ICAC
Independent Commission
Against Corruption
SOUTH AUSTRALIA

Response to Inspector's Review

of the investigation and prosecution of Mr John Hanlon

A report by the Hon. Ann Vanstone KC
Commissioner

September 2023

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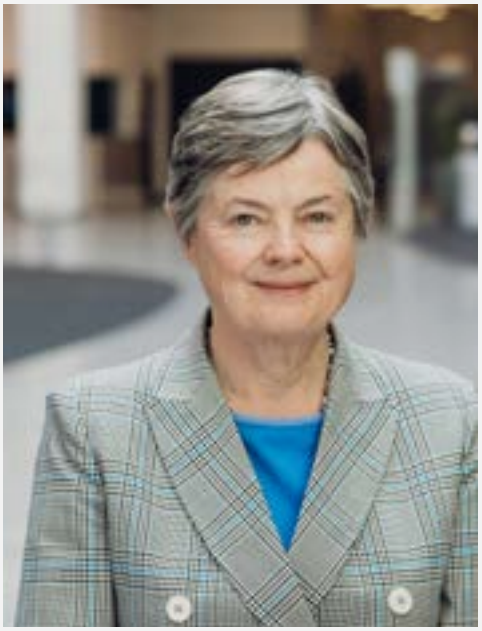

Commissioner's foreword

On 27 June 2023, the report of the Inspector, Mr Philip Strickland SC, on the investigation and prosecution of Mr John Hanlon was tabled in Parliament.

The Commission is grateful for the considered way in which Mr Strickland and his staff conducted the review.

I have accepted in principle the four recommendations that have been made. Other changes within the Commission have been implemented as a result of my own, earlier, review of the matter.

Clearly some aspects of the conduct of officers involved in the investigation of Mr Hanlon were unacceptable. As a result, a matter that should have been adjudicated at trial has not been. That is regrettable.

The substantive errors in this matter stemmed from inadequate planning for a trip to Germany by investigators. That created the environment in which there was subsequently a failure to advise the then Commissioner, the Honourable Bruce Lander KC, of developments, and a failure to later advise the Director of Public Prosecutions of those matters. Those failures were serious.[1]

However, the flaws in the investigation do not justify many of the conclusions that have been publicly drawn in relation to it. It was never clear to me why individuals in the media and the Parliament constructed a largely false narrative around this investigation and subsequent prosecution, when they had not had the benefit of hearing the evidence. It is even less clear to me now why that narrative continues in the face of Mr Strickland's report. I am inclined to assume that those individuals have not read the report, because the only alternative is that they are wilfully misleading the public.

There are fair criticisms made of the Commission in Mr Strickland's report. I do not step away from those. I think it is important that I publicly address those criticisms and explain to the Parliament and the public what we have done to remedy them. I also think it important that I address the ill-informed criticisms and falsehoods that continue to be perpetuated in the media and, as recently as 21 August 2023, in the Legislative Council Select Committee into Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations.[2] Hence, I have decided to prepare this report in accordance with section 42 of the *Independent Commissioner Against Corruption Act 2012* (SA)[3] because I think it is in the public interest that I do.

The Hon. Ann Vanstone KC
Commissioner

1 Inspector's Report, p82 [295], p131 [497].
2 The transcript of the hearing can be found at https://www.parliament.sa.gov.au/en/Committees/Committees-Detail.
3 Pursuant to s 70 of the *Independent Commission Against Corruption Act 2012*, the *Independent Commissioner Against Corruption Act 2012* continues to apply in relation to any complaint or report made under that Act on or before 25 August 2021, or any investigation commenced under that Act before 25 August 2021.

Background – a brief overview of the matter

The facts of this matter – both in terms of its procedural history and the evidence obtained in the course of the investigations into Mr Hanlon's conduct – have been extensively canvassed in the Inspector's Report and I do not intend to repeat all of them here. What follows is a brief summary of key events in this matter.

After receiving a number of complaints about the conduct of former Renewal SA executives Mr John Hanlon and Ms Georgina Vasilevski, on 16 May 2017, the former Commissioner determined to commence an investigation into potential corruption in public administration. This investigation ('the Melbourne investigation') focused on the legitimacy of a November 2017 taxpayer funded trip to Melbourne by Mr Hanlon and Ms Vasilevski.

During the course of the Melbourne investigation, information came to light that caused Commissioner Lander to commence a further investigation into potential corruption in public administration. This investigation ('the Germany investigation') focused on the legitimacy of a taxpayer funded trip to Germany by Mr Hanlon in September 2017.

As part of the Germany investigation, Commissioner Lander authorised travel by two investigators to Germany in September 2019 to investigate whether Mr Hanlon had, as he claimed, conducted business on behalf of Renewal SA in Germany.

A failure to undertake adequate preparations for this trip meant that important legal protocols were not properly ascertained or met. This resulted in witness statements being taken in a manner that did not comply with the provisions of the *Evidence Act 1929* (SA) relating to taking affidavits outside South Australia.

Briefs of evidence in relation to both the Melbourne investigation and the Germany investigation were referred to the Director of Public Prosecutions ('DPP') for determination of whether criminal charges should be laid.[4] On 29 January 2020, the then Deputy DPP advised Mr Lander that a decision had been made to lay charges against both Mr Hanlon and Ms Vasilevski in relation to the Melbourne trip, and against Mr Hanlon in respect of the Germany trip.

At a committal hearing in June 2021, counsel for Mr Hanlon submitted to the Magistrate that, on the evidence filed by the DPP,[5] the prosecution was foredoomed to fail because the DPP could not establish that Mr Hanlon did *no* work of any kind on the Melbourne trip or the Germany trip. The prosecutor conceded that this was the case. Faced with that concession, the Magistrate found no case to answer on each count.

In subsequent reviews of the matter, two senior prosecutors formed the view that the prosecutor's concession was legally incorrect.[6]

4 The brief in relation to the Melbourne investigation was initially referred to the DPP in December 2018, with further material provided to the DPP between February and April 2019. Evidentiary materials gathered in the course of the Germany investigation were delivered to the DPP in July 2019, and a formal referral of the matter was made by Commissioner Lander to the DPP in November 2019.

5 And on the basis of oral evidence given by witnesses before the Magistrate as part of the committal process.

6 Inspector's report, p 43 [140].

In September 2021, the DPP filed an *ex officio* Information charging Mr Hanlon only with offences arising from his trip to Germany in September 2017. Prior to laying that Information, it is understood that the DPP invited, and received, a submission from Mr Hanlon's legal representatives about the matter. The Inspector was satisfied that the decision to lay the *ex officio* Information was made entirely independently of the Commission.[7]

The trial of the charges was due to commence in the District Court on 31 October 2022. A number of pre-trial applications were heard in September 2022. Those applications related, in essence, to the fairness of proceeding on the *ex officio* Information, and to the question of whether the prosecution was foredoomed to fail for the reasons advanced at the committal proceedings. These applications were dismissed and, in relation to the latter, the Judge accepted the DPP's submission that the committal prosecutor's concession was legally incorrect.

Following the dismissal of Mr Hanlon's pre-trial applications, the prosecution applied for an adjournment of the trial to facilitate the attendance of six German witnesses via video link. Due to a Mutual Assistance Request[8] not having been made in a timely manner, their attendance at trial could not be secured by 31 October 2022. This application was refused.

The DPP then indicated an intention to tender the statements of these witnesses pursuant to s 34KA(2)(c) of the *Evidence Act.* Due to considerations of fairness to Mr Hanlon – arising both from the taking of the statements in Germany without adherence to German protocols, but also from the inability of Mr Hanlon to cross-examine the witnesses if the statements were received into evidence – the Judge excluded the statements.

On 9 November 2022, following the Judge's ruling, the DPP abandoned the prosecution.

7 Ibid, p 151 [574].
8 An application made under the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

Where did it go wrong?

As the Inspector's report makes plain, the investigation into the conduct of Mr Hanlon ran into trouble after the decision was made to send investigators to Germany, without sufficient preparation.

Prior to that, the investigation was well run. Mr Strickland found that the decision to investigate Mr Hanlon and Ms Vasilevski's trip to Melbourne was *'appropriate and lawful'*.[9] He found that the applications for surveillance device, telephone intercept and search warrants was *'appropriate.'*[10]

Mr Lander's decision to commence an investigation into Mr Hanlon's trip to Germany was found to be *'reasonable and appropriate in circumstances where [Mr Lander] reasonably assessed the evidence as giving rise to a potential issue of corruption in public administration.'*[11]

The decision to send investigators to Germany was made after Mr Hanlon provided investigators with an account of his movements in Germany, including information about organisations he said he had engaged with and locations he had attended. Following an unremarkable line of inquiry, investigators sought to verify his account by contacting representatives of the organisations named by Mr Hanlon. Information provided electronically by some representatives suggested that no such meetings took place, but communication with other representatives had proved difficult from South Australia. Investigators considered that physically attending those premises was likely to increase the prospects of securing witness co-operation and would allow an opportunity to assess the credibility and reliability of the witnesses.

Against this background, the Inspector found that, *'[t]here was a reasonable basis for ICAC investigators to request that inquiries be conducted … on the ground in Germany and for Mr Lander to approve that request. It was reasonable to expect that investigators made in-person inquiries with key witnesses and did not rely upon email correspondence.'*[12]

In making the case for conducting inquiries in Germany, the former Director Investigations wrote in a memorandum to Mr Lander about the need for a *'successful prosecution'*. This is a very unfortunate turn of phrase that has understandably raised questions about the impartiality of investigators and others within the organisation. Examining this point Mr Strickland wrote, *'I do not find that the evidence established that there was a pervasive culture of inappropriately pursuing prosecutions within ICAC. Nor do I accept that ICAC investigators approached the investigation into Mr Hanlon with a bias or a pre-determination of guilt.'*[13] Nonetheless, the language used was imprudent and has caused reputational damage to the Commission.

9 Inspector's Report, p 21 [62].
10 Ibid, pp 27 [86]; 28 [90]; and 41 [133].
11 Ibid, p 50 [169].
12 Ibid, p7 56 [185] and 178 [701].
13 Ibid, p 58 [208].

Poor planning

After Mr Lander approved the investigators' travel to Germany, planning for the travel commenced. It is accepted that inadequate planning was undertaken.

At no point during the planning stage was consideration given to what specific arrangements should be made for conducting an investigation in a foreign jurisdiction, beyond a request for (and provision of) legal advice regarding the requirements under the *Evidence Act* for witnessing affidavits in Germany for use in South Australian courts.

The Inspector concluded that investigators infringed German sovereignty by failing to *'obtain evidence in Germany by a [Mutual Assistance Request] or, at the very least, [by obtaining] permission and assistance from the German police.'*[14]

No Mutual Assistance Request was made prior to travel, primarily because at the time such a request was thought to be unnecessary. No internal policies existed at the time relating to conducting inquiries outside the jurisdiction, but in this regard, as noted by the Inspector, ICAC was no different from SAPOL.[15] Although investigators were aware that it was possible to make a Mutual Assistance Request, it was considered unnecessary in this case because no assistance was being sought from local authorities in carrying out the intended inquiries, and no coercive powers were involved.

Advice was not sought from the Australian Federal Police ('AFP') prior to travel, and nor was the Australian Embassy in Berlin advised ahead of time that investigators might attend at the Consul-General's offices for the purpose of having affidavits witnessed. Had that advice been sought from the AFP or that information provided to the Australian Consulate *prior to* travel to Germany, it is likely that investigators would have been alerted to the correct procedures to be followed before conducting investigations.

14 Ibid, p 108 [404].
15 Ibid, p 63 [220].

Poor information handling

As set out in the Inspector's report,[16] on 11 September 2019 a series of emails passed between a Commission investigator, AFP Interpol officers and AFP Liaison in The Hague. The effect of the emails to the investigator was that local approvals were imperative when undertaking any official activity in another jurisdiction, and that Germany took a strict approach to such matters.

While the Inspector did not make any finding about whether *both* investigators were aware of these emails, it is plain that at least one was. It is also plain that, not only was Mr Lander not told of these emails, but they were not recorded or referred to in any document in the Commission case management or record management systems, as they should have been. There is no evidence that they were ever forwarded to anyone.

The emails were located by my staff on 24 November 2022 in the course of examining Commission holdings relevant to my review of this matter. They were brought immediately to the attention of the then Reviewer, the Hon. John Sulan KC, and subsequently provided to the Inspector.[17]

On 18 September 2019, investigators met with Consul-General Sams at the Australian Embassy in Berlin for the purpose of his witnessing affidavits of two German witnesses. He declined to do so, essentially because of the failure of the investigators to consult with the AFP and German authorities.[18] No notes were made by investigators of this conversation with the Consul-General and it was not relayed to Mr Lander until investigators returned to Australia. Written records of the meeting are confined to mention of it in a later memorandum by one of the investigators to Mr Lander.

Plainly, the content of the AFP Interpol emails and the conversation with the Consul-General should have been conveyed immediately to Mr Lander and instructions sought regarding what steps should be taken in light of them. The emails should have been saved in the record management system as soon as possible, and should have been later disclosed to the DPP. Although the Inspector did not find that investigators deliberately withheld any of this information, it was a significant and most unfortunate oversight.

16 Ibid, pp 78-79 [280]-[283].
17 Ibid, p 85 [310].
18 Ibid, pp 86-87 [316].

Statements

It is accepted that six witness statements obtained in Germany did not comply with the witnessing requirements of the *Evidence Act.* The investigators were aware of this, and it seems that when they were in Germany they intended to arrange for those statements to be re-witnessed, after the DPP had decided whether to lay charges. Ultimately, this did not occur.

This matter was not alluded to in the District Court proceedings. I pointed out in my review that the statements were irregularly witnessed. Subsequently the Inspector made the same point in his report.

Whilst the manner in which the statements were witnessed was inadequate, that error did not mean that the content of the statements was false or the evidence unreliable. The statements themselves were never meant to be tendered at trial; rather, it was always anticipated that – in the usual way – the witnesses would attend at trial and give oral evidence. The affidavits themselves serve as disclosure of the evidence it is anticipated the witnesses will give.[19]

The Inspector found that, in obtaining voluntary statements from German citizens in the manner adopted by the investigators, German sovereignty was breached. Whilst this is undoubtedly a serious matter, it did not render the evidence from those witnesses inadmissible. Had the witnesses been present at trial, there is no reason to suppose they could not have given oral testimony.

Of course, the statements did form part of the committal brief filed for the purposes of the committal hearing, pursuant to s 111(4) of the *Criminal Procedure Act 1921* (SA). The Inspector addressed this issue in his report[20] and concluded, correctly in my view, that in light of the prosecutor's concessions (referred to above) and subsequent finding by the Magistrate that there was no case to answer, *'any breach of section 111(4)... did not have any material effect on the proceedings against Mr Hanlon.'*

19 Ibid, p 109-110 [408]-[409].
20 Ibid, p 110 [408].

Disclosure

The Commission has been criticised for failing to disclose matters said to have been relevant to the prosecution of Mr Hanlon. These matters fall into two categories: first, aspects of the investigation conducted in Germany; and second, a document (the 'Berlin Movement Calendar') relating to call charge record ('CCR') data.

Turning to the first of these matters, the Inspector found that the following matters should have been disclosed to the DPP, on the basis that they had the potential to bear on the strength of the prosecution case:[21]

- an investigator witnessed affidavits in Germany contrary to the requirements of the *Evidence Act;*
- the existence and content of the AFP Interpol emails (referred to above);
- the existence and content of the investigators' conversation with the Consul-General (referred to above);
- advice received from the International Crime Cooperation Central Authority (within the Commonwealth Attorney-General's Department) regarding Mutual Assistance Requests; and
- no Mutual Assistance Request had been sought or obtained in respect of information obtained in Germany, and that the German authorities had not been advised of the investigators' actions in Germany.

I accept that all of these matters should have been disclosed. I have already addressed a number of these earlier in this report.

Turning to the second of the matters raised by the Inspector, namely the Berlin Movement Calendar, I respectfully take a different view. The relevant question is, might this document have reasonably been expected to assist the case for the prosecution or the case for the defence so as to require its disclosure? In my opinion the answer is in the negative.

The Berlin Movement Calendar was, save for two columns, identical to a document[22] disclosed early in the proceedings. The two additional columns contained information about cell tower locations marked *'Intel purposes only'* and were drawn from a further working document (referred to in the Inspector's report as the 'ICAC CCR Working Copy Spreadsheets') created by a Commission intelligence analyst for intelligence purposes only.[23] It was never intended to be relied upon as evidence.

The ICAC CCR Working Copy Spreadsheets were created using raw CCR data from Telstra (all of which was disclosed in June 2020) which had been entered into publicly available online databases purporting to give the location of cell towers in Germany. For reasons explained in detail in the Inspector's report[24] the information in the ICAC CCR Working Copy Spreadsheets was incomplete, unreliable and inadmissible as evidence.

21 Ibid, pp 133-135 [507]-[509].
22 Referred to in the Inspector's Report as the 'Bridge Affidavit Spreadsheet'.
23 Both the Berlin Movement Calendar and the ICAC CCR Working Copy Spreadsheets were disclosed during pre-trial hearings.
24 Inspector's Report, pp 141-144 [535]-[548].

Further, and importantly, for reasons explained in the Inspector's report,[25] the information in the ICAC CCR Working Copy Spreadsheets was not and did not have the capacity to be exculpatory. As the Inspector said:[26]

> *[E]ven if the location data on the CCR was accurate (which I do not accept), that* **would not establish** *that Mr Hanlon had in fact attended the Nine Co-Working Businesses as he claimed. …*
>
> *In short, I am* **not satisfied** *that the ICAC CCR Working Copy Spreadsheets relied upon by Mr Hanlon are exculpatory. They* **do not assist** *him in establishing that he visited any of the Nine Co-Working Businesses whilst in Berlin.*
> [emphasis added]

Given that the ICAC CCR Working Copy Spreadsheets (in combination with the Bridge Affidavit Spreadsheet) were used to create the Berlin Movement Calendar, it must logically follow that the latter also *was not* exculpatory; the stream cannot rise above its source.

Notwithstanding this, the Inspector concluded that the Berlin Movement Calendar should have been disclosed because it *may* have assisted the defence. In other words, information which *was not in fact* exculpatory nevertheless had the *potential* to be exculpatory, and therefore ought to have been disclosed.

I cannot see that provision of the Berlin Movement Calendar (or, for that matter, the ICAC CCR Working Copy Spreadsheets) could ever have assisted the defence. The information in the two additional columns could not be used as evidence. Nor did it provide a lead to follow to obtain evidence of Mr Hanlon's locations in Berlin which would not have occurred to the defence. Australian CCRs are frequently used to help establish a phone user's location, and the defence would be accustomed to that being a possibility.

Moreover, in the present case, evidence of *precisely* this kind was disclosed in relation to the Melbourne investigation and was criticised by counsel for Mr Hanlon on the basis that it was not reliable. Two senior prosecutors who reviewed the evidence also formed the view that it was unreliable.[27] As the Inspector said, *'The reasoning of both prosecutors applies with even greater force to the CCRs for the Germany trip in light of the issues with reliability highlighted by* [the intelligence analyst]*.'*[28]

The Inspector has acknowledged that disclosure of the Berlin Movement Calendar was a *'grey area'*.

The disclosure of any particular item can be seen to fall on a continuum. Some items are obviously in need of disclosure, others clearly not. In between there may be matters or documents about which reasonable minds might differ; this, I suggest, for the reasons given above, is such a document. My view remains that the entries in the two columns in the earlier documents were not disclosable.

25 Ibid, p 144 [545]-[548].
26 Ibid, p 144 [547]-[548] [emphasis added].
27 Ibid, p 143 [543].
28 Ibid, p 143 [544].

Action taken in the wake of examination of this matter

I reiterate that this investigation took place more than four years ago. We are a different organisation now.

As the Inspector notes,[29] prior to the publication of his report several important steps had been taken to improve processes within the Commission. These steps were taken because of matters identified in my review; indeed some predated it.

The Commission is committed to ensuring each investigation draws on the expertise of a multi-disciplinary team. Each Commission investigation is assigned an investigator, legal officer and prevention analyst, each of whom makes a substantive contribution to the investigation and proactively identifies any opportunities or risks it presents. This means that not only are the Commission's investigations more effectively calibrated towards advancing its statutory functions but key risks in an investigation – including legal risks – are also more likely to be identified and acted upon.

The Commission record keeping practices have been consolidated and strengthened. Internal policy and procedures have been revised to ensure key and significant decisions are recorded and official records retained. The Commission has provided training to its employees on these requirements, in addition to the regular program of training it provides as a matter of course.

A new Disclosure Procedure, which the Commission began developing in 2022, has been completed and is in force. Extensive training in its detailed requirements has been provided.

Although Commission employees rarely travel overseas to conduct inquiries the Commission's Operations Manual now provides detailed guidance on the subject. Internal approval from the Commissioner is required before any overseas travel is undertaken. That approval cannot be given until appropriate consultation with relevant Commonwealth and international authorities has been undertaken and legal advice obtained.

The Inspector made several recommendations[30] relating to obtaining statements from other jurisdictions, information and records management, referral of matters to a law enforcement agency, and the recording of key decisions.

The Commission immediately accepted those recommendations and has taken steps to implement them.

29 Ibid, pp 172-177 [673]-[695].
30 Ibid, pp 186-189 [743]-[755].

Setting the record straight

In this section of the report, I intend to correct the false and misleading information that has consistently been, and continues to be, put into the public domain about these matters.

Going after the whistleblower

Much has been said in the media, and indeed in Parliament, regarding the commencement of the investigations into Mr Hanlon. In particular, the motivation of complainants in these matters has been publicly called into question. Complainants in this matter have been labelled *'vexatious underlings'*, and their accounts described as *'fabricated'* and *'false'*.

This narrative is entirely false and sets a dangerous precedent that undermines and harms whistleblowers. Indeed, at the time they were made, those reporters were *obliged* to make those reports.[31] [32] Public administration and law enforcement relies on those with information speaking up. Demonising whistleblowers is both unfair and unhelpful and it undoubtedly has a chilling effect on those who want to speak up. I cannot understand why anyone would want to discourage people from making a report.

Mr Strickland stated, *'There is no evidence to support the assertion that the complainants were motivated by bad faith or that the complaints were simply a concoction of a "disgruntled employee"'*. Mr Strickland also made the point that, had the Commission decided not to investigate the allegations, it *'... would have been a dereliction of ICAC's statutory duty.'*[33]

Mr Strickland said that the information provided to the Commission *'was objective in nature (for example, in the form of business records, rather than the source's opinions). I do not find that the complaints were motivated by some ulterior purpose or that they were not genuinely made.'*[34]

It is also important to appreciate that, even if the complaints had been made for some ulterior purpose, this would not and should not render them able to be disregarded. If there were no evidence of the conduct complained of, an investigation would quickly establish this and the investigation would be closed. This happens often enough.

In any event, Mr Hanlon chose not to argue to the Inspector that the Melbourne trip should not have been investigated and referred to the DPP.

Mr Strickland's report contains an extract from a submission made to him by Mr Hanlon's representatives, stating that, '[Mr Hanlon] *elects not to contest or dispute a finding by you that there is no evidence of corruption or improperly* [sic] *in connection with the decision to commence the investigation into Mr Hanlon and the referral of the Melbourne trip to the ODPP nor that he suffered undue prejudice as a consequence.'*[35]

31 *ICAC Directions and Guidelines for Public Officers*, Amended and Republished March 2017.
32 Mr Hanlon's claim that there was 'no complaint from the government, nothing from my board, nothing from my Minister' misunderstands the reporting obligation. The obligation to report reasonable suspicions of corruption applied equally to all public officers. There are obvious problems if reports can only be made from the top.
33 Inspector's Report, p 25 [76].
34 Ibid, p 25 [77].
35 Ibid, pp 10 [18] and 120 [452].

Whistleblowers are a necessary part of a functioning democracy. A large body of research shows that whistleblowers are fearful of repercussions. The Commission's own research demonstrates this, with only a third of respondents to the 2021 Public Integrity Survey being confident that they would be treated fairly if they made a report.[36] Almost half of the respondents said they would be fearful for their job if they reported, with less than a quarter believing their organisation would protect them from negative consequences.[37]

Although it has been claimed in the media that whistleblowers receive special – and, by implication, *unnecessary* and *unjustified* – protection, research demonstrates that the general feeling among public officers and the broader community is that this is not the case.

I would suggest that those who have been complicit in maligning whistleblowers for meeting their obligation to report and uphold the integrity of public administration should stop.

The evidence

So much has been said about the evidence in this matter – that there was none, that it was *'retrofitted'*, that it was deliberately withheld, that undisclosed working documents proved Mr Hanlon's innocence and that evidence was *'doctored'*. The Inspector accepted none of these allegations.

I encourage people to read the Inspector's report and form their own view about whether there was a vacuum of evidence, but I note the following remarks made by the Inspector:

- In relation to the Melbourne Investigation:[38]

  > *I consider that there was sufficient evidence to justify the referral of the brief to the DPP for adjudication in relation to the Melbourne investigation. Although Mr Hanlon had proffered a version of events, it was open to ICAC to find that version was contradicted by other evidence…*
  >
  > *… ICAC investigators had a considerable body of evidence available to them that gave rise to a circumstantial case sufficient to justify the referral…*
  >
  > *… Mr Hanlon's representatives submitted to me that in circumstances where the Melbourne charges were ultimately abandoned, it must follow that there was no evidence to have justified the charges at the outset. This conclusion does not follow.*

- In relation to the Germany investigation:[39]

  > *The decision by* [Commissioner Lander] *to refer Mr Hanlon's Germany trip to the DPP for adjudication was reasonable in all the circumstances.*
  >
  > *Putting aside the German affidavits… there was significant other material which justified the referral to the DPP.*
  >
  > …
  >
  > *I am firmly of the opinion that ICAC had sufficient evidence to refer the Germany matter to the DPP.*

36 2021 Public Integrity Survey p 23.
37 Ibid p 24.
38 Inspector's Report, p 120 [449]-[452]. References omitted.
39 Ibid, p 122-124 [460]-[467].

I remind readers that it is the DPP who ultimately decided to prosecute the matter. By the DPP's assessment, the matter satisfied the two pronged test for prosecution; that is, it was in the public interest to prosecute, and there were *reasonable prospects of conviction*. Not only must this two pronged test be satisfied before the commencement of a prosecution, but it must continue to be satisfied for the life of a prosecution. This matter was comprehensively reviewed by Senior Counsel on more than one occasion, including before the filing of the *ex officio* Information, and the decision made to proceed to trial.

Finally, I note the observations of the District Court Judge who heard pre-trial applications, having considered the evidence upon which the prosecution intended to rely at trial:[40]

> *There is a very high public interest in properly made allegations of abuse of public office being brought to justice. There is clearly a case to answer in this matter.*

It should not be inferred from this statement or from my quoting it that Mr Hanlon would have been convicted had the trial proceeded. What the Judge's statement means is that the evidence disclosed in the statements was fit to go to a jury.

So much has been said about the evidence in this matter – that there was none, that it was 'retrofitted', that it was deliberately withheld, that undisclosed working documents proved Mr Hanlon's innocence and that evidence was 'doctored'. The Inspector accepted none of these allegations.

40 *R v Hanlon* (No 3) [2022] SADC 135 at [26]. Emphasis added.

The value of the alleged offending was too insignificant to investigate

This matter has received coverage in the media to the effect that the alleged offending, in terms of the financial cost to the public, was so insignificant that it should never have been investigated. The argument that offending must be of a certain value to justify an investigation and prosecution is preposterous.

The 'value' of any alleged offending (particularly offending of the kind investigated by the Commission) cannot be known at the commencement of an investigation. Nor can it be known what, if any, charge will ultimately be settled upon by prosecutors if the matter proceeds that far. Indeed, the question of whether an offence has been committed at all cannot be *known* – because that is the point of the investigation.

If there is a value threshold for commencing an investigation – or a prosecution, what is it? Is it different for different people? Does it depend on the person's role, or who their friends are? Should the allegations be ignored if the person is a valuable employee – perhaps they contribute more than they are alleged to have taken? What happens when alleged offending has no dollar value at all?

An investigation and any consequent prosecution is not just about punishment, it is about interruption and deterrence. It's about stopping the conduct from happening again. It's about sending a clear message about what is not acceptable.

Focusing on the dollar value of an alleged offence ignores that, in relation to offences of corruption in public administration, the most serious aspect of the offending may be a breach of public trust. Persons entrusted with public duties must be held to a high standard of conduct. As is stated in the *Code of Ethics for the South Australian Public Sector*, public officers *'must exhibit the highest standards of professional conduct in order to maintain the integrity of the South Australian public sector.'*

In his report Mr Strickland rejected submissions made by Mr Hanlon to the effect that the money involved in the alleged offending was inconsequential. The Inspector stated,[41]

> *The deliberate misuse of public funds by the senior executive of a statutory body may warrant investigation even if small amounts are involved, depending on the circumstances. This was a matter in which multiple complaints were received into the conduct of Mr Hanlon relating to his travel allowances. I do not consider that ICAC is obliged to only investigate matters that might be characterised as 'high value'. If this were the case, lower level but persistent corruption may continue unchecked.*

41 Inspector's Report, p 27 [84].

Investigations that cost more than the alleged offending are not worth it

There has been commentary to the effect that the investigators' trip cost the taxpayer more than the trip of Mr Hanlon himself. This is not correct. The expenses of the two investigators (airfares, accommodation and incidentals) amounted to $11,757. The cost of Mr Hanlon's airfares alone was in excess of $14,000. To my mind, however, this is a comparison without utility.

Putting aside that many criminal offences have no direct dollar value attached to them – for example assaults – the vast majority of investigations cost more than the declared dollar value of the alleged offending. Without doubt, investigating and prosecuting a person for trafficking in $1,000 worth of methamphetamine costs significantly more than the value of the drugs. Investigating and prosecuting a person for stealing a car, or for residential trespass and theft, usually costs more than the value of the goods stolen.

The plain fact of the matter is, that the cost to the community of ignoring these crimes justifies the expenditure of public funds to investigate and prosecute them. Parliament has recognised this by enacting the ICAC Act, and by creating the Commission and investing it with powers to investigate and refer for prosecution matters involving corruption in public administration. Moreover, in creating the Commission – a specialist body – to investigate these offences, Parliament has recognised that corruption offences bring with them special challenges that require particular skills and expertise. In such matters, the 'dollar value' versus 'investigation cost' comparison has no utility.

An ICAC junket?

There has been commentary to the effect that investigators taking a two day break in the middle of their work amounted to a 'junket'.

Plainly, the investigators could not be required to work more than a normal working week without a break. To require otherwise would likely be unlawful. Since they were overseas and unable to return to their homes for that break, it was appropriate that the Commissioner's office paid for their accommodation for those two nights. While it is the case that they left Berlin and spent those two days in Hamburg, the investigators themselves paid for their transport to and from Hamburg; that cost the taxpayer nothing.

ICAC prosecuted with no consultation with the DPP

Some spurious claims have been made in the media to the effect that the Commission prosecuted Mr Hanlon and indeed that it prosecutes matters in general, without reference to the DPP. This is wholly incorrect.

The Commission is *not* a prosecuting agency. The Commission has power to *investigate* potential issues of corruption in public administration, and to *refer* matters to SAPOL for prosecution. It stands to reason that the Commission would not refer a matter unless of the view that the matter warranted prosecution. But the plain fact is that the decision whether to prosecute and what charges will be laid, is a matter for the DPP or SAPOL.

In the present matter, as has been made plain by the Inspector in his report, briefs of evidence arising from both the Melbourne investigation and the Germany investigation were forwarded to the DPP for consideration. The decision to proceed with charges was made by the DPP. The decision to proceed on an *ex officio* Information following the dismissal of charges at the committal hearing was a decision made by the DPP without reference to me or my officers.

Investigations that do not result in a conviction, should never have been investigated or prosecuted

Media reports relating to Mr Hanlon's matter have perpetuated the idea that a 'failure' to secure a conviction at the end of an investigation and prosecution process necessarily means that the investigation and prosecution should never have been commenced. This kind of thinking is wholly illogical and, more than this, is antithetical to our criminal justice system.

The criminal justice system in Australia proceeds upon the basis that persons are presumed to be innocent until proved guilty beyond reasonable doubt. This is an appropriately demanding standard of proof. It is necessarily higher than the standard required for the commencement of an investigation, or the commencement of a prosecution.

A criminal justice system with a 100% conviction rate would rightly raise concerns regarding the integrity of the investigation, prosecution and trial processes, and would bring an unacceptable risk of some innocent people being convicted. A 100% conviction rate might alternatively suggest that investigators and prosecutors were demanding an overwhelming case before proceeding, bringing an unacceptable risk of some guilty people evading prosecution entirely. In either case, the community would not be properly served.

Conclusion

Like all integrity agencies, the Commission is not immune from criticism. Nor should it be. Indeed, across the country, integrity agencies are regularly subjected to intense examination and censure.

The Commission serves an integral role in promoting honesty and integrity in the public sector, in detecting and responding to corruption when it occurs, and in preventing and minimising the occurrence of corruption in public administration. It is essential that the public has confidence in the Commission. The Commission is a relatively young organisation, just 10 years old. It has matured a great deal in the four years since these investigations.

In my three years as Commissioner I have overseen marked changes in our focus and our practices and procedures. My review of these investigations and the Inspector's report have also allowed us to address deficiencies.

An integrity agency must exemplify the highest standards in every function it performs. I am committed to the continuous improvement in the performance of all Commission staff.

ICAC

Independent Commission
Against Corruption

SOUTH AUSTRALIA