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10 August 2022

Mr Benjamin Cranwell
Executive/Research Officer
Crime and Public Integrity Policy Committee

By email: cpip@parliament.sa.gov.au

Dear Mr Cranwell

Review of the *Police Complaints and Discipline Act 2016*

I thank the Committee for the opportunity to make a submission.

The Commission now has limited involvement in the operation of the *Police Complaints and Discipline Act 2016* (the Act) because the Office for Public Integrity (OPI) is now an independent body. However, this submission is informed by the remaining links between the Act and the *Independent Commission Against Corruption Act 2012* (ICAC Act) and the observations I made while the OPI was responsible to me.

I was somewhat surprised to learn of the Committee's review because the Act has been the subject of two reviews since its commencement in September 2017. The former Commissioner, the Hon. Bruce Lander QC, published a *Twelve Month Review of the Police Complaints and Discipline Act 2016*.¹ That was tabled in Parliament on 16 May 2019. He made 18 recommendations to improve the workings of the Act. Then, Mr Gordon Barrett's review,² which was conducted as required by section 48 of the Act, was delivered on 24 April 2020. Mr Barrett made 35 recommendations, many of which echoed those made by Mr Lander.

To date, so far as I am aware, no action has been taken to implement the recommendations made in either report.

¹ [A Twelve Month Review of the Police Complaints and Discipline Act 2016 | Independent Commission Against Corruption SA \(icac.sa.gov.au\)](https://www.icac.sa.gov.au/publications/12-month-review-of-the-police-complaints-and-discipline-act-2016).

² [Police Complaints and Discipline Act Review Report - The Hon Gordon Barrett QC - 17 April 2020.pdf \(icac.sa.gov.au\)](https://www.icac.sa.gov.au/publications/police-complaints-and-discipline-act-review-report-the-hon-gordon-barrett-qc-17-april-2020.pdf).

Some of those recommendations are no longer relevant.³ However, many ought in my opinion be revisited. Those include recommendations that the OPI be permitted to identify a matter on its own initiative⁴ and that section 28 of the Act be amended so that the OPI may reassess and substitute its view of the action proposed by the South Australia Police Internal Investigation Section.⁵ The definition of misconduct should also be reviewed,⁶ but for reasons other than those given by Messrs Lander and Barrett. I set out below the reasons on which I rely.

Additionally, changes made by the *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act 2021* impact on the operation of the Act and create a number of anomalies which require attention. It does not appear these consequential changes were contemplated by the Parliament, and I urge the Committee to consider them during the course of its review.

Definition of corruption – lack of scrutiny of police

Prior to the changes to the ICAC Act, the Commissioner could investigate any alleged offending by a police officer while acting in that capacity, including allegations of assault and theft. In some cases, the former Commissioner commenced an investigation because he disagreed with the way in which a matter was being handled by SA Police, or considered that it was otherwise inappropriate for SA Police to investigate. A number of those investigations resulted in criminal proceedings.

The narrowed definition of corruption means that all but a few offences alleged against police officers cannot be dealt with under the Act or the ICAC Act. Those matters can only be investigated by police, regardless of the seriousness of the allegation or the seniority of the officer involved. Further, those investigations are not subject to the OPI's scrutiny.

SA Police is not required to notify the OPI that it has received a complaint of that kind, and neither the complainant nor the officer under investigation enjoy the rights and protections the Act provides. Many would view this as unsatisfactory.

Indeed, a number of police officers who responded to the Commission's 2021 Public Integrity Survey expressed the view that reports about police should be investigated independently of SA Police.

It is difficult to see how the public can have confidence in a scheme where police are responsible for investigating their own personnel without independent scrutiny. It is important that a body other than SA Police is empowered to investigate criminal offending by police officers, and that the breadth of the OPI's supervision is not diminished.

³ For example, Recommendation 18 of Mr Lander's and Mr Barrett's reviews was to amend the Act to make clear that the Commission 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. This is no longer relevant due to changes effected by the *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act 2021*.

⁴ Recommendation 1 of both reviews.

⁵ Recommendation 6 of both reviews.

⁶ Recommendation 5 of both reviews.

Definition of misconduct and breaches of discipline

Under section 14(1) of the Act, the Internal Investigation Section of SA Police must assess whether a complaint or report raises a potential issue of misconduct in public administration. However, in practice, the action taken by the Internal Investigation Section is often determined by whether a complaint or report involves an alleged breach of discipline because that is the focus of the balance of the Act.

Breach of discipline means conduct that contravenes the Act or breaches the code of conduct established under section 7 of the Act and may be the subject of a notice of allegation.⁷

The Act requires designated officers to report *misconduct*,⁸ but no report is required of a breach of discipline unless it meets the new and more demanding definition of *misconduct* in section 4 of the *Ombudsman Act 1972*.

The new definition means that only those contraventions of the code of conduct that are *intentional and serious* will be dealt with as misconduct under the Act. It is unclear whether the act or omission which contravenes the code must be shown to be intentional, or whether the officer must have intended to breach the code. In any case, intent is difficult to establish. Remarkably, the definition does not encompass an act or omission which is reckless or negligent.

By way of example, if it were alleged that a police officer improperly used or disclosed information obtained during the course of the officer's employment, the matter could be investigated as a breach of discipline because it contravenes clause 10 of the code of conduct. However, it could only be assessed and investigated as potential misconduct if it were considered to be *intentional and serious*.

Although misconduct constitutes more serious behaviour, the Act only provides consequences for breaches of discipline, in the form of the Commissioner commencing proceedings in the Police Tribunal.⁹

With two systems of classifying conduct available to them – breach of discipline on the one hand and the definition of misconduct applicable to integrity matters by operation of the Ombudsman Act on the other – it is not surprising that the Internal Investigation Section tends to use its own currency. The OPI still oversees the Internal Investigation Section's handling of those matters and so it is not that serious allegations are not viewed by the OPI. However, it is confusing and impractical.

If the bulk of police code of conduct matters do not fall within the new definition of misconduct and those matters are addressed as breaches of discipline, the term misconduct becomes redundant.

⁷ *Police Complaints and Discipline Act 2016* s 3(1).

⁸ *Police Complaints and Discipline Act 2016* s 12(1).

⁹ *Police Complaints and Discipline Act 2016* s 22.

This issue could be resolved by defining misconduct in public administration, for the purposes of the Act, as any breach of discipline by a designated officer which could result in disciplinary action against the officer. Alternatively, 'breach of discipline' could be included in the assessment criteria outlined in section 14(1) and form the basis for reporting under section 12(1).

If the latter change were made, references to misconduct could be removed from the Act altogether. This approach would bring the Act into line with the present practice within SA Police and obviate the need for the Internal Investigation Section and the OPI to consider two different conduct classifications. Such an approach would have the advantage of achieving consistency with the language used throughout the Act and in proceedings commenced in the Police Disciplinary Tribunal.

Operation of sections 29 and 30

The Commission's substantive involvement in the Act is enlivened only by sections 29 and 30. These provisions empower the Commission to investigate matters of police misconduct and maladministration.

Power to investigate misconduct and maladministration

It is noteworthy that the Commission retains jurisdiction over police misconduct and maladministration whereas it is now unable to investigate such matters involving other public officers. If it is accepted that there should be an avenue for independent investigation of police misconduct and maladministration, it is unclear why the Commission cannot investigate alleged criminal offences by police officers which do not fall within the new narrow definition of corruption.

Determining jurisdiction

Sometimes, the OPI will utilise section 29 of the Act to refer a matter to the Commission for investigation. However, the OPI has suggested that the Commission should determine whether it will investigate the matter under the Act or the ICAC Act. It relies on legal advice for this suggestion.

The Commission's powers under the respective acts are very different. Commission staff will be taken to have all the powers of a member of the Internal Investigation Section when conducting an investigation under the Act.¹⁰ The powers conferred on the Internal Investigation Section, which may be exercised by the Commission following a referral under section 29 of the Act, lack the broad and coercive nature of those available to the Commission for the purpose of conducting a corruption investigation under the ICAC Act.

¹⁰ *Police Complaints and Discipline Act 2016* s 30(4).

The Commission's jurisdiction to investigate should be conferred by a decision by the OPI, as the referring agency. Matters of jurisdiction should not be left to be decided by the Commission upon referral because it could rightly attract criticism and legal challenge.

The solution is to make clear that section 30 is reserved for matters which are assessed as raising something less than corruption. As a consequence section 29(2) would need to be amended to operate only on a referral following an assessment of corruption.

Referral and investigation thresholds

I also draw the Committee's attention to sections 29(1) and 30(1) of the Act. It is not clear what is the nature of circumstances that should satisfy the OPI that a complaint or report relates to matters that *should be dealt with* by the Commission. Similarly, it is unclear when the Commission should be satisfied that it is *appropriate* to investigate a matter under the Act, particularly given the Commission's now narrowed focus under the ICAC Act. Perhaps such instances could include complaints or reports which involve a senior ranking officer, or an officer from the Internal Investigation Section or Anti-Corruption Section.

Sections 29(1) and 30(1) should provide greater guidance.

Police Disciplinary Tribunal

I think it is fair to say that the Act provides a more effective and efficient scheme for addressing complaints about police than that created by the *Police (Complaints and Disciplinary Proceedings) Act 1985*. Provided the Internal Investigation Section and the OPI are properly resourced, most complaints are assessed and dealt with in an appropriate and timely fashion. However, those efficiencies are not always seen in matters which proceed to the Police Disciplinary Tribunal.

Police officers cannot be found to have breached the code of conduct or to have otherwise engaged in misconduct unless a notice of allegation is laid before the Tribunal.¹¹ If the officer does not admit the allegation, the matter will be heard and determined by the Tribunal.

Between September 2017 and September 2021, very few misconduct investigations resulted in a notice of allegation being laid. I suspect that is because, in the absence of an admission, the scheme creates a lengthy, costly and adversarial process. These factors are compounded by the fact that the Tribunal is bound by the rules of evidence.¹² It is difficult to see what benefit imposing a strict adversarial process provides to SA Police or its members, including those who are the subject of allegations.

I am advised there have been occasions where SA Police have addressed serious breaches of the code of conduct by giving the officer management resolution, intended to be an informal and educative process, in order to avoid protracted Tribunal proceedings.

¹¹ *Police Complaints and Discipline Act 2016* s 22.

¹² *Police Complaints and Discipline Act 2016* s 35(9).

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In the event the allegation is admitted by the officer, or the Tribunal determines a breach has occurred, the matter is remitted to the Commissioner of Police for sanction.¹³

This differs from other areas of public administration, where an employing authority may consider evidence and make findings against an employee without the need for an intermediary body.

In my view, the Committee ought to consider the role of the Tribunal during the course of its review.

Other anomalies

I outlined in my submission to the Attorney-General of 20 June 2022 and my report entitled *An examination of the changes effected by recent amendments to the Independent Commission Against Corruption Act 2012* a number of anomalies created by the changes to the ICAC Act.

In order to address those anomalies, I recommended:

The definition in section 3 of the Act should be updated to reflect the newly titled ICAC Act.

The powers and functions within sections 12(2), 13(4), 31 and 35(6) of the Act should be conferred upon the Director of the OPI.

I trust these observations are of assistance.

Yours sincerely



The Hon. Ann Vanstone QC
COMMISSIONER

¹³ *Police Complaints and Discipline Act 2016* s 26.