ICAC
Independent Commission
Against Corruption
SOUTH AUSTRALIA

An examination of the changes effected by recent amendments to the *Independent Commission Against Corruption Act 2012*

A report pursuant to section 42 prepared by the Independent Commission Against Corruption

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Introduction

The changes made by the *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act 2021* (SA) alter the operations of the Independent Commission Against Corruption and limit the matters it can investigate. This was clearly the intention of Parliament. However, the changes made to the Act also have significant consequences for the entire scheme designed to ensure the integrity of public administration in South Australia. These consequential changes do not appear to have formed part of any of the parliamentary debate. I do not know if they were anticipated or intended.

I was not invited to comment on the Bill before it was filed and I did not see it in its final form until it had passed both Houses of Parliament.

I have now had the opportunity to consider the amending Act and the entirety of the changes it makes. In particular, I have had the opportunity to consider those changes against the knowledge I have obtained in my role as the Commissioner of the causes and effects of corruption, and the way the public integrity system works to address them.

The changes do little to improve the capacity of the public integrity scheme to identify, investigate, prevent or minimise corruption in public administration. On the contrary, the changes create an increased risk of corruption remaining hidden and undermine the ability of public administration to deal with it. This is so whether "corruption in public administration" as defined under the former Act or the much narrower definition created by the amending Act is considered.

In this report I set out in detail why I have come to this view.

I do this because I consider the increased risks of corruption created by the amending Act are of such significance that the public interest requires me to bring them to the attention of the community and the Parliament. I therefore make this report pursuant to s 42(1)(c) of the *Independent Commission Against Corruption Act 2012* (ICAC Act) and in doing so I have had regard to my statutory functions of furthering the identification, investigation, prevention and minimisation of corruption in public administration.

I wish to say two things about the suggestion that the changes made by the amending Act reflect recommendations made by the *Crime and Public Integrity Policy Committee* (CPIPC) in its December 2020 report.

First, the suggestion is misleading. The most significant changes made to the integrity scheme were not dealt with in the CPIPC's report and, in some respects, are contrary to the tenor of its recommendations. This is a view held not only by me. A recent assessment of the amending Act by the *Centre for Public Integrity* found that many of the changes made by the amending Act "appear to have no basis" in the CPIPC report.

Second, on commencing as the Commissioner I had the view that the ICAC Act (as in force at that time) ought to be reformed. To that end, I engaged in extensive confidential consultation with the Attorney-General (as the Minister responsible for the Act) about the CPIPC recommendations. At no stage was I asked about the full extent of the changes made by the amending Act. If I had been I would have advised against those changes for the reasons discussed in this report.

Curtailing the Commission's operations

The changes made by the amending Act limit the Commission's jurisdiction, curtail its independence and reduce its ability to effectively identify, deal with and prevent corruption in public administration.

A reduction in the matters the Commission can investigate

The Commission's ability to identify, investigate and deal with "corruption in public administration" depends on the definition of corruption in the ICAC Act.

Even before the recent changes the definition of corruption was more confined than the definition in comparable legislation interstate. The amending Act significantly narrows this definition by severing the Commission's ability to investigate a wide range of conduct which on any common sense view ought to be characterised as corruption.

This has occurred because s 5(1)(c) has been deleted from the Act. That section had provided that corruption included conduct which amounted to:

> any...offence (including an offence against Part 5 (Offences of dishonesty) of the *Criminal Law Consolidation Act 1935*) committed by a public officer while acting in his or her capacity as a public officer.

The significance of this change should not be understated. The substantial majority of the investigations I have undertaken relate to offences now removed from the Commission's jurisdiction.

The Commission can no longer investigate dishonesty or theft offences committed by public officers even if the offending is widespread or public resources substantially defrauded. Neither can the Commission any longer investigate other conduct where its expertise or independence is important. Examples are alleged assaults by police officers, or prison officers smuggling contraband into prisons.[1]

The deletion of s 5(1)(c) strikes me as odd because conduct it describes should properly be characterised as corruption. Does the embezzlement of public funds by a public officer charged with their management not involve the same breach of public trust as with those offences which remain in the definition of corruption? Does a police officer assaulting a prisoner or a prison officer smuggling contraband for a fee not involve the same misuse of public power? Does all such conduct not compromise the integrity of public administration and the public interest in the same way?

Because this conduct can no longer be investigated and addressed by the Commission it is less likely to be identified and more likely to continue. Its greater prevalence will contribute to a culture which encourages corruption, even in the new and narrowly defined sense.

1 Section 51 of the *Correctional Services Act 1982* (SA).

It is no answer to say that those offences that now fall outside the definition can be investigated by South Australia Police (SAPOL). The reality is that corruption is complicated and difficult to detect, and investigating it requires specialist skills. It is the Commission which has the powers, resources and expertise necessary to investigate corruption. And so while it is true that what was a crime before the changes is still a crime, the simple fact is that many of these crimes are less likely to be identified, investigated and dealt with.

I do agree that the terms of s 5(1)(c) were unnecessarily broad. I have previously supported narrowing s 5(1)(c) and I think the recommendation of the CPIPC which limited it to offences only punishable by imprisonment for two years or more is sensible. However, I see no rationale for its complete removal.

The amending Act also removed s 5(2) of the ICAC Act.

This was an important provision that allowed the Commission to adequately investigate and deal with offences incidental to the alleged corrupt conduct, which were not, of themselves corrupt conduct as defined. Removing s 5(2) means that there could potentially be two concurrent investigations into allied conduct being undertaken by two different agencies (the Commission and SAPOL). This would be inefficient and is likely to prejudice both investigations to the benefit of those involved in the offending.

There is a real risk that reports of corruption will be missed or misunderstood

Under the changes the Commission can no longer receive a report or complaint about corruption. Instead, complaints and reports are received and assessed by the (separate) Office for Public Integrity. Only if the Office assesses a report as involving potential corruption will the Commission be able to investigate it or, in fact, know about it at all.

Disturbingly, the Office must make these assessments in a vacuum without access to either the information and corruption intelligence database held by the Commission or the specialist expertise the Commission has. This expertise constitutes not only the significant judicial experience of the Commissioner. It includes the understanding of the signs, symptoms and causes of corruption the Commission develops from its investigations, research and consultation with like national and international agencies.

Assessing complaints and reports as the now separate Office must creates the real risk that they will be misunderstood or their significance missed.

It should be understood that complaints and reports will rarely contain a comprehensive picture of the corrupt conduct they describe. Corruption is by its nature clandestine. Those with knowledge of corrupt schemes are usually complicit in them (or closely associated with those who are) and have a common interest in maintaining secrecy. A complainant or reporter will usually only observe a small part of a corrupt scheme. It is only by comparing this information with other contextual information, or by bringing to bear expertise about corruption, that its full significance can be understood.

It is troubling that, because the Commission's corruption information database and its expertise is now denied to the Office, this significance may be missed.

This will mean serious corruption goes undetected.

The Commission can no longer start its own investigations

The Commission can no longer choose what suspected corruption to investigate. This is because its ability to commence an "own initiative" investigation has been removed.

An "own initiative" investigation took place when suspected corruption was brought to the Commissioner's attention other than by a person making a complaint or report about it. For example, the Commissioner might have become aware of suspected corruption because of something reported in the media or because another law enforcement body had come across it during a separate investigation.

This was an important power which is available to all other integrity bodies in Australia. It was critical to the Commissioner's ability to effectively identify and deal with corruption. A number of significant investigations were commenced using it. It is difficult to see how serious corruption can be addressed without it.

Whilst s 18E(2) of the ICAC Act does permit the Commission to ask the Office to assess a matter, that does not extend to matters about which it becomes generally aware, for example, from the media.

Further, I consider this section will pose difficulties when other law enforcement bodies identify corruption which they want to refer to the Commission for investigation. Those agencies may be reluctant to share such information with the Office, given the confidentiality of the information and the Office not being a law enforcement body. Further, and importantly, in some cases Commonwealth legislation will specifically prohibit it being provided to the Office.

These referrals usually contain credible information about serious corruption which requires investigation.

The Commission has no control over the outcome of its investigations

Previously the outcome of an investigation of the Commissioner which identified corruption was a referral to the Director of Public Prosecutions for him to independently consider whether or not to bring charges. That is the position for interstate anti-corruption bodies.

The Commission is now specifically prohibited by its own Act from making such a referral. It is only permitted to refer a matter to another law enforcement agency.

This is a remarkable prohibition on an utterly unremarkable function.

The Commission is an independent body "not subject to the direction of any person in relation to any matter".[2] It is charged with independently identifying corruption by public officers. Once such corruption is identified it should be referred to the Director so that it can be prosecuted. It is only if the conduct is prosecuted that the corruption is revealed to the public. However, despite the Commission's independence, this last step in the investigation, namely, the referral to the Director, is a decision over which the Commission now has no control. Rather, that decision is made by another law enforcement agency, usually SAPOL. Officers of SAPOL might be the very persons of interest in the investigation completed by the Commission.

2 ICAC Act s 7(2).

This is antithetical to the independence of the Commission. It is somewhat ironic given its functions that the Commission is now the only public authority in South Australia specifically prohibited from bringing information relevant to the Director's functions to his attention.

There does not seem to be any rationale for this change. Like the Commissioner, the Director is an independent statutory officer. There has never been any question of his independence. Despite suggestions the changes were required to guarantee the independence of the Director, there is no evidence that the Director's independence has ever been compromised by the Commissioner or anyone else. In any event, that independence is preserved by s 9 of the *Director of Public Prosecutions Act 1991* (SA).

I consider that this change creates risk.

It re-enlivens a risk (which predated the most recent scheme) that SAPOL might decline to investigate or charge with the aim of limiting reputational damage. These risks were addressed in the review undertaken by former Commissioner[3] which underpinned the enactment of the *Police Complaints and Discipline Act 2016* (SA).[4]

Further, the unnecessarily convoluted process will absorb and duplicate both Commission and SAPOL resources which could have been directed elsewhere, including at corruption prevention. It will also waste time.

The Commission can only tell the public about its investigations when no corruption is found

The ability of the Commission to communicate with the public about its functions and completed investigations is an important means by which the public sector and the public more generally can be advised of its work and of corruption risks.

This vital prevention tool has been removed by the amending Act.

Under amendments to s 25 of the ICAC Act the Commission cannot make any public statement about a corruption investigation unless the Commissioner is satisfied that no criminal, disciplinary or penalty proceedings will result from it. Further, the Commission's ability to publish a report to Parliament on its investigations and operations is now limited to circumstances where that report does not contain "any findings or suggestions of criminal or civil liability". This exclusion will apply to all investigations where the Commission identifies corruption or any other conduct injurious to the integrity of public administration and the public interest.

The consequence of these changes can be plainly stated. The Commission can only communicate with the public about an investigation when no corruption or suggestion of it is found. If corruption is found, the Commission cannot tell the public about it.

This will impede the Commission's and the public sector's ability to prevent corruption, creating a real risk that it will become more prevalent.

3 The Hon. Bruce Lander QC, (2016) *Review of Legislative Schemes: The Oversight and Management of Complaints About Police, The Receipt and Assessment of Complaints and Reports About Public Administration* - https://www.icac.sa.gov.au/__data/assets/pdf_file/0004/370696/Legislative_reviews_report_0.pdf pp 40-41.

4 South Australia, *Parliamentary Debates,* House of Assembly, 6 July 2016, p 6333 (John Rau, Attorney-General).

It is likely to have damaging consequences for the community's trust in the public sector. How will the community be assured that allegations of corruption are properly and independently considered and investigated? In the past the Commissioner was criticised for unwarranted secrecy. These changes will exacerbate that position.

It is difficult to see what purpose is to be served by preventing the public accessing this information. It is true that a careful balance needs to be struck between preventing unfair prejudice to reputations on the one hand and the public interest in ensuring the public sector and community are aware of the corruption risks and vulnerabilities the Commission has identified on the other. This balance was appropriately struck in the previous s 25.

Parliamentary privilege

Section 6 of the ICAC Act has been amended so that the Commission cannot exercise any powers "in relation to any matter to which parliamentary privilege applies". A similar change has also been made to the *Ombudsman Act 1972* (SA).

The meaning of this section is unclear. It may well be found to operate to place a wide range of conduct beyond the reach of the Commission and Ombudsman.

The privileges, rights and immunities of Parliament are important notions which protect the community's interest in a free and functioning legislature. It troubles me that the ambiguity created by this section could be used by individuals to protect their private interests. For example, a Member of Parliament might table incriminating documents in the chamber in an effort to put himself or herself beyond the reach of an investigation of the Commission or Ombudsman.

Such an abuse would not only impede the identification of questionable conduct, it would lead to a loss of confidence in public administration and in parliamentary privilege itself.

Public officers convicted for indictable offences can have their legal costs reimbursed from public funds

The amending Act inserted a new Schedule 5 into the ICAC Act. It provides that some but not all public officers can have legal expenses incurred as a result of a Commission investigation reimbursed from public funds. Relevantly, some public officers (including Government Board appointees, public sector employees and Members of Parliament) would be entitled to have their legal costs reimbursed unless they were "convicted of an indictable offence that constitutes corruption in public administration".[5]

This means that those public officers will be entitled to the reimbursement of their legal costs from public funds even if convicted for an indictable offence, provided the offence does not fall within the new and narrower definition of corruption. Accordingly, some public officers found guilty of offences commonly charged as a result of Commission investigations, such as theft, deception and dishonestly dealing with documents, will be entitled to reimbursement.

5 See ICAC Act Schedule 5 clause 3(a), some other conditions set out in the Schedule also apply.

Clause 70(2) of Schedule 1 of the amending Act provides that Schedule 5 is one of only two provisions that apply to all past Commission investigations. Accordingly, the reimbursement of legal costs will be available to those persons who are currently, or who may become, the subject of charges as a result of existing Commission investigations.

I query how the public interest requires that public officers convicted for any criminal offence should be reimbursed for legal costs from public funds. I apprehend that this provision might influence the conduct of criminal prosecutions, conceivably leading to the accused agreeing to plead guilty to certain non-corruption charges or the prosecution laying corruption charges because of the consequences in terms of the repayment of legal costs. I would argue this has potential to impact, not only upon my independence in determining what matters to investigate, but also on the independence of the Director of Public Prosecutions.

The new Schedule 5 reproduces a government policy called *Legal Bulletin 5* – Reimbursement of Legal Fees. The criteria for eligibility just outlined appears to be the only substantive variation from *Legal Bulletin 5*. In my view, the criteria used by the policy was appropriate. It precluded legal costs being reimbursed where a "material adverse finding" was made against the public officer.

Unlike *Legal Bulletin 5* it is not made clear what the source of the payments is intended to be. Is it intended that they would be paid in accordance with Treasurer's Instruction 14 – *Ex Gratia Payments*? Or are payments to be absorbed by the Commission's budget?

Requirements to advise a person of the outcome of an investigation

The amended Act now requires the Commission to advise the subject of an investigation that it has been completed.

It is appropriate that a person who is aware they are the subject of a Commission investigation be told of its outcome as soon as possible after completion. The Commission has in place processes to ensure this occurs where necessary.

However, a different question arises when the subject of the investigation is not aware that it has taken place. This occurs frequently because investigations are often conducted and then closed in circumstances where an allegation is found to be not supported by evidence.

Advising a person he has been the subject of a Commission investigation is likely to cause discomfort and stress. It may also cause the person of interest to try to identify the complainant or reporter. This is conduct that is likely to discourage persons from reporting information in the future. In some circumstances, merely informing a person of a Commission investigation could identify a reporter, in contravention of s 8 of the *Public Interest Disclosure Act 2018* (SA).

If there is to be such a requirement it would be preferable for it to be limited to circumstances where the subject of the investigation has been made aware of the investigation.

An unclear, uncertain and likely unworkable definition of misconduct

The amending Act has changed the definition of "misconduct" so that only those contraventions of a code of conduct that are "intentional and serious" can constitute "misconduct".[6]

The definition is quite unclear. Its lack of certainty is likely to compromise the public sector's ability to use the concept of "misconduct" to protect the community from behaviour injurious to the integrity of public administration and the public interest.

The immediate problem with the insertion into the definition of the requirement that a contravention be "intentional" is that it makes the definition open to two materially different interpretations. That is, must a public officer *intentionally* contravene a code of conduct in the sense that the public officer knows that the conduct he is engaging in is in breach of the code when he is engaging in it.

Alternatively, does it mean that the conduct which constitutes the contravention must itself be *intentional* conduct in the sense that the conduct is not accidental or the result of negligence or recklessness?

It is simply unclear.

Public officers are expected to use this definition to decide what matters they need to report. The Ombudsman and his officers are expected to use the definition when deciding whether or not a matter can be investigated. The lack of certainty will make these decisions extremely difficult.

There are significant problems with both interpretation of the misconduct definition.

If the definition is intended to cover only those circumstances where a public officer has knowingly contravened a code of conduct then the initial assessment of a report, its investigation and the ability to make any findings about it will be problematic. How will it be established that a public officer knew he or she was in breach of a code of conduct at the time a contravention occurred? Absent an admission from the public officer (which would be rare) this is a very difficult matter to establish. The reality is that the assertion, "I was not aware my conduct breached the code" is easy to make and difficult to disprove.

This difficulty will be compounded at the assessment stage when the Ombudsman will have scant information about the conduct and the circumstances in which it occurred. The likely consequence is that the definition will only be satisfied, and the Ombudsman only able to make findings about misconduct on the rarest of occasions, if at all.

It is difficult to see what public interest there is in setting the bar so high. The conduct has the same capacity to damage public administration whether knowing or not. Why should public officers' ignorance of the standards expected of them render them immune from a finding of misconduct? It is out of step with the criminal law where recklessness about such standards is generally sufficient to establish liability.[7]

Significant problems also exist in respect of the alternative meaning of misconduct, that is, that the conduct which constitutes the breach must be intentional, as opposed to accidental or negligent.

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6 The full definition is in s 4(1) of the *Ombudsman Act 1972 (*SA) and is in the following terms.

Misconduct in public administration means an intentional and serious contravention of a code of conduct by a public officer while acting in their capacity as a public officer that constitutes a ground for disciplinary action against the officer.

7 See, for example, *Criminal Law Consolidation Act 1935* (SA) s 238(1).

Again, there is a real question about whether that definition is practically workable. How is an officer of the Ombudsman to make an assessment at the complaint stage of whether alleged conduct was intentional? Such assessments can only be accurately made after evidence of the alleged conduct is gathered and the circumstances in which it occurred are revealed. Questions of intention trouble judges and juries in trials. They will present significant challenges for assessment officers with scant information about the alleged conduct. These difficulties create the real risk of errors in the assessment process.

This meaning also excludes a good deal of conduct which is contrary to the various codes of conduct applicable to public sector employees. For example, it is no longer misconduct for a public officer to negligently perform or fail to perform duties. It is difficult to see why such conduct should not be considered misconduct and why the Ombudsman should be precluded from dealing with it.

Two other problems with the amended definition of misconduct should be noted.

First, the inconsistency between the definition of misconduct, various codes of conduct applicable to public officers and the definition in the *Public Sector Act 2009* (SA) is liable to create substantial confusion for public officers deciding what matters fall to be reported and to whom, and for those officers charged with administering the public integrity scheme. These inconsistencies will send mixed messages to public officers about the standards of conduct they ought to adopt and to expect from their peers.

Second, the amending Act deleted from the definition of misconduct the paragraph which provided that misconduct also included "other misconduct of a public officer while acting in his or her capacity as a public officer".

This means that now, only those public officers subject to a code of conduct are capable of committing misconduct.

While "misconduct" is now the responsibility of the Ombudsman, I maintain an interest here. Because a system that does not effectively address misconduct, breaches of codes of conduct and maladministration creates an environment conducive to corruption.

The changes will mean less conduct is reported

The amending Act made a number of changes which are likely to reduce and discourage the reporting of information about corruption, misconduct and maladministration in the public sector. These reports are used to identify and deal with conduct damaging to its integrity.

While the Director of the Office may, in the future, issue guidelines requiring public officers to report suspected corruption, it is no longer mandatory for a public officer to report suspected maladministration, and the only obligation to report suspected misconduct arises, not under the ICAC Act or Ombudsman Act, but under the Code of Ethics for the South Australian Public Sector issued by the Commissioner for Public Sector Employment, Ms Ranieri. The removal of these statutory obligations is a step backwards, in my opinion.

Although only a month has passed since the Amending Act took effect, the number of referrals to the Commission for potential corruption is running at 50% of the monthly average of such assessments seen in the 12 months preceding the changes.

Under the previous ICAC Act public officers were required to report all relevant matters to the Office. Now they will be required to report corruption to the Office and may report misconduct or maladministration to the Ombudsman. This will require them to make difficult judgements about whether conduct they have observed fits statutory definitions across two Acts. Because conduct which is corruption will almost always involve misconduct and possibly maladministration, public officers will potentially have to make two reports.

The reporting system for corruption, misconduct and maladministration should be simple, easy and accessible for all public officers. This ensures the public sector receives information about conduct damaging to its integrity so that it can be properly dealt with. The previous system where a public officer could report concerns to one place (the Office) achieved this. The new and more complex reporting requirements are likely to mean that less information about corruption, misconduct and maladministration is reported.

The reduction of reporting and the narrowing of the scope of the definition of corruption and misconduct will mean much poor or unlawful conduct will not be identified, let alone addressed, and cultures conducive to corruption will likely develop.

The *Public Interest Disclosure Act 2018* (SA) and a reduction in protections for complainants and reporters

It has long been recognised that the free flow of information from complainants and reporters is critical for the ability of anti-corruption and law enforcement agencies to identify and deal with corruption. To this end, Parliament passed the *Public Interest Disclosure Act 2018 (*SA) to encourage and facilitate disclosures about corruption, misconduct and maladministration in public administration by establishing protections for those who make them.

These protections are undercut by the amending Act.

Protections under the Public Interest Disclosure Act are hinged on the definitions of corruption, misconduct and maladministration in public administration. The narrowing of the definitions of corruption and misconduct reduces the availability of those protections. This is likely to adversely affect the free flow of information that the Act is designed to encourage. Without such information, the ability of the public sector to deal with conduct damaging to its integrity and the public interest is diminished.

Further, there is discordance between the purpose of the Public Interest Disclosure Act and ss 18A(3) of the new ICAC Act and 12A(3) of the Ombudsman Act. There are sections which require the Ombudsman and the Office for Public Integrity to consider the motives of a complainant before receiving a complaint. There is a real danger that those provisions may discourage persons with information about corruption and misconduct from reporting it. It is not clear why those provisions are necessary given both the Ombudsman and the Office already have the power to take no action on complaints they deem to be “trivial, vexatious or frivolous”.

Changes to the Police Complaints system

Complaints against SAPOL officers are considered, investigated and dealt with under the *Police Complaints and Discipline Act 2016* (SA). The Police Complaints Act is the result of an extensive consultation and legislative review process conducted by the former Commissioner, and was more recently the subject of further review by Mr Gordon Barrett QC, a former District Court Judge.

The Act lays out a scheme of investigative powers and procedural rights and protections designed to ensure the proper investigation of police complaints and fairness to both complainants and police officers. Significantly, the Act subjects SAPOL's handling and investigation of complaints to the independent supervision of the Office.

The Police Complaints Act adopts the definitions of corruption, misconduct and maladministration in the ICAC and Ombudsman Acts. Accordingly, the narrowing of those definitions by the amending Act has consequences for the Police Complaints Act regime. These are as follows.

The narrower definition of "corruption" means that conduct which would have previously been dealt with as corruption under the Police Complaints Act can no longer be. This includes allegations of assault or theft by police officers. Hence SAPOL is no longer required to notify the Office that it has received a complaint of that kind. It may be that SAPOL cannot investigate such complaints under the Police Complaints Act. Therefore they would not be subject to the Office's independent supervision. Neither would the complainant and the subject police officer enjoy the rights and protections the Act provides.

Similarly, the new definition of misconduct means that only those breaches of the police Code of Conduct that are "intentional and serious" (as required by those definitions) will be dealt with as "misconduct" under the Act. It may be that such complaints also fall outside the scope of the Police Complaints Act and the Office's independent supervision.

These matters may have significant consequences for the effectiveness of the police complaint system and the confidence the public places in it. Both the former Commissioner and Mr Barrett concluded that independent supervision of the handling and investigation of police complaints was critical to public confidence in the police complaints system and SAPOL itself.

Two other consequences of the changes are worthy of note.

First, if the new definition of misconduct is intended to apply only to conduct which is intentional, uncertainty exists about whether those parts of the police Code of Conduct which now fall outside the new definition of misconduct are *ultra vires*. What would be the public interest in excluding the Commissioner of Police from being able to take action in respect of poor conduct falling outside the new definition because it was not "intentional and serious", for example, negligence[8] or an unintentional use of excessive force by a police officer?

8 Clause 5 of the Code which provides that a police officer "must not be negligent in carrying out a lawful order, direction or duty".

Second, s 12 of the Police Complaints Act requires police officers to report any matter reasonably suspected of involving corruption, misconduct or maladministration. This is an important means by which the Commissioner of Police identifies poor conduct and promotes integrity and excellence in his force. The narrowing of the definitions means that substantially less conduct must be reported. The ability of the Commissioner of Police to promote and preserve the integrity of SAPOL is thereby reduced.

Miscellaneous

These changes have caused a number of aberrations in the legislation establishing the public integrity scheme. These aberrations are likely to cause uncertainty in the administration of the scheme and detract from its efficiency.

The *Independent Commission Against Corruption Act 2012* (SA)

- Section 17(1) of the Act is problematic for a number of reasons. First, insofar as the amended section identifies the functions of the office, they include the Office referring complaints and reports to inquiry agencies, public authorities and public officers (s 17(1)(c)). However, in the provisions that follow there is no power for the Office to refer complaints and reports to either public authorities or public officers. The inclusion of 'public authorities and public officers' in section 17(1)(c) is otiose. Second, the stated functions in s 17(1) do not include a role in referring a matter to a law enforcement agency. However, s 18E states that the Office must assess a complaint or report received and determine whether or not action should be taken to refer the matter to a law enforcement agency or an inquiry agency.

- Section 18E sets out how the Office can assess a matter it has received and provides that a determination can be made "as to whether or not action should be taken to refer the matter to a law enforcement agency or an inquiry agency". However, s 18F (which sets out what action can be taken after such an assessment is made) provides no power for the Office to refer any matter to a "law enforcement agency". It would be preferable for the Act to clearly state how the Office is meant to deal with information which suggests criminal offending not amounting to corruption, but which should otherwise be investigated by SAPOL or another law enforcement body.

- Section 18E(2) provides that an inquiry agency may require the Office to assess a matter. The word 'require' is inconsistent with the terms of s 18F(3), which states that the making of an assessment by the Office is at the absolute discretion of its Director. A suitable substitute for 'require' might be 'request'.

- Section 18F(2) provides that before referring a matter to an inquiry agency (including the Commission) the Office must "take reasonable steps to obtain the views of the agency as to the referral". However, s 18F(1) contains no discretion about the referral of matters if they are assessed in a particular way. For example, if a matter is assessed as involving corruption in public administration it *must* be referred to the Commission. In light of such a mandatory requirement, the consultation required by s 18F(2) seems pointless and a waste of resources.

- The Commission retains the power to refer matters to public authorities and public officers for further investigation and disciplinary action (see ss 7(1)(d) and 36(1)(b)). Further, the Commission has retained the power to accompany any such referrals with directions, including a requirement that the public authority submit a report on any action taken. Neither the Office nor the Ombudsman would have visibility of any such referral or report.
- Section 54 permits the Director of the Office to authorise publication of information which may relate to a confidential Commission investigation. Similarly, the Commissioner can authorise the publication of information confidentially held by the Office. These powers seem out of place and unnecessary when such information is confidential to the other entity.
- Section 56A has been amended by deleting the words 'misconduct or maladministration' wherever occurring. This wholesale amendment may have unintended consequences. The amendment means that for the purposes of s 56A(1)(b)(ii) the Commission may only provide to a public authority and the public authority may only receive and use information for the purposes of a disciplinary investigation or action *in relation to suspected corruption in public administration*. This is much narrower than the former provision, which allowed the information to be used for any disciplinary investigation or action in relation to suspected ***corruption, misconduct or maladministration in public administration.*** The effect of this amendment is that if in the course of a corruption investigation the Commission identifies maladministration or misconduct by a public officer (as opposed to corruption) it could not report that conduct to the relevant public authority. If it is intended that the Commission should be able to provide information obtained by the lawful exercise of the Commission's powers to a public authority for use by the authority for the purposes of any disciplinary investigation or action in relation to misconduct or maladministration, then the provision requires further amendment.

The *Police Complaints and Discipline Act 2016* (SA)

- The definition of "Office" in s 3 has not been updated to include reference to the amended name of the ICAC Act.
- According to s 12(2)(c), the Commissioner is required to approve requirements (determined by the Commissioner of Police) for making a report under s 12. This does not seem appropriate given the complaints system is now supervised solely by the Office (which is no longer headed by the Commissioner).
- The Commissioner is also required to approve requirements for referral of a matter to SAPOL Internal Investigation Section. This also seems inappropriate given the complaints system is now supervised solely by the Office (which is not headed by the Commissioner).
- The Office retains the ability to refer a matter to the Commission if it thinks it should be dealt with "under this Act" (s 29). Further, the Commission may still use powers under the Police Complaints Act to investigate matters (s 30). The Commission's ability to use the powers in the Police Complaints Act appears to have been directed to the Commissioner's investigation of misconduct by police officers. This is not a function the Commission continues to perform. It is not clear what purpose these sections are now intended to serve.

- Section 31 of the Police Complaints Act requires the Independent Commissioner Against Corruption to produce a report on the number of sanctions imposed each year under s 26. This function should now rest with the Office.
- Section 35(6) of the Police Complaints Act provides that the Police Tribunal must permit "a member of staff of the OPI nominated by the ICAC" to be present at its proceedings. It does not seem appropriate that the Commission be the nominating body in these circumstances, given the Office is responsible for supervision of the police complaints system.

The *Public Interest Disclosure Act 2018* (SA)

- The Commission remains responsible for publishing guidelines about the Public Interest Disclosure Act. It is also responsible for exempting public sector agencies or councils from certain of the Act's requirements and for approving training for responsible officers under the Act. It is not clear why this role has remained with the Commission given the primary responsibility for the receipt and assessment of complaints or reports is with the Office, now a separate entity.

The Hon. Ann Vanstone QC
Independent Commissioner Against Corruption

ICAC

Independent Commission
Against Corruption

SOUTH AUSTRALIA