LOOKING BACK

A REPORT BY
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INDEPENDENT COMMISSIONER
AGAINST CORRUPTION

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Office for Public Integrity

LOOKING BACK

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INTRODUCTION

My term as South Australia's Independent Commissioner Against Corruption (ICAC) ends on 1 September 2020.

This will be the last report I publish in which I offer my observations of the operations of my office and of matters related to integrity in public administration.

Because this is my last report I will reflect upon my last seven years as Commissioner and address what I believe to be the most pertinent issues for the office and for the new Commissioner.

I will also take the opportunity to acknowledge the extraordinary people I have worked with over the last seven years. I will summarise many of the office's achievements and respond to some of the more common criticisms levelled at it.

I will offer a number of observations about integrity in public administration. Many of the matters I will raise in this report are matters that I have addressed publicly on previous occasions but I think they are worth repeating.

Towards the end of this report I will propose a number of further amendments to the *Independent Commissioner Against Corruption Act 2012* (ICAC Act) which I think would improve the operation of that legislation. Those recommendations include the creation of an integrity commission and a change in title for the Commissioner.

ACHIEVEMENTS AND CHALLENGES

I thought it appropriate to begin by recognising the achievements and occasional challenges that my office and the Office for Public Integrity (OPI) have faced over the last seven years. For convenience I will refer to my office and the Office for Public Integrity as 'the office', unless I wish to draw specific reference to one or the other office. An appropriate starting point is to reflect upon the work done to establish the office.

Back to the beginning

The office was created from scratch. There was no similar organisation in this state and while similar agencies existed in other jurisdictions, substantial differences in legislative functions and likely available resources meant that largely the offices had to be established from a blank sheet.

It was an enormous body of work.

Indeed I expect most public officers would take for granted the structures, frameworks, systems, policies, procedures and resources that exist to enable an agency to operate. It is only when an entirely new agency is to be created that it becomes apparent how substantial the task is.

Before I was appointed Commissioner a small team was established within the Attorney-General's Department to create all that was necessary to enable the office to open on 2 September 2013.

But even upon opening that work was far from complete. Work has continued over the ensuing years to ensure our systems and resources were sufficient to address our evolving requirements.

We established a suitable model for the employment of staff, including developing suitable employment contracts; work, health and safety policies; welfare management; ongoing learning and development and health and wellbeing programs; and rigorous recruitment and induction processes. The office has since grown to around 75 staff.

In order to accommodate those staff, and to maintain the high level of security necessary given the sensitivity of the information we hold and many of our activities, our accommodation was carefully designed and built. While our office space has been sufficient over the last seven years the expansion of our jurisdiction, combined with ever increasing workload and a trend toward more complex and protracted corruption investigations, means that our space is being pushed to its limits. Work is presently underway to alter parts of our existing accommodation for better and more efficient use of existing space, rather than seeking additional accommodation at this point.

We have developed a dedicated corporate technology network to house our systems and data, together with a separate digital forensic network and digital forensic laboratory to support our investigations. We are in the process of renewing our network infrastructure given it is reaching the end of its supported life.

Our case management and information management systems have been continuously refined to meet expanded responsibilities and to maximise efficiency.

Most importantly we have recruited high quality staff, led by committed leaders to carry out all of the responsibilities given to the office.

Expanded functions

As might be expected, seven years on we operate very differently to the early years.

Numerous changes to the ICAC Act and the expansion of our jurisdiction through the introduction of the *Police Complaints and Discipline Act 2016* (SA) (PCD Act), the *Judicial Conduct Commissioner Act 2015* (SA) (JCC Act) and the *Public Interest Disclosure Act 2018* (SA) (PID Act) have required further changes to our processes, resourcing and focus.

The benefit of experience has allowed us to be more efficient in how we receive and assess complaints and reports and our business processes have matured. We are less reliant upon other agencies, although some agencies continue to be critical partners in respect of our activities.

Our approach as an agency has been to constantly challenge our own processes to see if there is a better and more efficient way of carrying out our work. Indeed, one of our organisational values is to scrutinise ourselves as vigorously as we scrutinise others.

What have we accomplished?

I am proud of what the office has achieved in its first seven years of operation. We have established a well organised and efficient agency with a strong workplace culture. We are now more capably discharging all of the functions given to the office and we are using the information gained over the last seven years to better inform our decisions and our activities.

But I think the true story of the impact and value of the office is perhaps not well understood. I think that is the case for a number of reasons. First, the title that I hold would naturally lead to the conclusion that the office is exclusively focussed upon corruption. Secondly, the varied pieces of legislation under which the office operates means that many of the office's activities are not known to the public. Thirdly, other aspects of the work conducted by my office are very important to protecting integrity in public institutions, but they are unlikely to attract widespread interest or media commentary.

In those circumstances it is perhaps unsurprising, but nevertheless disappointing, to hear the occasional suggestion that the value of the office should be measured solely upon the number of successful prosecutions that arise following an ICAC investigation. While such suggestions might

be unsurprising, they appear to arise from ignorance or at least an unwillingness to acknowledge the many and varied responsibilities given to the office.

In reality the investigation of corruption is but one of around 20 functions given to the office under the ICAC Act, the PCD Act, the JCC Act, the *Protective Security Act 2007* and the PID Act.

Those functions include receiving and assessing complaints and reports, investigating or referring alleged corruption, investigating misconduct and maladministration, overseeing investigations into misconduct and maladministration by public authorities, reviewing assessments of complaints against police, overseeing the conduct of police disciplinary investigations, conducting evaluations of the practices, policies and procedures of public authorities, and conducting or facilitating the conduct of education programs designed to improve integrity in public administration.

All of these functions could be said to have one overarching aim: to influence those engaged in public administration to act with integrity.

The ability to have such influence requires the office to be able to discharge all of the functions given to it. For that reason it is necessary to ensure resources are allocated to allow those functions to be carried out effectively. We remain a relatively small office but we have found ways to multi-skill our workforce to support all of our functions.

Since September 2013, the office has:

- Received more than 8,000 complaints and reports under the ICAC Act and assessed more than 11,000 issues raised in those complaints and reports.
- Reviewed more than 7,000 assessments undertaken by the Internal Investigation Section (IIS) of South Australia Police (SA Police) (the majority of which have been complaints received by the OPI and referred to SA Police) and consulted with IIS on over 300 of those assessments.
- Commenced 47 matters on my own initiative.
- Completed more than 300 corruption investigations.
- Completed 50 misconduct and maladministration investigations by exercising the powers of an inquiry agency.
- Referred more than 500 matters involving potential corruption to SA Police for investigation, many of which have resulted in prosecution.
- Referred more than 2,100 misconduct and maladministration matters to inquiry agencies and public authorities for investigation and action.
- Overseen more than 1,100 misconduct and maladministration investigations undertaken by public authorities to ensure that action was duly and properly taken.
- Completed evaluations of the practices, policies and procedures of the Public Trustee, SafeWork SA and the City of Playford Council and published reports and recommendations in respect of each those evaluations.
- Delivered more than 600 face to face education sessions to almost 26,000 people.
- Provided online training to approximately 6,000 people.
- Published a number of reports following investigations and research activities, including a survey of more than 12,000 public officers in 2018.

- Published reports on legislative reviews, including reviews which led to the abolition of the *Police (Complaints and Disciplinary Proceedings) Act 1985,* and the introduction of the PCD Act, and the abolition of the *Whistleblowers Protection Act 1993* and the introduction of the PID Act.

But those statistics alone do not tell the whole story because raw numbers are incapable of explaining the impact that the activities that underlie those numbers have.

Countless reviews of investigations undertaken by other agencies have resulted in detailed feedback being provided to those agencies about the manner in which those investigations were conducted, and how investigation practices can be improved.

Corruption investigations that do not lead to a prosecution nevertheless result in a detailed review to identify weaknesses in an agency's practices, policies and procedures and those findings are routinely communicated to agency heads.

Many misconduct and maladministration investigations have led to significant changes in public administration. My investigation in respect of the sale of state owned land at Gillman resulted in changes to the manner in which the Government assesses unsolicited bids. My investigation in respect of the Oakden Older Persons Mental Health Unit contributed to a range of reforms, many of which are still being implemented.

My evaluations of the Public Trustee and SafeWork SA have resulted in significant improvements to practices within those agencies, and recommendations made in those evaluations have been considered and acted upon by like agencies in other jurisdictions. The same is true of the Deputy Commissioner's evaluation of the City of Playford Council.

We have developed training to improve the manner in which agencies conduct internal investigations. We have established online training in respect of identifying and addressing conflicts of interest and we train responsible officers in respect of their obligations under the PID Act. We routinely present to public officers on topics relevant to public administration and offer our thoughts and suggestions as to how integrity can be improved.

We independently oversee the manner in which SA Police assess complaints and reports about police and we supervise investigations conducted by SA Police in respect of police misconduct.

The office receives and reviews notifications made in accordance with the PID Act and, where necessary, takes further action to ensure public interest disclosures are dealt with appropriately.

The office supports the discharge of my functions under the JCC Act by receiving complaints about judicial officers and conducting preliminary analyses of those complaints.

I have published reports arising from state wide integrity surveys, which have resulted in a number of actions from a broad range of agencies. I have also published reports in respect of particular matters, such as my report on SA Health which led to the establishment of a government taskforce to address the matters raised in that report.

It is clear that while the investigation of corruption is an important function, it is not the only important function given to the office. Indeed, I would be surprised if anyone could suggest that any of what I have set out above is not important to preserving integrity in public administration.

I am firmly of the view that it is all of the functions given to the office collectively which allows it to influence those in public administration to act with integrity and, in turn, deliver significant value to the public.

Challenges and criticisms

As might be expected the office has faced a number of challenges and criticisms along the way.

Many of those challenges might be attributed to the nature of the functions given to the office and to the novel nature of the legislation under which we operate.

Resources

As with most public agencies, ensuring our resources are sufficient to meet an ever increasing workload is a constant challenge. I have generally felt that the current government and the previous government have adequately resourced the office. There have been occasions where I have sought discrete funding for particular investigations or other activities and, with the exception of my request for funding to conduct an evaluation of SA Health, those funding requests have been met.

In August 2018 when I decided that an evaluation of SA Health would be desirable, I enquired of the government as to its willingness to provide the necessary resources to conduct that evaluation. There was no appetite to provide those resources. The government's position was that I was well funded and that I enjoy the discretion of how to expend those funds. I do not disagree with that proposition. I am adequately funded, although like most agencies I could do more if I had more. It is true that I have the discretion to decide how the expenditure of those funds will be prioritised.

I think it is appropriate that I explain my approach to expending funds allocated to my office to clarify why I did not simply commence an evaluation of SA Health within my existing budget.

Each financial year I am allocated funds in order to discharge all of the functions that I have explained earlier in this report and to maintain the office established to discharge all of those functions.

Good public administration requires prudent financial management. I have always made it clear to my staff that overspending is not an option for my office and that public funds must be expended prudently. It is not surprising that my position on budget management has resulted in an underspend each year. I understand that it is enticing and politically expedient to add up all of those underspends to claim that I always had the money I was seeking. That of course is not how public administration funding works. Money that is not expended by the end of each financial year goes back into Treasury funds. It does not accumulate in a bank like it would in private enterprise. The fact that I have prudently managed my budget resulting in a yearly underspend is not something for which I would apologise and am frankly surprised that it would be raised with a negative undertone.

Throughout my tenure as the Commissioner I have required the resources of my office to be prioritised so that investigations into corruption and serious or systemic misconduct or maladministration are not compromised. I think that is what the Parliament intended and I think that is also the reasonable expectation of the community.

Since 2016/17 I have set aside modest funds to conduct evaluations of public authorities.

Those funds have since been utilised to undertake evaluations of the Public Trustee, SafeWork SA and the City of Playford Council, and to commence an evaluation of the Department for Correctional Services.

An evaluation of SA Health could not be undertaken at the same cost as previous and current evaluations for the simple reasons that SA Health is so big and so specialised. SA Health accounts for almost one third of public sector spending and more than one third of public sector employment, making it significantly bigger than the combined budget and employment figures for all agencies the subject of previous and current evaluations.

SA Health also delivers critical care to the community. I do not claim to have any medical knowledge, nor do I employ anybody who does. In addition, many of the issues in SA Health have been born out of complicated industrial arrangements. An evaluation of SA Health would have at a minimum required the engagement of persons who could assist in respect of understanding and reporting on the delivery of clinical care and to dissect the apparently numerous and convoluted industrial arrangements in that agency.

In August 2018, being the beginning of the 2018/19 financial year, I could not predict how much money would be expended on investigations and other core activities and accordingly I could not commit $2 million from within my budget to an evaluation of such scale. An evaluation of SA Health would not be an ordinary evaluation and I considered it then and I consider it now to have been an additional and unfunded body of work.

I remain of the view that an evaluation of SA Health would have been in the public interest and it is disappointing that I was not able to conduct it. I will return to SA Health later in this report.

More generally the office will be impacted by budget savings which have been imposed from this financial year. Those budget savings will need to be carefully managed in order to ensure that the office can meet its budget while at the same time continuing to discharge all of the statutory functions it is given.

COVID-19

Our operations have been impacted by COVID-19, as have the operations of practically every public institution. I am proud of the manner in which my staff were able to transition to working from home and I was surprised at how effectively we were able to continue to discharge most of our functions. In some cases, particularly in respect of investigations and education, we had to rethink how those functions were carried out.

Some capital projects have not been able to progress and a request will be made to Treasury for existing funding for those projects to be carried over to the next financial year.

Our statutory education function was perhaps the most significantly impacted because we were not able to continue face to face training and some other education activities. Nevertheless we have adapted by making use of online technologies to fill some of the training gaps and, as restrictions have eased, we have gradually reintroduced some face to face education activities. The Deputy Commissioner's evaluation of the practices, policies and procedures of the Department for Correctional Services was also delayed by several months but has progressively resumed.

Dissatisfaction

It is unsurprising that people who make a complaint or report to the OPI are sometimes aggrieved when a decision is taken not to investigate or otherwise pursue their matter, or to deal with the matter in a way that does not meet those persons' expectations. Complaints and reports are generally made in good faith and I accept that it might be disappointing or frustrating when that complaint or report is not dealt with as expected.

The ICAC Act does not assume that I will investigate every complaint or report. In fact the Act assumes that I will not investigate most complaints and reports about misconduct and maladministration, preferring those matters to be referred to an inquiry agency or public authority. Nor does the ICAC Act assume that I will investigate every allegation of corruption because the Act contemplates the referral of a complaint or report alleging corruption to SA Police or some other law enforcement agency.

The office is not established to deliver a service or outcome to individual public officers or members of the community. The office has been established to protect and promote public

integrity in South Australian public administration by acting in the public interest to achieve a broader public benefit.

It is inevitable that we will be criticised over decisions made to investigate or not to investigate. As I have said reasonable minds may differ as to how a matter should be addressed.

In fact I have stated publicly that I think with the benefit of hindsight some investigations that I commenced in earlier years probably did not need to be conducted by my office. In the end those investigations might be regarded as 'low level' matters that would have been better dealt with by SA Police.

'Low Level' corruption

Corruption under the ICAC Act is broadly defined and extends to any offence committed by a public officer while acting in that capacity. As I have said if a matter is assessed as raising a potential issue of corruption in public administration I may investigate it or refer it to SA Police or another law enforcement agency for investigation.

The broad definition of corruption captures a range of offending, including serious matters such as abusing public office, bribing and deception. But it can also capture what might be considered lower level offending, such as low value thefts and minor assaults.

One of the challenges in determining which matter to investigate and which matter to refer is that the information upon which the decision is made is often incomplete. Indeed the very purpose of an investigation is to determine what actually happened by collecting information and evidence to complete the picture. On many occasions I have decided to commence an investigation because the information available at that time has suggested serious criminal conduct. But as an investigation proceeds it becomes clear that the conduct alleged either did not occur or what did occur might be considered less serious (in which case it is still important that the investigation is concluded).

I do not set out to investigate conduct that might be considered less serious, but in the end that is what occasionally occurs.

I think the office has matured in its ability to better discern between information that raises a higher likelihood of serious corruption and that which does not. We have become better at focussing our investigation resources on the most serious and complex corruption matters and we have advanced our capacity and expertise to investigate them.

Of course that means that some of our investigations can be protracted and, on occasion, a prosecution brought as a consequence of an investigation will fail.

Protracted investigations

We do everything we can to ensure our investigations are undertaken as expeditiously as possible but some investigations take a long time. The length of time can be driven by the resources available, the need to rely upon resources from other agencies, the cooperation of witnesses, the volume of information to be assessed, legal challenges to the investigation, legal and logistical difficulties in obtaining evidence and the extent to which the investigation is focused on historic behaviour rather than contemporaneous behaviour.

Frequently it is the case that the evidence obtained does not support the allegation under investigation or that there is insufficient evidence to support the allegation to the required standard of proof. Those matters, which might be resolved relatively quickly, are not publicly known.

When there is sufficient evidence to support an allegation the matter will be referred for prosecution. I have no control over the period of time taken by the DPP to consider whether charges will be laid.

In the case of an investigation into serious or systemic misconduct or maladministration in public administration, I must accord the parties procedural fairness before making any findings. Sometimes that process can be lengthy.

I do not ordinarily consider an investigation that does not result in a prosecution to be a failed investigation. The purpose of an investigation is to determine the truth. If the truth is the evidence does not support the allegation, the investigation has in my view been a success.

Failed prosecutions

Some ICAC matters that are prosecuted do not result in a guilty finding. This is not unusual and is simply the way the justice system works. To expect every matter that comes before the court to result in a guilty finding is unrealistic. Nevertheless, we carefully review everything we do to identify any deficiencies in our processes and use it as an opportunity to improve. That is particularly the case where a prosecution is unsuccessful or a court expresses a view in respect of our conduct or processes.

Limiting the jurisdiction to corruption

I oppose suggestions that have occasionally been mooted to somehow constrain the activities of the office to focus exclusively on corruption and to transfer all responsibility for misconduct and maladministration to other agencies.

The difficulty with such a proposition is that it misunderstands the nature of those forms of conduct and how they can be inextricably linked.

I think one of the strengths of the existing system is that a member of the public or a public officer can bring a matter of integrity to the OPI and that matter will be assessed and dealt with at the direction of my office. The member of the public or public officer does not have to try to discern whether something is corruption, misconduct or maladministration in order to decide the agency to which their matter should be directed.

The line between corruption, misconduct and maladministration is often unclear. Indeed, it is not uncommon for minds to differ within my own office as to how a matter ought to be assessed.

Our experience tells us that corruption, misconduct and maladministration are often linked. Maladministration, by way of poor practices, policies and procedures or poor oversight and management, creates the opportunities for corruption to occur.

A matter that might be assessed as potential maladministration may, upon further inquiry, be reassessed as corruption and vice versa. The benefit of having a single agency capable of dealing with all three forms of impropriety is that it can continue to address a matter even when information changes the way in which the impugned conduct is assessed.

That is the reason why the office is and should remain empowered to investigate or otherwise deal with all three types of conduct.

To attempt to excise from the office's remit issues of misconduct or maladministration will do nothing more than reduce the office's capacity to improve public integrity and increase complexity within the integrity regime in South Australia. The resultant confusion, duplication and increased cost would not benefit the public.

Nevertheless I think the operations of the office and the broader public integrity regime in South Australia should always be under review. There ought to be continued debate about how organisations such as this office can best improve integrity in public administration.

INTEGRITY IN PUBLIC ADMINISTRATION

I think South Australia is in the fortunate position that its public institutions are largely free of systemic corruption. That is not to say that there are not corrupt individuals working in public administration. Regrettably there are public officers who misuse their positions and abuse their powers and it is important that their conduct is detected and they are prosecuted or disciplined.

I have said publicly before that the biggest risk to integrity in South Australian public administration is maladministration. I remain of that view.

Maladministration is a scourge and the harm it causes to South Australian public administration and consequently the South Australian public should not be underestimated. It is incumbent upon every public authority to work diligently to minimise waste, combat mismanagement and reduce opportunities for more serious conduct, such as corruption, to go undetected.

I think the office has made a positive contribution to assisting public authorities to improve integrity in their institutions and I hope the office continues to do so in the future.

But while the office has an important role to play, in the end the leaders within public administration bear the greatest responsibility.

Leadership

Good leadership is critical to good public administration and good decision making is critical to good leadership.

State and local government agencies are collectively South Australia's biggest employers and biggest customers. Combined they manage enormous sums of money, deliver community programs and services, regulate behaviour in many aspects of daily life and maintain significant public infrastructure. The sheer scope and size of the activities of public administration requires excellent leadership to ensure that all activities are ultimately aimed at serving the public interest.

There are undoubtedly many excellent leaders in public administration who are focussed on delivering the best outcomes for the South Australian community. However, I have on a number of occasions been perplexed by the decision making of some leaders and the occasional unwillingness of leaders to acknowledge and address poor behaviour and processes within their area of responsibility.

Leaders in public administration must understand the important role they play in setting the tone for how public officers conduct themselves. When public officers see their leaders behave with disregard for the public interest or proper process, or with disrespect, then it is unsurprising that public officers become inclined to model that conduct.

Trust and oversight

I have often heard that leaders are reluctant to introduce oversight mechanisms for fear that productivity and morale will be lowered because staff will not feel trusted. Some might think that trust and oversight are mutually exclusive propositions that cannot operate together. That is of course untrue.

There is little doubt that public officers must be trusted to carry out their functions. Too much oversight stifles discretion and productivity. An agency that imposes too much oversight and invests in its officers too little discretion runs the risk of becoming paralysed. But so too is there

little doubt that trust in the absence of any oversight creates unacceptable risks of improper conduct.

Effective oversight is critical to good public administration because it fosters a culture of accountability and continuous improvement. In turn trust is established in both the institution and in those who work within it.

I have observed a number of instances where the conduct or activities of public officers have been the subject of ineffective oversight or at times, no oversight at all. In one extreme example that I investigated it became apparent that an entire business unit of an agency had fallen off of that agency's reporting structure, leading to adverse consequences for that agency and, in turn, the public.

There are varying and sometimes complex factors that can lead to poor oversight.

At times formal reporting lines or the allocation of responsibilities are not clear or do not exist. This can result in fundamental misunderstandings about who is responsible for overseeing staff or operations.

Similar issues arise when formal agreements or contracts are not effectively managed by the responsible public authority. I have seen instances where poor contract management has resulted in the mismanagement of public resources.

Effective oversight is sometimes compromised because of geographical separation. I made this observation in my *Troubling Ambiguity: Governance in SA Health* report in relation to the approval of clinicians' timesheets by a public officer located at an entirely different physical site. Similar challenges arise in overseeing the activities and behaviour of public officers assigned to work in rural and remote locations.

In some cases I think there is a reluctance to manage the behaviour of individuals in more senior positions, perhaps owing to their status or the power that they hold and a fear that attempts to manage their behaviour will be very difficult.

Public officers who gain the trust of their employer can also be vested with significant powers or privileges that allow them to operate with minimal oversight. I spoke about this phenomenon in my report entitled *The Trusted Insider*. In those cases the trust invested in those individuals was abused and corruption followed. A lack of effective oversight meant that their corrupt conduct continued for some time before eventually being detected.

The consequences of poor oversight can be significant. Poor oversight can lead to corruption, misconduct and maladministration and that behaviour may go undetected.

In such cases it is often only by accident, chance or some other significant event that issues of impropriety are detected.

Finding the balance between trust and effective oversight can be difficult, but not impossible. Agency leaders should strive to identify their oversight structures and determine whether they are sufficient to satisfy the leader that effective mechanisms are in place to support public officers to do their work and to detect and address misbehaviour.

Those structures are critically important to building trust in the agency.

Parliamentary Code of Conduct

Events that have occurred in the South Australian Parliament over the last nine months have caused me to reflect upon the manner in which the conduct of Members of Parliament is assessed, managed and addressed.

The conduct of Members of Parliament is a public integrity issue that attracted my attention in the early days of my office, and is a topic worth revisiting as I approach the conclusion of my tenure.

The South Australian Parliament currently has no code of conduct by which to guide and regulate the behaviour of its members, even though a Code of Conduct for Members of Parliament was proposed in the second reading speech of the ICAC Bill:

> *The Government will be moving for the adoption of a Parliamentary Code of Conduct in each House in due course... It is the Government's intention that the code be adopted by a resolution of each House of Parliament. The legislative scheme of the Bill explicitly establishes the Parliamentary Conduct Committee to oversee and monitor the standards of conduct required of members of Parliament by their respective Houses, as proposed to be set out in the Code of Conduct.*[1]

In my first two annual reports I noted that that proposal had not been acted upon.

I could see no reason why Members of Parliament would regard themselves as excused from such expectations, and urged members of Parliament to work together to establish a code of conduct to lay the foundations for acceptable conduct and to define a mechanism to deal with unacceptable conduct.

Eight years on there is still no code of conduct. In the meantime almost every other Parliament in Australia[2] has established a code of conduct to regulate the conduct of its members.

In South Australia a 'Statement of Principles' was adopted by both Houses of Parliament in 2016. At the time I gave my support for the Statement of Principles because I thought that at least some collective agreement had been reached.

However, in the wake of recent events, the degree to which the Statement of Principles adequately spells out what the community might appropriately expect from their elected officials is now open to conjecture.

Where a Statement of Principles vaguely offers aspirational principles to guide behaviour, a code of conduct provides for agreed clear standards and rules by which behavioural breaches can be measured, and provides the justification upon which appropriate disciplinary action may be taken by the Parliament.

A Statement of Principles provides no such robustness.

In fact the Parliament was careful to ensure that its Statement of Principles would not have the status of a code of conduct when it inserted a provision in the ICAC Act which states that 'a code of conduct does not include any statement of principles applicable in relation to the conduct of members of Parliament'.[3]

The definition of 'misconduct' in the ICAC Act means 'a contravention of a Code of Conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for

1 South Australia, *Parliamentary Debates*, House of Assembly, 2 May 2012, Second Reading Speech *Independent Commissioner Against Corruption Bill 2012* (The Hon. Tom Kenyon MP).

2 The Federal Parliament has not established a code of conduct for members. In Western Australia a code has only been adopted by the Legislative Assembly.

3 *Independent Commissioner Against Corruption Act 2012* (SA), s 5(6).

disciplinary action against the officer, or other misconduct of a public officer while acting in his or her capacity as a public officer'. Members of Parliament are public officers for the purpose of the ICAC Act. However, the absence of a Code of Conduct applying to Members of Parliament means that a member can only be guilty of "other misconduct" which is not better defined in the ICAC Act.

Even if a member of Parliament were found to have engaged in misconduct, there is no properly defined mechanism for Parliament to deal with that misconduct.

When the Bill to establish the office was introduced into Parliament in 2012, that Bill included clauses that would have established a Parliamentary Standards Committee. That Committee was to have the following functions:

- promote compliance with standards of conduct required of members of Parliament by their respective Houses and investigate on its own initiative or on receipt of a complaint, alleged contraventions of those standards
- if it is satisfied that there has been a contravention of the standards by a Member, to report to the Member's House the nature of the contravention
- to keep the standard of parliamentary conduct generally under review and made such recommendations as it sees fit for modifications of the standards of conduct required of members of Parliament of both Houses
- to perform other functions assigned to the Committee under this Act or by resolution of both Houses.

That committee was never established because that clause in the Bill was defeated with little debate.

Eight years later there is still no such committee.

Other jurisdictions in Australia have parliamentary standing conduct committees, but not South Australia.

Presumably Members of Parliament regard the periodic and impromptu creation of privileges committees as an appropriate mechanism to deal with any poor behaviour of members. But such rare, impermanent and ad hoc mechanisms are subject to the whims of political partisanship and are devoid of the framework that would be established by a code of conduct.

The current arrangement fails to inspire confidence.

Members of Parliament and their conduct exist in a lacuna of oversight. It is said by those who support the absence of any code or committee that there is a need to maintain the sovereignty and independence of the Parliament, which will ensure that Parliament may conduct its business as it sees fit. This is clearly inferred from the outset of the Statement of Principles which states:

> *Members of Parliament are in a unique position of being accountable to the electorate. The electorate is the final arbiter of the conduct of Members of Parliament and has the right to dismiss them from office at elections.*

Undoubtedly the Members' relationship to the electorate puts Members of Parliament in a unique position. Some say democratic accountability is an inviolable principle which should not be diminished, such as by way of a code of conduct. But while the electorate may be the final arbiter of the conduct of members of Parliament, there is no principled reason that a member of Parliament ought not be the subject of a code governing their behaviour *during* their elected term. Nor is there a principled reason why the improper conduct of a member of Parliament should not be dealt with by the Parliament.

The unique relationship between members of Parliament and their electorates should not be invoked as an argument against accountability. Misconduct and improper behaviour by members of Parliament does not need to be tolerated as the price for maintaining parliamentary supremacy. Parliamentary supremacy would not be compromised by establishing a code of conduct and a well-defined mechanism for Parliament to deal with misconduct.

Those who disagree with my view will say that a code of conduct is no more than a desire to push the ICAC jurisdiction further. But as I have repeatedly pointed out, section 6 of the ICAC Act states 'nothing in this Act affects the privileges, immunities or powers of the Legislative Council or House of Assembly or their committees or members'. That is sufficient protection against undue interference into the sovereignty of Parliament. I also support those other provisions in the Act which prevent me giving directions to the Parliament in relation to a matter concerning a public officer or conducting an evaluation of the practices, policies and procedures of the Parliament.

Parliament does, and should, have the power to deal with its own members.

But I think the time has again arrived for the Parliament of South Australia to address the question of how it defines what is acceptable behaviour and how it will address unacceptable behaviour.

Recent events might suggest to the casual observer that Parliament is somewhat at a loss about how to best deal with misbehaviour by its members.

If the Parliament continues to reject a code of conduct it should explain to the public why members of Parliament in this state ought not be the subject of a code when the other parliaments in Australia have accepted that a code of conduct will not affect the sovereignty of Parliament.

It will also have to explain how it is that individuals who work in Parliament may be subject to disciplinary action as specified in s 16(2)(g) of the *Parliament (Joint Services) Act 1985* if they behave 'in a disgraceful, improper or unbecoming manner that reflects upon the joint parliamentary service', but that a similar standard does not apply to those whom they serve.

The community may find that such a double standard reflects poorly on the propriety of our legislature.

Recruitment

Recruitment is an inescapable part of the functions of all public institutions. It is a function that consumes considerable time, effort and resources. There is much at stake in getting recruitment right. A competent, capable, well trained and dedicated workforce comprising individuals who act with the highest standards of integrity should be a hallmark of public administration.

But recruitment can be vulnerable to various corruption risks. Two of the more prevalent issues I have observed are:

- poor screening and vetting practices that enable unsuitable or corrupt individuals to have access to public resources, information, power and money
- recruitment processes being compromised by conflicts of interest, favouritism, nepotism and discrimination

I have conducted two investigations into serious and systemic misconduct or maladministration relating to recruitment. I decided that those investigations and their findings should remain private so I will not elaborate on the particulars of those matters here. Suffice it to say that I think poor recruitment practices represent a significant risk in public administration.

Public authorities that do not adopt adequate screening processes for candidates risk employing individuals who may undermine their operations, sully their reputations and diminish the public's

confidence in the authorities' competence. Checking for criminal records and disciplinary histories, validating qualifications and work experience, assessing potential conflicts of interest, and setting high integrity standards for positions of trust, are necessary measures to minimise the prospects of a poor selection decision.

Likewise, the involvement of public officers in recruitment processes who have conflicts of interest, or who seek to corrupt those processes to favour their own or an associate's personal interest, is a grave threat to the integrity of the process and the agency more broadly.

My 2018 public integrity survey revealed that favouritism, nepotism, patronage and unjustified appointments in public administration cause anger amongst public officers and figured prominently in responses.

In my first three annual reports I spoke of the need for the creation of a register that will identify all persons who have been dismissed for misconduct or other inappropriate conduct from positions in public administration or who have resigned their position during the course of an investigation into that sort of conduct. I made this repeated call because I had seen evidence of public officers with problematic disciplinary and criminal histories being recycled through various agencies.

A register of this nature was implemented by the Commissioner for Public Sector Employment in October 2018. This development for state government was welcome, but there remains a need for such a register for those employed in local government, where there are continued recruitment deficiencies.

Some of the complaints to my office, and investigations I have undertaken, have highlighted the risks associated with the use of recruitment agencies. Recruitment agencies provide an entry point for employees into public administration at arms-length from the agencies where they will ultimately fulfil their duties. The levels of scrutiny that is applied by some recruitment agencies to potential employees/contractors may not be as rigorous as those applied by public authorities who are employing directly. Public authorities must ensure they have in place arrangements to be confident about the vetting processes applied by a recruitment agency in order to have confidence in the integrity of those engaged through that process.

Conflicts of interest

One of the most common integrity issues that I have observed in public administration is conflicts of interest.

Many public officers, including some in very senior positions, still struggle to understand why integrity in public administration requires that all conflicts of interest be identified, declared and managed.

I spoke about this at length in my *Troubling Ambiguity* report into governance at SA Health:

> *Conflicts of interest remain a source of confusion and apprehension for public administration in South Australia. Some public officers seem oblivious to the risks that conflicts of interest pose. For these reasons it is necessary to set out some context for conflicts of interest in SA Health.*
>
> *A conflict of interest arises when the private interests of a SA Health employee conflicts or could be reasonably perceived to conflict with the duties that employee has agreed to discharge by undertaking his or her employment.*
>
> *Conflicts of interest or perceptions of conflicts of interest arise routinely. When they do the public officer must declare that conflict. The conflict of interest must then be managed so that the public officer's private interests cannot be, or be perceived to be put ahead of the public officer's public duties.*

The same applies for every public officer in every public institution.

When a conflict emerges between a public officer's public duties and private interests, that conflict must be identified, declared and managed.

Inevitably most public officers will face a conflict of interest at some point in their career. Conflicts in and of themselves are not improper. They are a fact of life.

What is improper is failing to declare a conflict of interest and if detected manage that conflict.

It is incumbent upon public officers to understand how a conflict of interest can arise and how to identify and address a conflict that arises. My office has devised an online education course that instructs public officers on the 'why' and 'how' of identifying and disclosing all actual, perceived and potential conflicts of interest, as well as the responsibility of public authorities to manage those conflicts.

I encourage public officers to undertake the online course and familiarise themselves with their agency's policies and procedures relating to conflicts of interest.

Well intended or ignorant impropriety

Over the years I have observed occasions where public officers have engaged in improper conduct either inadvertently or for seemingly well-intended purposes. The motivations and rationalisations for that conduct can be complex and varied.

Examples have included public officers forging signatures on documents, splitting invoices to subvert financial delegations, approving contract variations or extensions in the absence of proper processes and amending or deleting official records.

On some of those occasions the public officer has acted or claimed to have acted in the interests of expediency, bypassing proper process in order to achieve an outcome in a time pressured environment. In those cases the end was thought to justify the means.

Sometimes the conduct has been the result of the public officer's misguided loyalty, in an attempt to protect a colleague or the agency's reputation. In other instances the public officer has acted in accordance with a workplace practice which has developed over time or has otherwise been apparently unaware that the conduct is improper.

There is a significant risk in bypassing the very processes which have been designed to guard against impropriety and which ensure accountability and transparency in public administration. It is incumbent on leaders in public administration to model ethical practices and to ensure staff understand the policies and procedures which apply to them, the importance of those policies and procedures and the potential consequences should those policies and procedures not be followed.

Policies and procedures should be routinely reviewed and updated as necessary to ensure that they remain relevant and meet the agency's needs.

Perverse incentives

One of the more unexpected risks to public administration that I have observed is the effect that perverse incentives can have on motivating improper or corrupt conduct. Perverse incentives are incentives, rules, regulations or structures which produce unintended negative consequences or undesirable outcomes.

Perverse incentives lurk behind corruption, misconduct and maladministration matters and are usually unappreciated. Examples might include setting benchmarks or key performance indicators that are unrealistic and could only be achieved through bypassing proper process or misrepresenting outcomes, or rewarding and recognising those who found 'efficient' ways of achieving outcomes, notwithstanding that those efficiencies were achieved by bypassing the very structures established to protect integrity.

I have seen examples of improper conduct which might otherwise not have occurred if more attention had been given to the structures, expectations and performance settings which ultimately encouraged, conditioned and sometimes condoned improper conduct.

One glaring example is the perceived need of agencies to spend unexpended funds before certain key milestone dates. Often this can occur around the end of a financial year, but many other types of looming budgetary, program, or contractual deadlines offer opportunities for impropriety. These budgetary pressures encourage public officers to find novel ways to spend surplus funds, often where the expenditure is poorly conceived, hasty, unplanned, unauthorised or requires questionable methods to progress.

I have also seen examples of public authorities devising ill-considered, unachievable or ungovernable incentive structures in their contracts with suppliers. My office has observed and investigated instances where such incentive structures have caused suppliers to engage in deceitful and misleading practices to either fulfil, or appear to fulfil, the terms and conditions of their contracts in the most financially advantageous way.

Leaders in public administration should always consider whether the processes, programs or customs established within their area of responsibility might create expectations that encourage the taking of shortcuts, the development of improper methods or the need to misrepresent achievement in order to achieve desired outcomes.

Grooming and capture

Certain groups of public officers, public agencies or work units within public administration will be exposed to a greater risk of being groomed and captured by the outside interests of other organisations, industries or individuals.

I have previously observed and discussed the concept of 'capture' as it pertains to public officers or public authorities. In my evaluation of SafeWork SA, the phenomena of grooming and capture and the harmful effect this could have on that regulator's functions and purposes was described:

> *'The main purpose of grooming is to create a favourable impression with the decision-maker. It can occur through the creation of a perceived friendship and the distribution of gifts. Grooming can lead to capture, which occurs when regulators and their staff potentially begin to align their value[s] and actions with that of the industry they are regulating, rather than with the values and legislative purpose of the regulator...'* [4]

Grooming and capture can be brought about by behaviour even more subtle than gifts or other benefits. It was also observed in that evaluation that potentially improper closeness between regulators and the businesses they oversaw could be achieved through simple slaps on the back, the use of nicknames and even appeals to a public officer's vanity.

Susceptibility to influence is a subtle art and it can often be difficult to differentiate mere politeness and gratitude, from efforts to improperly influence another person's conduct. The NSW ICAC has conducted inquiries which revealed that some companies trained their sales representatives to

4 Independent Commissioner Against Corruption, *Evaluation of the Practices, Policies and Procedures of SafeWork SA*, p. 147.

offer small novelty items to public servants in order to make the public servant psychologically indebted and motivated to buy more products.[5] Such insidious conduct constitutes grooming and is clearly unacceptable behaviour.

My office is not immune to the risks of grooming and capture.

I have previously said that the OPI discharges its police oversight functions under the PCD Act with a "spirit of cooperation between South Australia Police and the OPI", which enables the police oversight scheme to operate satisfactorily.[6] There are obvious risks involved in such a cooperative spirit in terms of independence and unbiased and impartial oversight. The PCD Act requires frequent communication and contact between staff of the OPI and police officers within the IIS, which necessarily raises the risk of the OPI staff being groomed or captured, either consciously or unconsciously, by SA Police's interests. I do not suggest that such grooming is occurring. Nevertheless, the OPI must remain vigilant to protect itself from capture, because otherwise public trust and confidence in the oversight system will be lost.

I encourage all public authorities to review their individual functions and purposes to identify any public officers or work units which may be at greater risk of grooming and capture by outside interests. I believe such reviews would likely identify some level of risk within most agencies. Any regulatory or procurement roles will be a particular risk.

If an agency identifies sections that are of a greater risk of grooming or capture, agencies should then consider what mechanisms it can put in place to reduce those risks. There are a number of different ways in which the risks can be addressed and in some agencies more than one of those ways may need to be employed; staff training; conflicts of interest registers; gifts and benefits policies; secondary employment policies; staff rotations or pairings; work separations and allocations procedures; random audits; and monitoring of work tasks.

Internal investigations

The ICAC Act assumes that I will not ordinarily investigate suspected misconduct or maladministration, but instead refer conduct of that kind to an inquiry agency or public authority for investigation. I can oversee the manner in which a referral of that kind is dealt with by requiring an agency to report back on the manner in which the referral was dealt with. In practice the office has overseen more than 1,000 such referrals.

In my first annual report I said:

> *On more than one occasion I have been concerned by the manner in which a public authority has undertaken investigations into misconduct or maladministration within its organisation. Where a public authority is required to deal with a matter referred by me, an investigation should be undertaken to determine the facts; to identify wrongdoing (if any); and detect shortcomings in practice, policy or procedure. An investigation should have the overarching purpose of determining the truth and minimising opportunities for further misconduct or maladministration.*

I raised that issue because I had observed investigations where the apparent attempt was to minimise the seriousness of, or diminish the responsibility for poor conduct, hide poor agency processes and policies, and generally attempt to deflect embarrassment away from an agency or public officer. In response my office resolved to create internal investigation training to be delivered to public officers on how to properly conduct such investigations.

5 NSW ICAC, *Corruption Risks in NSW Procurement: The management challenge*, December 2011, p. 4.
6 Independent Commissioner Against Corruption Annual Report, 2017-2018.

The cornerstone of that training has been to remind those in public administration that the overarching purpose of any investigation must be to determine the truth and to minimise opportunities for further misconduct or maladministration. I am grateful to those who have undertaken the training and I am pleased to have observed a gradual improvement in the quality of internal investigations conducted.

But there is still room for improvement.

Many internal investigations still take an inordinate amount of time to complete.

I acknowledge that many such investigations are necessarily delayed by complexity, concurrent criminal investigations, industrial considerations and other factors, but there have been numerous investigations that have come to my attention where there is no reasonable explanation for the time taken to bring the investigation to a conclusion.

In many cases an internal investigation is carried out while a public officer is suspended with pay. While it may be quite appropriate that a public officer is suspended with pay for the duration of an investigation it must not be forgotten that the community bears the financial costs in such circumstances. The wellbeing of those public officers caught in the uncertainty of investigations (whether they be the subject of the investigation, witnesses in the investigation, or who are otherwise affected by the investigation) and the effect that such uncertainty might have on office morale and productivity must also not be overlooked.

It is important that internal investigations are dealt with as swiftly as possible, particularly in the case where a public officer is suspended while that investigation is undertaken.

In my 2015-16 annual report I called for consideration of a body that could monitor excessive and undue delay in internal investigations when a public officer is suspended from the workplace with pay.

I still believe that consideration should be given to such a body in order to minimise potential waste of public resources, and unnecessary harm to individuals involved in an investigation, by unreasonable delays in the investigation and resolution of workplace conduct matters.

Local Government

Councils play a significant role in providing services and infrastructure to the South Australian community.

Since commencement the OPI has received more than 2,400 complaints and reports relating to local government. While some of those complaints and reports have involved serious allegations which have resulted in prosecutions, a large number of cases comprise elected members making allegations against one another. The resolution of those allegations at times proves to be a lengthy, costly and circular process which continues to detract from the proper functioning of some elected bodies.

Of those matters reported to the OPI and referred for investigation only a small number have resulted in the allegations being substantiated.

Councils continue to rely on law firms and consultants to provide advice on reporting obligations and to address complaints about breaches of the Codes of Conduct. While those services may be required from time to time, I have seen instances where councils have put themselves to considerable and unnecessary expense. On a number of occasions I have been surprised by the poor quality of ‘advice’ provided by some service providers.

In 2014 I first raised with the then Minister for Local Government, the Hon. Geoff Brock MP, the inadequacies of the Codes of Conduct which apply to elected members and local government

employees. I continued to remind him of that problem throughout his tenure as Minister for Local Government. A revised Code of Conduct for Council Employees was introduced in April 2018 four years later.

The current government's former Minister, the Hon. Stephan Knoll MP provided me with the opportunity to comment on the government's Reforming Local Government in South Australia Discussion Paper and the subsequent *Statutes Amendment (Local Government Review) Bill 2020*, which was introduced into Parliament in June 2020. There are aspects of the proposed scheme which in my view are an improvement to that which is currently in place and I provided the then Minister with my thoughts in relation to aspects of the scheme which I think could benefit from further consideration.

Amendments to the existing scheme will have little real effect unless elected members of local government remind themselves that they are elected to represent the interests of their electorate and to advance the statutory functions given to a local government body, rather than to use integrity systems in an effort to point score against each other, settle petty differences and undermine those who hold different views.

SA Health

My December 2019 report *Troubling Ambiguity: Governance in SA Health* detailed my observations of maladministration within South Australia's public health system and the frustrations it has caused me in the exercise of my functions, particularly in respect of identifying and investigating corruption in public administration.

Since the publication of that report the government has established a taskforce to address the issues I raised in the report. In April I met with the head of the taskforce, Mr Jim McDowell who provided me with a report on the progress of the taskforce. The activities and response of the taskforce appeared reasonable to me. Since that time some of the activities of the taskforce have been suspended to allow SA Health to focus on responding to the COVID-19 pandemic. I think that is entirely practical and reasonable, although I encourage SA Health and the taskforce to return to addressing the issues I raised in my report as soon as possible.

It is widely known that a report of this nature was not my first preference. I was of the view that the problems in SA Health and the various local health networks would be best served by conducting an evaluation of the practices, policies and procedures of SA Health and/or a local health network.

Aside from the funding debate which I have already addressed I would like to address some of the commentary around the value of the report. It has been said that the report contained nothing new and that the issues raised within it were known to the government and Health executives. I know this to be true because I have been raising those issues for some time. I fail to see how the existence of systemic long term problems and failures in a critical public service should not be made public because the issues are already known to some. Indeed, it would appear that the publication of the report was the catalyst for the establishment of the taskforce, which had not previously been established despite the suggestion that the report contained nothing new.

I have also heard from a number of sources that the report has had a detrimental effect on the morale of SA Health employees. I accept that the report's critical stance on many aspects of the operations of SA Health has been upsetting for those employees who are committed to providing a critical public service and see themselves as the subject of criticism by the conduct detailed in the report. That is unfortunate but in my view the report was necessary in order to spark a genuine commitment to change.

I might add that I have personally received many comments from SA Health employees feeling relieved that the poor systems, processes and toxic culture in SA Health have been exposed. Amongst these employees there is a sense of hope that the exposure will result in action.

I share their hope.

Victimisation

It is an offence under the ICAC Act for a person to commit an act of victimisation against someone who has made, or intends to make, a complaint or report to the OPI.

The PID Act is designed to further bolster the protections public officers have against victimisation for reporting suspected corruption, misconduct and maladministration. However, I think that legislation has proven difficult to give practical effect and I suspect its utility will remain questionable until it is properly reviewed and amended.

Despite the statutory protections that do exist, it is still my genuine fear that too many public officers who have chosen to speak up and report wrongdoing, either to my office or internally to their agencies, feel or experience victimisation for doing so. I also fear that the more that such victimisation occurs, the more it encourages the continued under-reporting of corruption, misconduct and maladministration.

The public integrity surveys that I have conducted have supported that fear in the starkest terms. In my 2018 Public Integrity Survey, over 35% of survey respondents stated that reporting externally has negative consequences. More than 31% stated that reporting causes trouble with colleagues and 29% of respondents knew of others who had experienced negative consequences from reporting.

One survey participant stated it plainly:

> *Reported once … got absolutely flogged for it … will never do it again.*

I have seen egregious examples of the victimisation of reporters. In one example, a public authority went to extraordinary lengths to identify an anonymous complainant who had alleged instances of sexual misconduct against an employee of the agency. Handwriting experts were engaged to try and identify the complainant in order to bring misconduct proceedings against them for what the authority deemed was a vexatious complaint. It was not apparent that any serious investigation was made into the initial allegations of sexual misconduct. In this instance I referred the matter to the public authority as raising 'some other issue' pursuant to section 23(1)(c) of the ICAC Act. In that letter I expressed my concern as to the way the complaint had been handled.

The victimisation of those who seek to improve the standards of public administration by reporting impropriety destroys the fabric of public administration in countless ways.

It stops the provision of information that an agency should welcome to improve its operations.

It poisons the integrity culture of organisations, spreading fear amongst employees that reprisals will follow from speaking up.

It conceals and embeds poor conduct and practices within an agency, allowing them to fester into potentially more significant and serious issues.

Most importantly, it profoundly affects the health and wellbeing of individuals who are brave enough to speak up.

Staff who are willing to take the often confronting and difficult step of speaking up are critical to an organisation's integrity.

Any victimisation of them is intolerable and those who engage in victimisation should be identified and dealt with appropriately.

The upshot

Much of this report may paint a bleak picture of my impressions of integrity in South Australian public administration.

It is true that there are a number of issues that public authorities must continue to address in order to maintain and improve their activities.

But it is also true that the vast majority of public officers perform their duties with passion and integrity. It is unfortunate that the small minority of public officers who act improperly sully the reputation of the majority.

It is all the more reason for every public officer to call out poor behaviour, continually strive to improve performance and seek out better and more effective ways to maintain and improve integrity within public institutions.

LEGISLATIVE REFORM

There are a number of amendments to the ICAC Act that I think would improve the operation of the Act, reduce ambiguity and enhance the office's ability to improve integrity in public administration.

Perhaps most fundamentally I recommend that the name of the office is changed and that South Australia move to the establishment of a public integrity commission.

A change of name to better reflect functions

At my appearance before the Crime and Public Integrity Policy Committee in May 2020 I said there is a good argument for a changing the Commissioner's title and for the establishment of a commission in South Australia.

Even after seven years many readers will still be surprised to learn that there is no Independent **Commission** Against Corruption in South Australia. Many members of the media, public sector employees and even a number of members of Parliament still refer to my office as a 'Commission'. As I have said, there is not and nor has there ever been an anti-corruption commission in South Australia.

Instead there is a Commissioner, a Deputy Commissioner, an Office for Public Integrity and the staff employed by the Commissioner. In an effort to reduce confusion and for convenience we often refer to ourselves collectively as 'the ICAC' even though the ICAC is the Commissioner alone.

While the OPI is responsible to the Commissioner for the performance of its functions, it is at law a separate body. To avoid unnecessary administrative costs we largely operate as a single organisation. But it is unnecessarily complex and confusing.

It is time that this state has in place a Commission which is led by a Commissioner. That would put South Australia in step with every other state in Australia.

As I have explained earlier in this report, while the ICAC Act creates the Independent Commissioner Against Corruption, the powers and functions held and discharged by that office holder and the OPI are much broader than simply identifying and investigating corruption in public administration.

In 2010, three years before the commencement of the ICAC Act, the Attorney-General's Department published a review of the Public Integrity institutions in South Australia. That review proposed an integrated public integrity model for the future (Integrated Model Review). At the centre of the Integrated Model Review was the proposed establishment of a *Commissioner for Public Integrity* along with the establishment of a *Public Integrity Office*.

The Integrated Model Review formed the basis for the development of the ICAC Act but the titles changed from a Commissioner for Public Integrity to the Independent Commissioner Against Corruption and from a Public Integrity Office to the Office for Public Integrity. Functions were split between those entities which has resulted in unintended complexity.

I think that good reason exists to go back to the original proposal and to call the office that I currently hold the 'Commissioner for Public Integrity.' I think there is also good reason to establish a 'Public Integrity Commission' which would be headed by the Commissioner for Public Integrity.

I do not suggest that there be any enlargement of the functions and powers presently in place (save for the changes that I propose in this report), but I think the change in name better reflects the broad functions and powers given under the ICAC Act and establishes a single agency, rather than the existing bifurcated and complicated system.

It would allow the public to understand better the scope of the work that my office undertakes and also its purpose. The scope and purpose are much broader than corruption alone because they extend to receiving and assessing complaints and reports, receiving disclosures and notifications under the PID Act, the oversight of police complaints and reports and disciplinary investigations, misconduct and maladministration in public administration, evaluations of public authorities and a broad education function. The existing title risks a narrower public perception of the work that is undertaken by my office which can result in misunderstandings and speculation by the public and public officers when a complaint or report is made or an investigation is being undertaken.

A change in name to 'Commissioner for Public Integrity' would better fit the functions given. A single 'Public Integrity Commission' would relieve confusion as to the functions of the Commissioner vis a vis the functions of the OPI and bring all of the responsibilities under one umbrella, without expanding the functions or powers given.

Narrowing the definition of Corruption

I have previously expressed reservations about proposals to narrow the definition of corruption. I was concerned that attempts to narrow the definition might lead to unintended consequences. Nevertheless with the benefit of almost seven years experience I think there is merit in narrowing the definition.

Corruption is defined in the ICAC Act to include any offence committed by a public officer while acting in his or her capacity as a public officer and extends to former public officers and prospective public officers. That broad definition can lead to curious results.

For example, if a public officer commits a road traffic offence while acting in his or her capacity as a public officer it would come within the definition of corruption in the ICAC Act. Most readers would not associate such behaviour with corruption even though it may be unlawful and improper. Indeed such offences are not reported to the OPI because I specifically omitted such offences from mandatory reporting directions.

In other jurisdictions corruption is defined by reference to what I would describe as hallmarks of behaviour, rather than broadly any offence committed by a public officer while acting in his or her capacity as a public officer. For example in New South Wales the definition of 'corrupt conduct' in the *Independent Commission Against Corruption Act 1988* (NSW) requires the conduct to be of a kind that 'adversely affects, or that could adversely affect, either directly or indirectly, the honest and impartial exercise of official functions by any public official, any group or body of public officials or any public authority' or 'any conduct of a public official or former public official that constitutes or involves a breach of public trust'.[7]

The definition of corrupt conduct is similarly defined in anti-corruption legislation in Victoria.

I think there is merit in considering whether such hallmarks of behaviour should be included in the definition of corruption. I say that because corruption is about abusing a power or a position held by a public officer. It is about exercising a power, exerting an influence, or taking improper advantage of a situation, to obtain a benefit or cause a detriment.

The relative 'value' of the offending is, in my opinion, irrelevant. It is the breach of trust and the misuse of a position of power that is relevant.

I have attempted to ensure that investigations conducted by my office have always focused upon allegations which align more closely to widely accepted notions of public corruption. Nevertheless, in circumstances where the definition of corruption is so broad, there is an opportunity to consider whether the definition could be narrowed so as to ensure that the focus remains on such conduct.

Revisiting the definition of 'serious or systemic'

In 2017 the ICAC Act was amended to include a definition of 'serious or systemic' in respect of misconduct or maladministration in public administration.

That definition, which appears at section 4(2), is:

> *For the purposes of this Act, misconduct or maladministration in public administration will be taken to be* ***serious or systemic*** *if the misconduct or maladministration –*
>
> *(a) Is of such a significant nature that it would undermine public confidence in the relevant public authority, or in public administration generally; and*
>
> *(b) Has significant implications for the relevant public authority or for public administration generally (rather than just for the individual public officer concerned).*

The definition, as currently drafted, tends to focus on the seriousness of the misconduct or maladministration but perhaps does not sufficiently articulate how misconduct or maladministration may be systemic. Misconduct or maladministration can be serious **or** systemic (or it could be neither serious nor systemic). The use of the disjunctive 'or' means that misconduct or maladministration does not need to be both serious **and** systemic for the purposes of relevant part of the ICAC Act.

The definition of 'serious or systemic' should cater to instances of serious misconduct or maladministration as well as instances of systemic misconduct or maladministration. At present the definition focusses almost exclusively on the former.

Systemic misconduct or maladministration might arise in circumstances where each incident of misconduct or maladministration is not 'serious', but collectively the episodes represent a pattern of behaviour or practice that is infecting the whole or a large part of a working group, section, agency or body. The systemic nature of the behaviour may be having a significant adverse impact

7 *Independent Commissioner Against Corruption Act 1988 (NSW)* s 8

upon integrity in an institution but is not being recognised because it does not meet the present definition.

In that respect the definition of serious or systemic warrants review.

Obtaining documents as part of an assessment

Section 23(3) of the ICAC Act provides that:

> *The [OPI] or the Commissioner may, for the purpose of assessing a matter, by written notice, require an inquiry agency, public authority or public officer to produce a written statement of information about a specified matter, or to answer specified questions, within a specified period and in a specified form, verified if the written notice so requires by statutory declaration.*

It is a criminal offence to refuse or fail to comply with a notice issued in accordance with that sub-section.

The power given in section 23(3) is used to assist in assessing a complaint or report. On occasion there may be serious allegations that are made but there remains some question as to whether those allegations are of sufficient veracity to justify the time and expense of an investigation. The power is used to obtain sufficient information to allow a proper assessment to be conducted.

The difficulty with the power given is that often the best information upon which an assessment can be conducted is contained within documents in the custody, power or possession of an inquiry agency, public authority or public officer. Section 23(3) does not currently permit the issue of a notice requiring that agency, authority or officer to provide documents.

I think the power ought to be amended to allow a notice to be issued to an inquiry agency, public authority or public officer to produce specified documents which would assist the OPI to conduct a proper assessment of allegations made in a complaint or report or as a consequence of an assessment I have required on my own initiative.

Of course nothing in the section as it presently exists, or in terms of the proposed amendment I have suggested, would abrogate a public officer's right to claim the privilege against self-incrimination in respect of the issue of a notice under that section. I think it is appropriate that such an entitlement is retained.

Referrals to the DPP

Section 7 of the ICAC Act prescribes the statutory functions given to the Commissioner. One of those functions is to identify corruption in public administration and to 'investigate and refer it for prosecution'.[8] Alternatively I can 'refer it to a law enforcement agency for investigation and prosecution'.[9]

In correspondence to the Attorney-General and to the South Australian Parliament's Crime and Public Integrity Policy Committee (the Committee) I set out why I had little doubt that I am entitled to investigate corruption in public administration and refer the evidence I collect in respect of that investigation directly to the Director of Public Prosecutions (DPP) for consideration of the laying of criminal charges.

8 *Independent Commissioner Against Corruption Act 2012* (SA) s 7(1)(a)(i).
9 *Independent Commissioner Against Corruption Act 2012* (SA) s 7(1)(a)(ii).

Nevertheless given the matter had been raised in court I proposed an amendment to bring any ambiguity to an end.

On the same day that I delivered that letter to the Attorney-General and to the Committee, the District Court, in a ruling related to an application for a permanent stay of a prosecution arising from an investigation conducted by my office, found that I was not empowered to refer a matter directly to the DPP.

I was surprised by that finding and a number of other findings made by the District Court in that matter. Those findings are now the subject of an application for the reservation of questions of law for the Full Court of the Supreme Court so I do not propose to comment further about those matters.

Investigations into serious or systemic misconduct or maladministration

The ICAC Act assumes that matters raising a potential issue of misconduct or maladministration in public administration will be referred to an inquiry agency or public authority for investigation.

However, the Commissioner is empowered to personally investigate a matter assessed as raising a potential issue of serious or systemic misconduct or maladministration in public administration.

I have conducted many such investigations, including investigations into the sale of land at Gillman and in respect of the Oakden Older Persons Mental Health Service.

Where the Commissioner decides to conduct an investigation into serious or systemic misconduct or maladministration, the Commissioner is not able to use the investigative powers provided for in the ICAC Act because those powers are preserved for corruption investigations. Rather, the Commissioner must utilise the powers of an inquiry agency.

When the ICAC Act commenced there were two other inquiry agencies, the Police Ombudsman and the Commissioner for Public Sector Employment both of whom had coercive investigative powers. There is presently only one inquiry agency: the South Australian Ombudsman. Hence if the Commissioner were to investigate serious or systemic misconduct or maladministration, the powers utilised to conduct that investigation are those powers found in the *Ombudsman Act 1972* (Ombudsman Act). The Commissioner would be bound by any statutory provisions governing the exercise of those powers.[10] Section 19 of the Ombudsman Act provides that for the purposes of an investigation, the Ombudsman has the powers of a commission as defined in the *Royal Commission Act 1917* (RC Act).

As can be plainly seen, the Commissioner must proceed along a convoluted path to be invested with powers to investigate serious or systemic misconduct or maladministration.

In my opinion it is appropriate that the ICAC Act continues to operate on the assumption that matters of misconduct or maladministration will be referred elsewhere. But the Commissioner should continue to have the power to investigate serious or systemic misconduct or maladministration. I have explained elsewhere in this report why I hold that view.

The mechanism by which the Commissioner conducts such investigations ought to be made simpler. I think the ICAC Act should be amended to enable the Commissioner to investigate serious or systemic misconduct or maladministration using the powers of a royal commission as found in the RC Act, together with the requisite power to make findings and recommendations and to publish those findings and any recommendations publically if it is in the public interest to do so.

10 Subject to modifications contemplated in section 36A.

The power to investigate would be retained, the powers of investigation would remain the same, but the process would be far simpler, less confusing and more efficient.

Public hearings

My thoughts on whether the ICAC Act should allow for public hearings in appropriate circumstances are well known. I am of the view that it should and have on a number of prior occasions identified why I hold that view (see for example Chapter 2.9 of my report *Oakden: A Shameful Chapter In South Australia's History*, 28 February 2018).

I appreciate that some of what the Commissioner does must be done in private. That is particularly so in respect of corruption investigations.

However, I have consistently stated that where the Commissioner undertakes an investigation into serious or systemic misconduct or maladministration in public administration there is much wider scope for part or parts of the investigation to be held in public. In those investigations the Commissioner is empowered to make findings about whether or not a public officer has engaged in misconduct or maladministration, or a public authority has engaged in maladministration in public administration.

Public hearings would enable the public to better understand the manner in which my office undertakes its work in those matters and it would allow the public to scrutinise that work, which in turn, would provide for greater transparency and accountability. In essence, it would demystify part of the work that my office does while providing another level of public oversight.

I hope that in time the question of public hearings will be reconsidered.

Varying the evaluations power

Earlier in this report I spoke about the evaluations that have been conducted in accordance with the ICAC Act. Based upon feedback received and my own observations, evaluations have had a powerful positive impact upon the practices, policies and procedures of the evaluated agency and more broadly. Evaluations are an important function of my office because it is often the practices, policies and procedures of an agency that create the opportunities for corruption, misconduct and maladministration to occur.

At present the power to conduct an evaluation is limited to a single agency's practices, policies and procedures.[11] There is no power to conduct an evaluation of an integrity issue that might be of direct significance to a broad range of agencies in public administration. To do so would require each agency to be the subject of a separate evaluation.

I think there would be public value in being able to conduct evaluations that focus on a theme or issue that might affect a broad range of agencies. For example I think an evaluation of recruitment practices across the public sector would be a most worthwhile exercise. So too would an evaluation of integrity measures applied to procurements throughout the local government sector.

Thematic evaluations are not contemplated in section 40 of the ICAC Act. I think there would be value in amending that section to allow for such evaluations. Evaluations of that kind could be more targeted, be less resource intensive for each of the agencies that might be impacted by the evaluation, and would provide a basis for more universally meaningful recommendations to flow from them.

11 *Independent Commissioner Against Corruption Act 2012* (SA), s 40.

The power to make reports

Section 42 of the ICAC Act provides that the Commissioner may prepare a report to parliament setting out:

> *(a) recommendations, formulated in the course of the performance of the Commissioner's functions, for the amendment or repeal of a law*
>
> *(b) findings or recommendations resulting from completed investigations by the Commissioner in respect of matters raising potential issues of corruption, misconduct or maladministration in public administration*
>
> *(c) other matters arising in the course of the performance of the Commissioner's functions that the Commissioner considers to be in the public interest to disclose.*[12]

It is a section which provides perhaps the most significant opportunity for me to inform the public (through the Parliament) of the activities and observations of my office. But it is a power that is subject to stringent restrictions:

> *(1a) The Commissioner must not—*
>
> *(a) prepare a report under this section setting out findings or recommendations resulting from a completed investigation into a potential issue of corruption in public administration unless—*
>
> *(i) all criminal proceedings arising from that investigation are complete; or*
>
> *(ii) the Commissioner is satisfied that no criminal proceedings will be commenced as a result of the investigation, in which case the report must not identify any person involved in the investigation; or*
>
> *(b) prepare a report under this section setting out findings or recommendations resulting from a completed investigation into a potential issue of misconduct or maladministration in public administration that identifies any person involved in the particular matter or matters the subject of the investigation unless the person consents.*[13]

Those prohibitions are far too restrictive. Unsurprisingly it has meant that I have only utilised the power on two occasions:

- To report on findings and observations from two completed corruption investigations conducted by my office (*The Trusted Insider*).
- To report on findings and observations of SA Health's governance arrangements revealed to me as a result of my investigations and referral functions involving that agency (*Troubling Ambiguity)*.

While I also release reports publicly that are not tabled in parliament like survey reports and reports such as this, I must be careful not to publish reports that are more properly of a kind that should be prepared in accordance with section 42.

12 Section 42(1) ICAC Act
13 Section 42(1a) ICAC Act

One of the primary objects of the ICAC Act is to give the Commissioner functions designed to further 'the prevention or minimisation of corruption, misconduct and maladministration in public administration'.[14] Another primary object is:

> *To achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person's reputation (recognising that the balance may be weighted differently in relation to corruption in public administration as compared to misconduct or maladministration in public administration).*[15]

In my opinion the effect of the prohibitions imposed in section 42 is to shift the balance too far in favour of the protection of reputation as against the public interest in exposing corruption, misconduct or maladministration.

There are many corruption investigations which do not result in a prosecution. But that does not mean that the investigation does not uncover information that ought to be brought to the attention of the Parliament and the public. At present the Commissioner is prevented from preparing such a report where that report would identify any person involved in the investigation.

Similarly there are a number of instances of misconduct or maladministration that I think the Parliament and the public ought to be made aware of but the section permits the person who has engaged in the misconduct or maladministration the absolute right to veto any attempt to prepare a report under that section that identifies him or her.

Far from finding a balance, the prohibition means there is no ability to balance the public interest in exposing the matter against the individual interest in the matter remaining secret.

The better approach would be to require the Commissioner to determine whether it is in the public interest that a matter arising from a completed investigation of corruption, misconduct or maladministration be the subject of a report under section 42. Determining where the public interest would necessarily have to include protecting an individual from undue reputational harm, but that should not be the only consideration.

I think the prohibitions contained within section 42 ought to be revisited. If they remain in their present state I anticipate that the power will continue to be rarely used and important matters that should be brought to the attention of the Parliament and the public will remain behind closed doors.

Secrecy

The ICAC Act strictly regulates information connected with a complaint, report, investigation or referral under the ICAC Act. Section 54 regulates the communication of information while section 56 regulates the publication of information.

There have been numerous examples, including some which have become public, where the application of section 54 and/or 56 has been misunderstood or misapplied, notwithstanding the best of intentions on the part of those involved.

There is good reason for some aspects of the work of the office to remain confidential.

As I have already explained, corruption investigations are criminal investigations. Corruption investigations routinely involve the use of covert techniques, including physical and electronic surveillance, telephone intercepts, undercover operations, money tracing and contact tracking.

14 Section 3(1)(a) ICAC Act.
15 Section 3(1)(C) ICAC Act.

Obviously the ability to conduct such investigations relies upon the person who is the subject of the investigation being unaware of the investigation. If the person was aware then the person could take steps to thwart the investigation.

The investigation of corruption is already difficult. Corruption investigations are often factually and legally complex, involve multiple individuals who have an interest in covering their tracks, and evidence can often be destroyed, changed or buried amongst significant volumes of information.

Of course in many cases an investigation reveals that a person has not engaged in any criminal conduct. Not infrequently an investigation will result in no further action, not because the person is not suspected of having engaged in corruption, but because the evidence collected is deemed insufficient to prove the offending.

In many such cases the person who was the subject of the investigation will never be aware that he or she was ever investigated.

I rarely issue a public statement about an active corruption investigation. I will only issue such a statement where I am satisfied that issuing a statement will not compromise the investigation, or where there is such widespread speculation about a matter that it is in the public interest that that speculation is resolved through the issue of a public statement.

In order to protect the effectiveness and integrity of corruption investigations I think they should continue to be conducted in private. Police conduct most of their investigations privately.

But despite my views that corruption investigations should be held in private I remain of the view that the existing confidentiality provisions provided for in the ICAC Act are over engineered. Too little regard is had for the public interest and too much regard is had to avoiding reputational harm.

I have already expressed my views about investigations into serious or systemic misconduct and maladministration. I think there is scope when it is in the public interest for those investigations, or at least parts of those investigations, to be conducted in the public eye.

More broadly I think section 54 and 56 of the ICAC Act require reconsideration.

Section 56 prohibits publication of:

> *(a) information, including information tending to suggest that a person is, has been, may be, or may have been, the subject of a complaint, report, assessment, investigation or referral under the ICAC Act; or*
>
> *(b) information that might enable a person who has made a complaint or report under the ICAC Act to be identified or located; or*
>
> *(c) the fact that a person has made or may be about to make a complaint or report under the ICAC Act; or*
>
> *(d) information that might enable a person who has given or may be about to give information or other evidence under the ICAC Act to be identified or located; or*
>
> *(e) the fact that a person has given or may be about to give information or other evidence under the ICAC Act; or*
>
> *(f) any other information or evidence the public of which is prohibited by the Commissioner.*

There are only two exceptions to the prohibition. First, where the publication is authorised by the Commissioner. Second, where the publication is authorised by a court hearing an offence **against the ICAC Act**. It is important to be clear about the latter exception. Rarely has there been a prosecution for an offence against the ICAC Act. An offence against the ICAC Act means that a person is charged with an offence which is included in the ICAC Act itself. Breaching section 56 is an example of an offence against the ICAC Act. So too is an offence of lying to an examiner during the course of an examination.

Most prosecutions arising from investigations by my office are not in respect of offences against the ICAC Act. They are offences to be found in other legislation such as the *Criminal Law Consolidation Act 1935*. Accordingly, it will rarely be the case that a court authorises the publication of the information prescribed in section 56. It follows that publication of information of the kind prescribed in section 56 will almost always need to be authorised by the Commissioner or, if the Commissioner so chooses, a person who has been delegated the power to give such an authorisation.

There is another point about section 56 that is perhaps not well understood or not understood at all. There is nothing in section 56 that suggests that the statutory prohibition on publication ceases to apply upon a person appearing in court. Indeed, the fact that the section empowers a court hearing an offence against the ICAC Act to give an authorisation to publish is a clear indication that the prohibition on publication extends into court proceedings.

In that respect I think the prohibition is clearly over engineered. Once a matter is before a court it should be for a court to determine whether there is information that ought to be prohibited from publication. Courts already have the power to suppress information by virtue of section 69A of the *Evidence Act 1929*. Otherwise information of the kind contemplated in section 56, which has been made public by virtue of the court proceedings, ought to be able to be published. It should not be for the Commissioner to continue to be able to control the information that can or cannot be published once a matter is the subject of court proceedings.

The more difficult question arises as to whether the prohibition on publication ought to remain before a matter proceeds to court. I have already set out why it is critical for corruption investigations to be conducted in private.

Of course section 56 does more than prevent the publication of information that might compromise an investigation. It protects the identity of those who are willing to come forward and report corruption and impropriety. A survey of more than 12,000 public officers conducted by my office in 2018 revealed significant fear associated with reporting improper conduct. Removing section 56 might well have a negative impact upon a person's willingness to come forward and report matters.

Section 56 might be seen as a necessary shield to ensure that such investigations are not compromised by the premature publication of their existence. On the other hand SA Police have operated for over 100 years without the benefit of a provision such as section 56. I am not aware of calls for the introduction of a similar provision owing to the compromise of an investigation by the premature publication of its existence.

I think it is time for a debate as to whether section 56 should be repealed or amended. I propose that the ICAC Act be amended to achieve the following purpose.

The balance might be found by relevance to the type of investigation. First limit the application of section 56 to all matters before assessment by the OPI and thereafter to all matters that have been assessed as requiring no further action or have been assessed as raising issues of corruption and then in respect of the latter group to the point of time when information is laid by the DPP.

That would protect a person who has been the subject of a complaint or report that the OPI does not consider worthy of any investigation but leave it open to the media to publish information about those who are being investigated. In the case of corruption investigation there would be no public report until the investigation is complete which would protect the integrity of the investigation.

There are other ways that the Commissioner can protect the integrity of investigations. Schedule 2 of the ICAC Act provides powers to protect the secrecy of examinations.

Section 54 continues to create confusion and ought to be extensively amended.

Section 54 has two defined aspects. First it requires those engaged directly or indirectly in the administration of the ICAC Act to maintain the confidentiality of that information except in the circumstances provided for in the Act. It is relatively unremarkable.

The second aspect is more difficult. It requires a person who **receives** information, knowing that the information is connected with a complaint, report, assessment, investigation, referral or evaluation under the ICAC Act to maintain the confidentiality of that information unless authorised to disclose the information in the manner discussed by the Act. It does not matter where or how a person receives the information. All that is required to enliven the prohibition is for the person to know that the information is connected with a complaint, report, assessment, investigation, referral or evaluation. That necessarily captures a significant amount of information.

The result is a great deal of uncertainty as to what a person can do with the information that he or she has received. While there are a number of exceptions permitting disclosure, in many cases disclosure is sought in circumstances not contemplated. The result is frequent requests for authorisations to make disclosures.

In many cases, the information is of such a benign nature that it need not be the subject of a confidentiality obligation. But it is captured because of the wide ambit of section 54.

Section 54 is premised on the basis that everything is to remain confidential unless an authorisation is given in writing or is provided for in the ICAC Act.

Consideration ought to be given to reversing section 54 so that information of the kind captured by that section is permitted to be disclosed to another person where the person is satisfied that the disclosure is reasonable in the circumstances, unless there is direction issued by the Commissioner, or a delegate of the Commissioner, requiring the information to be kept confidential. In that way information that ought to be kept confidential can be maintained while all other information can be disclosed where appropriate.

Provision and use of information obtained in the course of an investigation

Section 56A is intended to clarify the use that can be made of evidence and information obtained by the lawful exercise of powers in respect of corruption, misconduct or maladministration. It also makes clear that information and evidence obtained in one investigation can be used for the purposes of a different investigation. The section is designed to overcome a number of legal obstacles that might arise in the absence of such a section.

The terms of section 56A are subject to the other provisions of the ICAC Act. That is so because section 56A commences with the words ‘Subject to this Act’.

Those words create unnecessary confusion and give rise to unnecessary argument. The clear intention of section 56A is to enable appropriate use of the evidence obtained. To make that use subject to other provisions of the ICAC Act is to unnecessarily restrict the intended wide ambit of the powers.

The categories of public officer – Schedule 1

Schedule 1 of the ICAC Act lists the various categories of public officer. They include members of parliament, members of the judiciary, elected members and employees of local government, public sector employees, members of the governing body of a statutory authority and the employees of a statutory authority. There are many other categories.

In all but one case the categories of public officers refer to natural persons. There is one category that is anomalous.

One category of public officer is the Local Government Association (LGA).

It is unclear to me why the LGA is listed as a public officer. The definitions of corruption and misconduct in the ICAC Act do not lend themselves to conduct of an entity other than a natural person. While the definition of maladministration, in so far as it relates to a public officer, could include conduct of an entity other than a natural person, it would be an uncomfortable fit.

A person who is a member of the governing body of the LGA is a public officer, as is an employee of the LGA. The LGA is, quite rightly, the public authority responsible for those categories of public officer.

In those circumstances it seems anomalous to include the LGA as a public officer and it should be removed.

Conduct of examinations

Schedule 2 of the ICAC Act permits an examiner to summons a person to appear at an examination to answer questions or produce documents.

The power to issue a summons for an examination resides in clause 4(1) of Schedule 2. It provides that an examiner 'may summon a person to appear before the examiner at an examination to give evidence and to produce such documents or other things (if any) as are referred to in the summons.'

The effect of clause 4(1) is that the examiner who issues the summons must be the examiner who conducts the examination. There have been occasions where the examiner who issues the summons becomes unable to hear the examination. Because there is no flexibility in clause 4 the examination must be adjourned or the summons revoked and a new summons issued.

Greater flexibility could be achieved by making a small change to the wording of section 4(1). If section 4(1) was amended to replace 'the examiner' with 'an examiner', there would be the flexibility to replace the examiner who issued the summons with a different examiner.

The examiner who issues the summons will still remain responsible for being satisfied that it was reasonable to issue the summons. If an examiner, other than the examiner who issued the summons, during the examination thinks the examination should not proceed, that examiner can immediately conclude that examination. The examination is a separate process to the issue of the summons.

False or misleading evidence

Clause 10 of Schedule 2 of the ICAC Act provides for a criminal offence where a person gives evidence that the person knows is false or misleading in a material particular.

Clause 8(2)(b) provides that a person appearing as a witness at an examination before an examiner must not refuse or fail to answer a question that he or she is required to answer by the examiner.

However, if the person appearing as a witness at any examination, before answering a question, claims that the answer might tend to incriminate the person or make the person liable to a penalty, the answer is not admissible in a criminal proceeding or a proceeding for the imposition of a penalty other than a proceeding in respect of the falsity of an answer: clauses 8(4) and 8(5).

An examinee was prosecuted by the DPP for making a false statement contrary to clause 10 of Schedule 2 of the ICAC Act.

During the course of the examination the examinee claimed that each of his answers would tend to incriminate him, no doubt with the purpose of ensuring that the evidence would not be admissible, other than in a proceeding in respect of the falsity of an answer.

The examinee admitted in the examination to giving a false answer.

The examinee argued before a Magistrate that the admission to giving false evidence during the examination was not admissible because it was excluded by reason of clause 8(5). The Magistrate accepted that argument and excluded from the evidence the examinee's admission.

The DPP declined to appeal the decision.

It seems to me extraordinary that a person who admits that he or she has given a false answer during the course of the examination escapes a proceeding in respect of the falsity of the answer on the basis that the admission that the answer was false was not admissible.

Consideration should be given to an amendment to clause 8(5) to ensure that an admission made by a person that he or she has given a false answer during the course of an examination is admissible against that person in respect of proceedings for giving a false answer.

CONCLUDING REMARKS

Corruption exists in South Australia but South Australia does not have a corrupt public administration. I have not seen evidence during my tenure which suggests that South Australia's public institutions have been corrupted. There is corruption but it is not systemic. There is however evidence of widespread maladministration which enables individuals to engage in corrupt conduct. I encourage public authorities to consider the issues I have raised in this report and how governance in their agencies can be improved to reduce the risk of corruption occurring.

I will leave office on 1 September. I would like to extend my gratitude to a number of people who have assisted and supported me in my role as the Independent Commissioner Against Corruption.

I am grateful to those public officers who have made a report to the Office for Public Integrity over the last seven years. This office cannot investigate or refer matters for investigation if the office does not know about them. Public officers best know what is occurring in public administration. Therefore it is vital that they make appropriate reports to the OPI.

After accepting the role as Independent Commissioner Against Corruption I knew that I would need assistance to set up the office of the ICAC and the OPI. That assistance came from inaugural ICAC/OPI Chief Executive Officer, Ms Patricia Christie. I could not have done what she did. She did an excellent job of establishing the organisation and I am grateful for her efforts and her friendship.

Mr Michael Riches as ICAC/OPI's second CEO and first Deputy Independent Commissioner Against Corruption continued to offer me exceptional support in the running of the organisation. I am grateful to Mr Riches for all of the skills and talents that he bought to the role and generously shared with me and my staff.

Both Ms Christie and Mr Riches are fine lawyers and I have relied upon them for both legal advice and strategic advice.

The ICAC and OPI have since commencement been served by an impressive management team who have worked extremely hard and have demonstrated a high level of commitment to the organisation. I thank them for their efforts.

I am grateful to the staff of my office and the OPI both present and past who have worked very hard throughout the seven years of my office. Often they have been under relentless pressure but have not complained. They have been loyal and supportive.

It has been a privilege to serve South Australia as the Independent Commissioner Against Corruption.

I wish the Hon. Ann Vanstone QC all the best for her term as South Australia's next Independent Commissioner Against Corruption.

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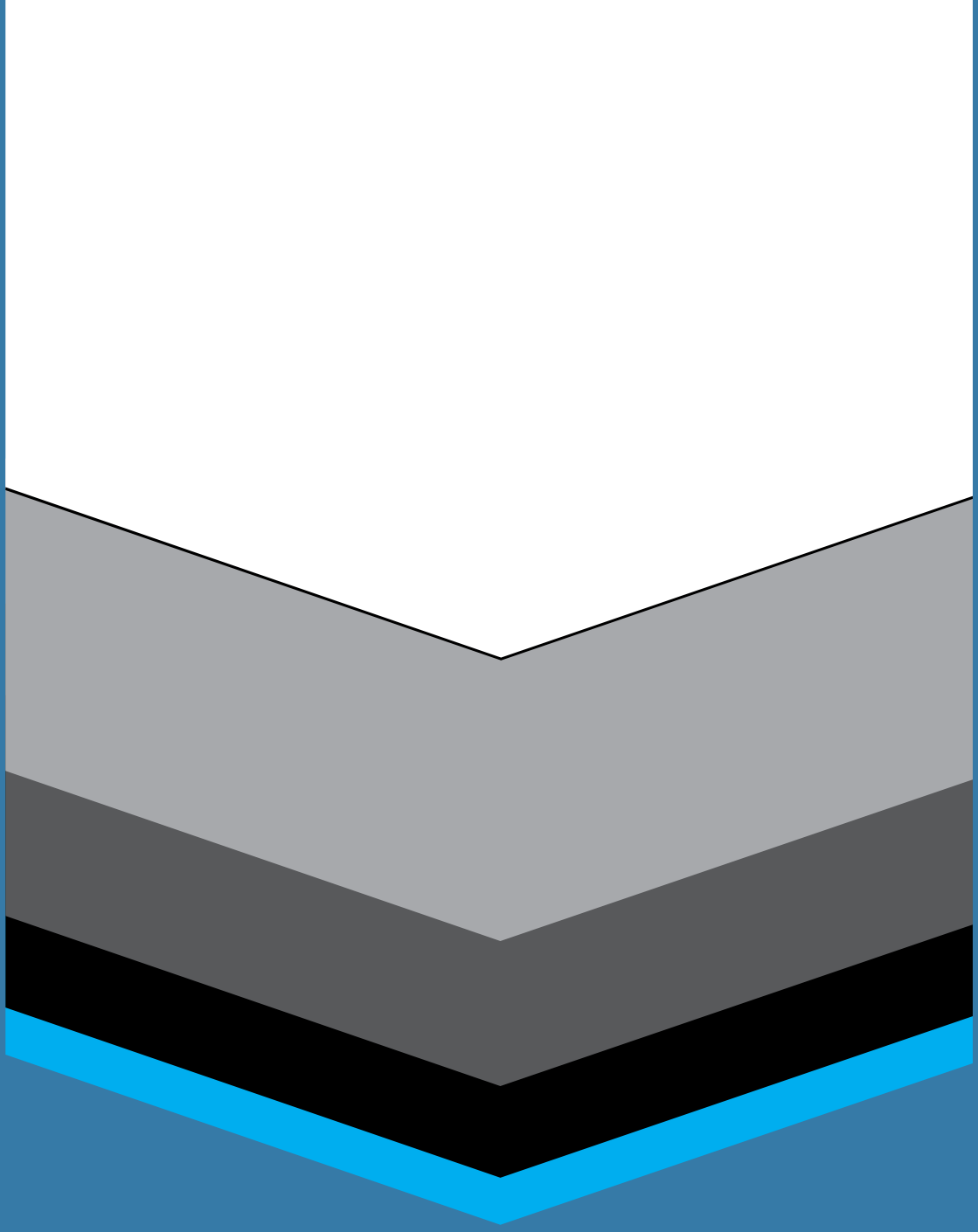

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