A future complaint process cannot expect to be perceived as legitimate, just, fair and equitable if it operates 'behind closed doors'.

As Commissioner, I am not empowered to request or demand production of documents or other when consulting on a victim's complaint. Public officials and representatives have dealt with this omission in differing ways. On one occasion the official complained about provided a written report denying the victim's allegations, while the representative for the agency provided documents that contradicted the official. On another occasion the representative for the agency in which the official complained about was employed allowed me to read all documents pertaining to the matter and interview staff. Mostly, however, I am not given access to 'evidence' for or against the complaint and instead I rely on the integrity of the public official or the representative of the respective public agency. To overcome this shortcoming in my authority, I call on the Police Ombudsman or other complaint mechanism, such as the Ombudsman, the Health and Community Services Complaint Commissioner or the Equal Opportunity Commissioner.

To the extent that the relevant laws allow, co-operation and collaboration are useful in dealing with victims' complaints. Such can also leave some victims with a sense that there has been no truly independent assessment of their complaint.

Notably, the New South Parliament enacted law to establish a Commissioner for Victims' Rights whose authorities in general are not as extensive as mine but regarding victims' complaints does empower the Commissioner to request production of documents and other. In Queensland, the Victims of Crime Co-ordinator can review the process and/or outcome after a victim's complaint has been dealt with under an agency internal complaint mechanism. Both the New South Wales and Queensland law seeks, it seems to me, to ensure the integrity of complaint mechanisms rather than to replicate such.

Mindful of victims' sense of justice and the nature of their grievances, the existing complaint mechanisms, my authorities and experiences as well as review of literature (including your discussion paper), I do not favour a police complaint process that, with the exception of matter that falls under your authority, is entirely in control of the police themselves. My view is, I hasten to add, not confined to police. I have publicly criticised professional vocations and others that maintain the role of 'guardian' of themselves. In another submission, for instance, I have urged that the Director of Public Prosecutions be subject of independent review as now happens in England and Wales and in yet another submission I have urged the establishment of a Judicial Review Council, or similar, to enquire into complaints about

judicial officers. Further, I expressed my support for an independent commission (or like) into corruption.

I stress that my urgings and recommendations are founded on principles and are not intended as an attack on the integrity of these and other institutions. It is important that process and procedure dispel the myths about, for instance, police protecting police.

I urge that complaint mechanism provide for victim participation. Victim participation is consistent with the principle of access to justice for those allegedly aggrieved. Furthermore, victims feel that they are best placed to explain their victimisation and the act or omission that causes them to complain and, in this sense, they feel they can contribute to the establishment of the truth. They should be treated with sensitivity, empathy, respect and dignity throughout all stages of the complaint process. They should in addition be kept informed, so long as keeping them informed does not jeopardise the, or another, investigation. The process itself should be visible and the investigation and outcomes should be transparent, as appropriate on a case-by-case basis.

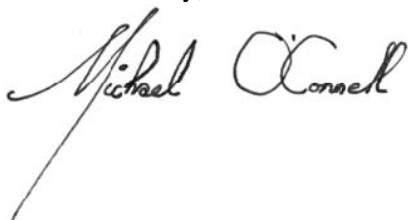
In most cases police should investigate police – many police officers are very competent investigators with high integrity but there should be provision for independent review and that authority should be empowered to order the Commissioner of Police to conduct further investigation and/or assume control of the investigation.

I urge also that the complaint mechanism comprise an effective and accessible investigation and enforcement body with power to award remedy, such as apology, direct or symbolic restitution from individual officers and compensation from the Police, as well as to recommend changes in procedure and practice, in those cases where the Declaration Governing Treatment of Victims is violated.

The Declaration Governing Treatment of Victims honours our international (for example, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power) and national obligations (for example, the National Charter on Victims' Rights). Its implementation must not fall short of the 'rights' or 'entitlements' intended by Parliament and articulated in the Act and those sections of other Acts that compliment it. This includes the right to be treated with respect and dignity, the right to be told how to make a complaint, the right to be kept informed about the progress of the investigation and the right to how the outcome explain in a manner that is comprehensible.

Victims' access to justice depends not only on the applicable law but also the attitudes and behaviours of those tasked with treating victims in accordance with the said Declaration. There has been a remarkable cultural shift in the Police since the first declaration on victims' rights was promulgated in our state in 1985. Nonetheless, victims who come forward to complain should receive adequate and effective support. Victims whose rights are violated should have access to fair and just processes to inquire, to restore and to provide remedy. Victims' rights should be meaningfully enforced.

Yours faithfully,

A handwritten signature in black ink, reading "Michael O'Connell". The signature is written in a cursive, flowing style. The first name "Michael" is written in a larger, more prominent script, and the last name "O'Connell" is written in a slightly smaller, more compact script. The signature is positioned below the text "Yours faithfully,".

Michael O'Connell APM | Commissioner for Victims' Rights