



LOOKING BACK

A REPORT BY

THE HON. BRUCE LANDER QC

THE INDEPENDENT COMMISSIONER AGAINST CORRUPTION

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The Independent Commissioner Against Corruption

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LOOKING BACK

By the Hon. Bruce Lander QC
Independent Commissioner Against Corruption

On 1 September 2019 I commenced my seventh and last year as South Australia's Independent Commissioner Against Corruption (ICAC).

The ICAC Act

Over six years there have been several changes to the *Independent Commissioner Against Corruption Act 2012* (ICAC Act) and the ICAC Regulations, most of which have been designed to provide clarity as to the intention of the legislation and some of which have been designed to address practicalities such as defining what might constitute serious or systemic misconduct or maladministration in public administration. Additional accountability for my office and the Office for Public Integrity (OPI) have also been introduced through the expansion of the role of the ICAC Reviewer. All of the changes implemented to date have in my view improved the functions and operations of the ICAC and the OPI.

There is currently a Bill before Parliament that contains further changes to the ICAC Act, including provisions for public maladministration hearings in some circumstances. I have previously said that I do not support all of the proposed amendments in the Bill and I have stated my reasons to the Crime and Public Integrity Policy Committee (the Committee), the Attorney-General, the Shadow Attorney-General and members of the crossbenches. I will not restate those reasons here but they are available on the 'other published documents' page on my website in the form of letters from me to the Attorney-General and Shadow Attorney-General.

It is well known that I support some relaxation of the secrecy provisions that underpin the ICAC Act. I accept and support that the ICAC Act seeks to protect persons against unnecessary reputational harm. However, there is a public interest in some of my functions being publicly known. There are some aspects of my functions that the public have a right to know about and to be satisfied that I am discharging those functions fairly and appropriately.

I am the only mainland anti-corruption agency that cannot conduct any form of public hearing when investigating corruption, misconduct or maladministration.

The law and the functions exercised by a person with my powers should always reflect what is in the public interest. If a person may suffer embarrassment by reasons of the exercise of those functions but it is in the public interest that the exercise of those functions be in public, the individual person's embarrassment must give way to the public interest.

I have said, and others have agreed, that the definition of corruption is too wide because it picks up the less serious types of offences that are not usually associated with corruption. That can be managed and I have managed that by excluding some offences from the reporting obligations imposed upon public officers.

In a sense however the definition of corruption is also too narrow in that it does not recognise that a person can be 'corrupt' as that term is widely understood, without that person committing a criminal offence. A person who acts without integrity is corrupt. For example a decision maker who has a conscious bias in favour of particular persons and who makes decisions reflecting that bias would ordinarily be thought to be corrupt even though that person has not committed a criminal offence. Perhaps the yardstick of corruption should not merely be proof beyond reasonable doubt of a criminal offence but include proof of conduct that is wanting in integrity. Guidance might be taken from the statutory schemes in Western Australia, Queensland, New South Wales and Victoria.

Oversight of Police Complaints

There have been a number of changes to the statutory functions of the OPI, an office that is responsible to me for the performance of its functions. The most notable change being the OPI gaining the statutory function of oversight of the assessment and investigation of complaints and reports relating to the conduct of South Australia Police (SA Police), under the *Police Complaints and Discipline Act 2016* (PCD Act).

Some controversy has arisen as a result of a report I prepared in respect of the first 12 months of operation of the PCD Act.

In my experience new legislation almost always provides challenges in terms of its administration. Those challenges only become obvious once the legislation commences. It seems entirely uncontroversial to me that those challenges and recommendations for addressing them are outlined for the consideration of the Minister and the Parliament, who I assume would want the scheme to work as well as possible. After the commencement of the ICAC Act, I outlined issues with the legislation to the former Attorney-General and made recommendations for amendments to the Act. I will follow a similar process at the completion of 12 months of operation of the *Public Interest Disclosure Act 2018* (PID Act), which also affects the operations of the OPI.

I never considered the report I prepared on the first 12 months of operation of the PCD Act to be the Review of the Act caused by the Minister under section 48 of the PCD Act, because the Minister did not cause it.

My report made 18 recommendations based on the experiences of the OPI in administering the Act. I consulted with SA Police in respect of those recommendations and I attempted to consult with the Police Association of South Australia (PASA). SA Police agreed with all but one of my recommendations and did not at the time offer any additional recommendations or commentary. PASA refused to consult on the basis that it was improper of me to have prepared the report, a view I do not share.

SA Police subsequently made a submission to the Committee's Inquiry into Matters of Public Integrity in South Australia. That submission was somewhat critical of the way that OPI administers its functions under the PCD Act. I was unaware of those criticisms prior to reading the SA Police submission because they had never previously been raised with me and were not raised with me during our consultation on the operation of the PCD Act. Furthermore, the criticisms were not evidenced and in some instances were based upon a misunderstanding of the legislation. However, the SA Police submissions have been accepted and built upon by PASA, and subsequently reported as fact, which in many instances I would contest. The discussion has in my view denigrated because of a number of misrepresentations. Since SA Police made its submission to the Committee I have attempted, thus far without success, to understand in more detail the basis for the concerns raised. I will continue to seek that detail in an effort to best ensure the scheme is operating effectively.

I expect that the Committee would wish me to formally respond to issues raised in either of those submissions that it considers important and I would welcome the opportunity.

Maladministration

Over six years of operation I have concluded that South Australia does not have a public administration that is systemically corrupt. There are of course corrupt individuals but the administration itself is not corrupt. However, South Australia does have a public administration that is plagued by maladministration and very poor conduct, both of which foster environments that make individual corruption possible and in some instances make it extremely difficult to detect corruption. In many ways the harm caused by maladministration is probably far more significant than the harm caused by instances of corruption detected in this state.

I have undertaken a number of investigations over the years that have been undermined by a public authority's poor record keeping, a lack of appropriate leadership, and systems that are not fit for purpose. It is difficult to gather evidence of offending when there are no records or when leadership have been aware of inappropriate conduct over long periods of time and failed to address it.

In some investigations it has been difficult to establish something as simple as whether or not someone was at work on a particular date, working from an alternate location, or even rostered to work, because time sheets are so poorly managed and agreements for flexible or perceived flexible working arrangements are not documented and not communicated to appropriate persons.

A number of public officers are entitled to recall allowances, which are sometimes claimed and approved with little oversight. Some public officers get paid according to his or her activity or output but poor systems or systems that are not enforced or have no oversight, do not tell us if a public officer produced the activity or output for which they are seeking compensation or remuneration.

Public administration must ensure it is managing its workforce and records appropriately through utilising proper systems and processes and applying appropriate oversight. I am of the view that maladministration of this type is costing the South Australian public a significant amount of money.

Misconduct

My Public Integrity Survey 2018 highlighted the prevalence of poor personal conduct in public administration. Over 44% of survey respondents reported encountering bullying and harassment in his or her workplace. This is unacceptable. What is more unacceptable is an agency being aware of this type of conduct and failing to address it.

Reflecting upon the qualitative data from the survey and past complaints and reports, it would seem that public administration employs a number of high performing or high value individuals, who because of the quality or uniqueness of his or her work or skills, the person's reputation, or other significant benefit the person brings to an agency, there is a reticence to address poor conduct by those people. A public officer's individual value should not determine the extent to which they are required to conduct themselves in an appropriate manner. A free pass should be afforded to no one.

Conflicts of Interest

I continue to be surprised by the way that conflicts of interest are managed, or more precisely not managed by some public authorities and public officers. Conflicts of interest continue to present in matters relating to procurement, administrative decision making and recruitment.

I think the problem in part stems from a general lack of understanding as to what constitutes a conflict of interest, resulting in an inability to recognise a conflict or perceived conflict of interest, a reticence to declare one, and a failure to appropriately manage a conflict. We have attempted to fill that knowledge gap through the creation of an online education program available to all public officers on the ICAC website.

However, the problem of poorly managed conflicts of interest is not entirely one of misunderstanding. We have encountered many instances where a public officer's position, knowledge or privilege has been knowingly exploited to further personal interests.

The public have a right to expect that the activities of public institutions are fair, unbiased and uninfluenced by any personal interests of individual public officers.

Public authorities should review conflicts of interest policies to ensure they are clear and appropriate for managing the significant risks that arises from conflicts or perceived conflicts of interest. Public officers must make themselves aware of their agency's conflict of interest policy and comply with it at all times.

Recruitment

This year we have received a number of matters relating to compromised recruitment processes, including conflicts of interest and fraudulent applications that have resulted in employment. The aim of a recruitment process should always be to employ the best possible candidate for the job.

I am surprised by a general lack of due diligence in public administration recruitment. Essential qualifications for a role must always be verified as should any relevant experience or knowledge a candidate professes to have.

Security vetting including police checks and criminal association checks should be carried out for appropriate roles. Poor recruitment practices can have a significant impact on the community in terms of community safety, security and general health and wellbeing.

Reporting Obligations

I am very confident that corruption and serious or systemic misconduct and maladministration is occurring in public administration of which I am unaware. The reason I do not know about it is because it has not been reported to the OPI.

The public integrity survey tells me there are a number of explanations for why people are not reporting conduct of this kind to the OPI, including not understanding they have a reporting obligation.

I will continue to work with public authorities to ensure that public officers are educated about the type of conduct that must be reported to the OPI. However, the primary reason that public officers are not reporting conduct that ought to be reported is because of the poor reporting cultures that exist in public administration.

The public integrity survey revealed a clear pattern of anxiety about reporting, with more than half of all participants responding that they would be worried about their job if they were to report. The qualitative survey responses offered some sobering personal stories about victimisation for reporting. It is incomprehensible to me that a public authority would not want to hear from its staff about matters they are concerned about. Public officers who are willing to speak up should never be punished.

There have been times this year that I have felt frustrated by a lack of timely reporting of conduct to the OPI. Too frequently agencies and councils embark upon an investigation into serious allegations of impropriety without reporting the matter to the OPI. When the matter is eventually reported to the OPI, as a result of the investigation undertaken by the public authority, any investigation that I might have determined to undertake, would likely be compromised.

I remind all public authorities and public officers that any conduct reasonably suspected of raising a potential of corruption or serious or systemic misconduct or maladministration, must be reported to the OPI as soon as practicable.

Investigation Referrals

There remain some stubborn misunderstandings about the role and functions of my office and the OPI. I think it is not well understood the type of conduct which I am likely to investigate and this can sometime result in a level of disappointment for some people who have made a complaint or report.

The vast majority of complaints and reports received by the OPI are not assessed as raising a potential issue of corruption in public administration. If the matter does not involve corruption, I am not likely to investigate it. Furthermore, if the matter does not involve corruption that is particularly complex or significant, I am also not likely to investigate it myself but to refer it to SA Police for investigation.

The ICAC Act assumes that I will not investigate misconduct or maladministration except in some circumstances where that conduct is serious or systemic and it is in the public interest for me to do so. The bulk of misconduct and maladministration complaints and reports are referred to the public authority in which the conduct occurred, for investigation and action. In a small number of cases they are referred to the Ombudsman.

Complainants and reporters can feel disappointed that I am not personally dealing with their matter.

Whether or not a complaint or report is investigated, referred for investigation or not investigated, does not diminish the importance of having made the complaint or report. All complaints and reports form part of a broader knowledge base about public administration. This sometimes means that individual complaints and reports that have not been acted upon in the first instance, come together to form part of a bigger picture and instigate a course of action at some other time.

Corruption investigations

On occasion I am criticised for investigating matters that are viewed as low level corruption. I do not generally set out to investigate low level corruption but that is sometimes what I find. Once found I cannot ignore the conduct because it does not align with expectations of what I should investigate, or what I should find. If I find criminal conduct that could result in a prosecution, I will refer the matter to the Office of the Director for Public Prosecutions (ODPP) for consideration. The ODPP then determines whether the matter will be prosecuted.

Value Proposition

I would also like to address the ongoing debate about the value of my office, which is an important debate that should be encouraged because public money is involved. However, debates should be well informed and I do not think that some recent musings about my role and functions have been well informed.

The ICAC public report card generally focusses on the number of successful prosecutions resulting from my investigations. Although I understand this is an intuitive measurement for a law enforcement agency it is a curious measuring stick in respect of the South Australian ICAC model. It is curious because I do not decide if something should be prosecuted and I do not prosecute. These decisions are in other's hands. It is also an inadequate measurement because identifying and investigating corruption is only one of 12 functions given to the ICAC and the OPI under the ICAC Act, with additional functions given to the OPI under the PCD Act and the PID Act.

In my view some of the ICAC's most important work happens in the corruption, misconduct and maladministration prevention space, including through the referral function and investigations into misconduct and maladministration. The problem is the public do not generally know what we are doing in this space, because the legislation requires most of our activities to be carried out in private. Many people are aware of my maladministration investigations into the sale of state government land at Gillman and the Oakden facility because they resulted in public reports. However, I have conducted 45 investigations into misconduct and maladministration that are not publicly known and the reasons they are not publicly known is because the scheme does not allow them to be publicly known. The majority of those 45 investigations were carried out before the ICAC Act was amended, limiting me to investigating only serious or systemic misconduct or maladministration.

The work of the ICAC and the OPI stretches far beyond what you see in court.

I have referred nearly 1000 misconduct or maladministration matters to a public authority with a requirement for them to report back to me. Every matter is considered by my staff and often results in the provision of feedback to agencies about improvements to this process. If I am not satisfied that these referrals have been duly and properly dealt with, I express those views and request further consideration and action in respect of the matter. If I remain unsatisfied, I report the matter to the Minister responsible, which I have done on a number of occasions.

It is not publicly known that my staff and I meet with Chief Executives and Ministers to discuss systemic problems in the agencies they head. It is not known that I regularly write to public authorities about conduct that I find unacceptable. It is not known that as a result of private meetings and communications between the ICAC and public authorities that policies are being changed, governance improved and training implemented on a regular basis.

I would support amendments that would allow me to tell you more but until the Parliament determines to make the activities of the ICAC more transparent through changes to the ICAC Act, then you will remain in the dark about much of what I do with the exception of matters that come before the court.

After six years of operation, I would like to be able to demonstrate that there has been measurable improvement in public administration in South Australia but there is currently no metric that can reliably measure this. We are currently undertaking a project to determine whether it is possible to introduce metrics that would assist the ICAC and stakeholders to assess the impact of our operations. However, I can tell you that I have witnessed firsthand many improvements right across public administration. There is a long way to go but there has been progress.

In September I informed the Attorney-General that it is my intention to stay in office to complete my full term as South Australia's first Independent Commissioner Against Corruption at the end of August 2020.

I intend to present another report of this kind in April 2020.



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