

OUR REFERENCE NUMBER: A654109



20 June 2022

The Hon. Kyam Maher MLC  
Attorney-General  
10 Franklin Street  
ADELAIDE SA 5000

By hand delivery

Dear Attorney

## Introduction

As we have discussed previously, the October 2021 amendments to the *Independent Commissioner Against Corruption Act 2012 (ICAC Act)* and related legislation<sup>1</sup> have shattered the integrity landscape in South Australia and introduced ambiguity and inefficiencies into the scheme.

Over a number of weeks my Deputy has conferred with and received assistance from officers of the Ombudsman and the Office for Public Integrity (OPI) to capture mechanical problems with the legislative scheme, in addition to problems of efficiency and clarity. I thank those officers for their assistance. Ultimately there was not agreement to put a joint position to you, and I understand that the Ombudsman and Director OPI will write separately to you. I confirm that they have each seen a copy of this correspondence in draft prior to its presentation to you.

I trust that in the interests of delivering a public integrity scheme that properly services the public interest and the stated intention of the Parliament to “streamline” the making, management and investigation of complaints about public administration, you will give consideration to addressing the issues raised herein as soon as possible.

## Information sharing

The fracturing of the integrity landscape in South Australia means the Ombudsman, the OPI and the Commission are operating in a vacuum. This has repercussions for assessments, investigations and prevention activities.

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<sup>1</sup> *Ombudsman Act 1972, Public Interest Disclosure Act 2018, Police Complaints and Discipline Act 2016*

I do not know what is coming through the doors of the Ombudsman or the OPI. The OPI does not know what is coming through the doors of the Ombudsman and *vice versa*. Neither the Ombudsman or the OPI knows what I am investigating and finding and in turn the OPI and the Commission do not know what the Ombudsman is investigating and finding.

Regardless of who is undertaking assessments, they cannot be fully informed without access to all appropriate intelligence. Comprehensive investigations into corruption, misconduct or maladministration require all relevant information, which could include separate complaints made about a particular agency or person, or inquiries and investigations that have been conducted or are on foot.

Without appropriate access to relevant information, serious integrity issues will be missed and miscarriages of justice might occur.

Moreover, preventing improper conduct in the first place is preferable to dealing with the aftermath of such conduct. Access to information is vital to the prevention program.

To put the above observations in context, formerly, all reports and complaints ('reports') of corruption, misconduct and maladministration went to the OPI which operated under and was responsible to me. Now, those reports are spread between the OPI and Ombudsman and are not seen by the Commission. The OPI must now assess complaints without reference to the Commission's existing database of all previous reports, or its corruption intelligence and expertise developed from investigations, research and consultation with like national agencies. Assessing reports within a separate office creates the real risk that their import will be misunderstood or their significance missed, which will mean serious corruption or misconduct may go undetected.

Neither does the OPI have access to assessments made by the Ombudsman. This raises the possibility that the two offices could assess reports about the same conduct simultaneously.

#### Recommendation 1

Legislative provisions which allow our agencies to enter into memoranda of understanding to share information be inserted into the *ICAC Act* and the *Ombudsman Act*.

### **Reporting obligations**

Changes to reporting obligations for public officers have resulted in a complicated system with fewer reporting obligations. It is likely that over time, this will result in a reduction in reporting.

Prior to the amendments, public officers had a mandatory obligation to report any reasonable suspicion of corruption or serious or systemic misconduct or maladministration. It is unclear why the Parliament took the view that it was no longer necessary to report all conduct of this type.

Previously, public officers were obliged to make those reports to the OPI. Now reports go either to the OPI or to the Ombudsman.

Putting aside the confusion created by there being two offices - each with separate guidelines for reporting - the only statutory obligation to report conduct now relates to suspected corruption. It is no longer mandatory for a public officer to report suspected serious or systemic maladministration. The only obligation to report suspected misconduct arises under the *Code of Ethics for the South Australian Public Sector*. That is not a statutory obligation.



Further, although suspected corruption must be reported to the OPI, misconduct and maladministration may be reported to the Ombudsman. This requires an assessment, usually by a layperson, of which statutory definition applies to the suspect conduct, in order to ensure a report is directed to the appropriate agency. This unnecessary confusion is likely to lead to less reporting, as well as double handling and delay.

A further result is that with both the OPI and Ombudsman making assessments, there will inevitably be a variation of approach.

### Recommendation 2

There be a mandatory reporting requirement, not only for potential corruption but for all three categories of conduct - certainly *serious* or *systemic* maladministration or misconduct - and, to avoid confusion, reporting for all categories should be to the OPI.

## **Reporting system**

The amended definition of misconduct in section 4 of the *Ombudsman Act* raises a number of issues in relation to its practical workability. The expression 'an intentional and serious contravention of a code of conduct' is ambiguous. Does the definition merely require the act or omission to be intentional, or does it require the public officer to intentionally contravene a code of conduct in the sense that they know the conduct they are engaging in is in breach of the code when they are engaging in it? Either way 'intention' is extraordinarily difficult to establish.

Moreover, the requirement for the conduct to be intentional sets a high bar, and excludes conduct, even serious conduct, that may be reckless or negligent, even where the conduct falls far short of that expected of a diligent public officer. It is also relevant to note that the narrower definition of misconduct commensurately narrows the types of disclosures that are protected under the *Public Interest Disclosure Act 2018* (see below). This is undesirable.

In November 2021, I prepared a report entitled 'An examination of the changes effected by recent amendments to the *Independent Commission Against Corruption Act 2012*' (the November report). That report identified a number of practical issues with the definition, including (at pages 11–12):

- a) By excluding the sub-paragraph 'other misconduct of a public officer while acting in his or her capacity as a public officer', the definition now limits misconduct to those public officers who are subject to a code of conduct, and
- b) The inconsistency between the definitions of misconduct in the *Ombudsman Act* and the *Public Sector Act 2009*, as well as the various codes of conduct applicable to public officers, is likely to create confusion for public officers administering the public integrity scheme, as well as those deciding which matters should be reported.

The definition should be further amended to clarify the position in the local government space. The definition should make clear that a breach of the integrity provisions (to commence later this year) in the *Local Government Act 1999* will constitute a breach of a code for the purposes of the misconduct definition. With respect to local government, it is relevant to note that the Ombudsman can still investigate council member 'misconduct' under the *Code of Conduct for Council Members* and the *Local Government Act 1999* whether it is intentional and serious or not. This creates two different classes of misconduct to be investigated by the Ombudsman. This is unsatisfactory.

### Recommendation 3

The definition of misconduct revert to the former *ICAC Act* definition, which was:

- (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 disciplinary action against the officer; or*
- (b) *other misconduct of a public officer while acting in his or her capacity as a public officer.*

### Recommendation 4

The *Local Government Act* be amended to provide that a breach of the integrity provisions will amount to a breach of a code in terms of the definition of misconduct.

## **Consideration of motives**

Section 18A(3) of the *ICAC Act* and section 12A(3) of the *Ombudsman Act* require the OPI and Ombudsman to ensure that the complainant's motives are considered *before* the complaint is received for consideration. It is not clear how compliance with this provision can be achieved. Any consideration of motive has to form part of the assessment of the complaint. In any event motive may also be irrelevant where there is an overriding public interest in receiving a complaint, even if made for an improper motive.

If the two subsections were deleted, motives of bad faith, improper purpose etc. could be stipulated as a factor in determining that no action be taken, in accordance with section 18E(1)(c) and section 12H(1).

### Recommendation 5

Sections 18(A)3 *ICAC Act* and 12A(3) *Ombudsman Act* be deleted.

## **Time limit**

There has never been a time limit applicable to complaints or reports to the OPI. It would not be in the public interest to impose a time limit on the reporting of corruption, misconduct or maladministration.

Complaints to the Ombudsman (which were previously only in relation to administrative acts) had to be made within 12 months of the complainant having notice of the matters alleged<sup>2</sup>.

Since the amendments, this time limit now applies to the additional *complaints* which the Ombudsman may receive, namely complaints *from the public* about misconduct and maladministration in public administration, but not to *reports from public officers* about misconduct and maladministration: section 12D.

This appears to be an arbitrary distinction, particularly as the same complainant could approach the OPI and be subject to no time limit. It is probably unintended.

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<sup>2</sup> section 12C of the Ombudsman Act



## Recommendation 6

Section 12C *Ombudsman Act* be amended to confine its ambit to complaints in relation to administrative acts.

## **Referrals**

Section 17(1)(c) of the *ICAC Act* identifies one of the functions of the OPI as referring complaints and reports to inquiry agencies, public authorities and public officers. However, there is no corresponding *power* for the OPI to refer complaints and reports to either public authorities or public officers. (The powers given are confined to 'the Commission' or 'another inquiry agency'.) Such a power should be included in the legislation.

## Recommendation 7

Section 18E *ICAC Act* be amended to give the OPI the additional power to refer complaints and reports to public authorities or public officers.

Moreover, the stated functions in section 17(1) do not include referring a matter to a law enforcement agency. However, section 18E provides that the OPI may do just that. Section 17(1) should be amended to rectify this discrepancy.

## Recommendation 8

Section 17(1)(c) *ICAC Act* be amended to include 'a law enforcement agency'.

Section 18E(1)(a) of the *ICAC Act* uses the phrase 'and *should* be referred to the Commission' (emphasis added). However, section 18F(1)(a) suggests that there is no discretion and that a matter assessed as raising a potential issue of corruption *must* be referred to the Commission.

## Recommendation 9

The word 'should' in section 18E(1)(a) *ICAC Act* be replaced with the word 'must'.

Section 18E(1) of the *ICAC Act* sets out how the OPI can assess a matter and provides, in its concluding words, 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, section 18F (which sets out what action is to be taken after such an assessment is made) provides no *power* for the OPI to refer any matter to a law enforcement agency. The Act should clearly state how the OPI 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; namely to refer it to the appropriate body.

## Recommendation 10

Section 18F(1) *ICAC Act* be amended by adding subparagraph (c) to the effect: if the matter is assessed as raising potential criminal conduct not amounting to corruption in public administration, the matter must be referred to a law enforcement agency.

Similarly, section 18F should include a power for the OPI to refer a matter following assessment as 'other issues', not only to an inquiry agency, but also to a public authority, public officer, or inquiry agency other than the Commission.

## Recommendation 11

Section 18F(1)(b) *ICAC Act* be amended to give the OPI the power to refer a matter as 'other issues' to a public authority, public officer or inquiry agency other than the Commission.

Section 18G of the *ICAC Act* provides that before referring a matter to an inquiry agency (including the Commission) the OPI must 'take reasonable steps to obtain the views of the agency as to the referral'. In contrast, section 18F(1) contains no discretion about the referral of matters once they are assessed in a particular way. For example, if a matter is assessed as involving corruption, it *must* be referred to the Commission. In light of this mandatory requirement, the consultation required by section 18G serves no purpose. If the receiving inquiry agency disputes the assessment it can send it back suggesting re-assessment or redirection.

#### Recommendation 12

Section 18G *ICAC Act* be deleted.

The Commission retains the power to refer matters to public authorities and public officers for further investigation and disciplinary action: sections 7(1)(d) and 36(1)(b) of the *ICAC Act*.

It is contemplated by section 7(1)(d) that the Commission could refer a matter to the Ombudsman if maladministration or misconduct were identified. However, there is no *power* to do so and it is arguable that such matters would now have to be sent back to the OPI for assessment under section 18E(2). A power for the Commission to refer matters directly to the Ombudsman should be included in the Act.

#### Recommendation 13

Section 36(1) *ICAC Act* be amended to allow the Commission to refer a matter to the Ombudsman for investigation.

### **Dissemination of information**

Section 56A of the *ICAC Act* has been amended by deleting the words 'misconduct or maladministration' wherever occurring. This wholesale amendment means that, under section 56A(1)(b)(ii) the Commission may only provide to a public authority information for the purposes of a disciplinary investigation or action in relation to suspected *corruption* in public administration. Public authorities cannot investigate corruption.

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, it cannot report that conduct to the relevant public authority to be dealt with. This is an undesirable and presumably unintended outcome that detracts from a public authority's ability to deal with maladministration or misconduct. It is also inefficient, as it gives rise to a need to refer back to the OPI, thereby interposing that agency into the process.

Allied to this is the need to ensure that the Commission can maximise the use of information gained from investigations. One of the key functions of the Commission is to communicate to an agency, after an investigation, suggestions for improvements in the agency's practices and procedures. This leads to important corruption prevention reforms. The Commission should be free to impart whatever information it has which assists in this process. It should also be empowered to require a report back from the agency to describe the reform introduced by it as a consequence.

#### Recommendation 14

The words 'suspected corruption in public administration' in section 56A(1)(a) and (1)(b)(ii) *ICAC Act* be replaced with 'the conduct identified', or similar.



### Recommendation 15

Section 56A *ICAC Act* be amended to add another subparagraph to subsection (1) to this effect:

- (d) Where information is provided to a public authority in accordance with subsection (b)(ii), the Commission may issue directions or guidance to the authority including a requirement that the authority submit a report back to it on the action taken.

### **Investigation on Commissioner's initiative**

Section 23(2) of the former *ICAC Act* allowed me to *initiate an investigation* when suspected corruption was brought to my attention other than by way of a report or complaint. This power is available to all other integrity agencies in Australia.

While section 18E(2) of the current *ICAC Act* does permit the Commission to ask the OPI to assess a matter, this is highly inefficient. Moreover, this section may pose difficulties when other law enforcement bodies identify corruption which they wish to refer to the Commission for investigation. Those agencies are often reluctant to share such information with the OPI, given the confidentiality of the information and the OPI not being a law enforcement body. Alternatively, there might be problems that arise because of legislative restrictions, such as those that apply to intercepted telecommunications.

The result is an inefficient system and increased risk that corruption will go undetected.

The amending Act also removed section 5(2) of the Act, which allowed the Commission to investigate and deal with *incidental offences*, that is, offences connected to corrupt activity which were not, of themselves, corruption. The removal of section 5(2) means that potentially there now could be two concurrent investigations into allied conduct being undertaken by two different agencies (the Commission and SAPOL, for example). This would be inefficient and likely to prejudice both investigations, to the benefit of those involved in the offending. This could also result in double handling of reports by the OPI.

### Recommendation 16

A section mirroring section 23(2) of the former *ICAC Act* be introduced.

### Recommendation 17

A section mirroring section 5(2) of the former *ICAC Act* be introduced.

### **The function of evaluating agency or authority practices**

Sections 7(1) and 40 of the *ICAC Act* set out the Commission's function to evaluate the practices, policies and procedures of an inquiry agency or public authority. Formerly the Act referred to such evaluations being aimed at preventing not only corruption but misconduct and maladministration too. Now the ambit is confined to corruption or matters relating to it.

Limiting the Commission's evaluation scope to corruption only is artificial and unnecessarily restrictive. Misconduct and maladministration are often the genesis of corruption and present corruption risks for agencies. The three behaviours are so closely linked that a corruption evaluation will almost always extend to analysis which is apt to uncover issues or risks relating to maladministration and misconduct. An amendment to rectify this would not affect the Commission's reach, but would make plain the reality of the evaluation function.



The amending Act gave the Ombudsman the power to evaluate the practices, policies and procedures of public authorities 'with a view to advancing comprehensive and effective systems for preventing or minimising misconduct and maladministration in public administration'. Section 5A(e) of the *Ombudsman Act* is the new provision. The effect of these parallel provisions is to replicate in each agency a resource rich function which has been performed by ICAC since 2013. This is wasteful, likely to lead to overlap and ultimately pointless.

The Commission and the Ombudsman are at one in submitting that the Commission, rather than the Ombudsman, should be responsible for fulfilling the evaluation function. The evaluation function is a specialist one, requiring highly qualified analysts which the Commission has. It is inefficient and wasteful to have two agencies exercising this function, in circumstances where there is likely to be broad overlap between the work done by each.

#### Recommendation 18

Section 7(1)(b) be amended to reflect the previous wording in section 7(1)(d): 'to evaluate the practices, policies and procedures of inquiry agencies and public authorities with a view to advancing comprehensive and effective systems for preventing or minimising corruption, misconduct and maladministration in public administration'.

#### Recommendation 19

Section 5A(e) *Ombudsman Act* be deleted.

### **Education function**

Similar arguments apply to the Commission's and the Ombudsman's education functions: section 7(1)(c) *ICAC Act* and section 5A(f) *Ombudsman Act*. Each of us should be able to educate agencies about the entire integrity landscape. To confine any particular education event or program to either corruption or misconduct and maladministration is counterproductive.

#### Recommendation 20

Section 7(1)(c) *ICAC Act* be amended to add after the word 'corruption', the words 'misconduct and maladministration'.

#### Recommendation 21

Section 5A(f) *Ombudsman Act* be amended to add after the word 'minimise', the word 'corruption'.

### **Specific provisions**

#### **Section 6 *ICAC Act*; section 4A of the *Ombudsman Act*: Parliamentary privilege**

The meaning of these sections, which apply retrospectively, is now unclear and their relationship with section 38 of the *Constitution Act 1934* problematic.

The word 'matter' in the two sections is ambiguous. Does it mean 'material' or is its meaning wider?

The ambiguity might lead to a wide range of conduct being placed beyond the reach of the Commission and Ombudsman. It might also lead to individuals using it to protect their private interests by for example, tabling incriminating documents in Parliament to put them beyond the reach of an investigation. The ambiguity is also likely to lead to expensive litigation.



## Recommendation 22

Section 6 *ICAC Act* and Section 4A *Ombudsman Act* be amended to conform to the wording of the former section 6 *ICAC Act*.

### **Section 54 *ICAC Act*: Confidentiality**

Section 54 of the *ICAC Act* permits (at least on a literal reading) the Director of the OPI to authorise publication of information which may relate to a confidential Commission investigation. Similarly, I can authorise the publication of information confidentially held by the OPI. This suggests each agency is privy to the confidential information of the other (which is no longer the case) and allows for a situation where one agency could authorise disclosure of the other's confidential information without consultation. Although in practice it appears unlikely that the Director OPI or I would authorise the publication of confidential information not held or being dealt with by our respective agencies, it is nonetheless preferable for section 54 to more clearly specify the information which may be subject to authorisations by each officer.

## Recommendation 23

The power of the Director and the Commissioner to authorise disclosure of information be confined to information in the possession of the authorising person.

### **Schedule 1 *ICAC Act*: Local Government Association as a public officer**

The Local Government Association of South Australia is listed as a public officer. This does not fit within the Act's framework relating to public officers. However, the Association is also listed as a public authority responsible for its members, officers and employees, which seems more apt.

## Recommendation 24

The Local Government Association of South Australia be removed from the list of public officers.

### **Section 5 *Ombudsman Act*: Non-application of Act**

Subsection 5(2)(a) provides that the Act does not apply to complaints to which the *Police (Complaints and Disciplinary Proceedings) Act 1985* applies. This reference should be to the *Police Complaints and Discipline Act 2016*, noting that the former Act was repealed by the latter, which was enacted in September 2017.

## Recommendation 25

The reference in section 5(2)(a) *Ombudsman Act* to the *Police (Complaints and Disciplinary Proceedings) Act 1985* be replaced with a reference to the *Police Complaints and Discipline Act 2016*.

### ***Police Complaints and Discipline Act 2016***

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

The Act continues to confer a number of powers and functions on the Commission or me.

- i. Under section 12(2)(c) of the Act, I may determine and approve requirements for a designated officer making a report to the SAPOL Internal Investigation Section or the OPI under section 12.
- ii. Under section 13(4) of the Act, I may determine and approve requirements for a referral of a matter to the SAPOL Internal Investigation Section.

- iii. Section 31 of the Act requires the Commission to produce a report on the number of sanctions imposed each year for breaches of discipline.
- iv. Under section 35(6) of the Act, the Commission may nominate an OPI staff member to be present at Police Tribunal proceedings—the Tribunal must then permit such person to be present.

Those powers and functions should now be conferred on the OPI.

#### Recommendation 26

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

### **Public Interest Disclosure Act 2018**

The Commission continues to have responsibilities under this Act, despite no longer having any knowledge of disclosures made to the OPI. The Act includes the following:

- i. Section 12(2) provides that the regulations may prescribe qualifications for persons designated as responsible officers for the purposes of the Act. Regulation 4 of the *Public Interest Disclosure Regulations 2019* provides that ‘persons designated as responsible officers...must have completed any training courses approved by the Commissioner for the purposes of this regulation.’ Currently, the Commission still, not only approves, but conducts the responsible officer training courses.
- ii. The Commission may grant exemptions under section 12(6) of the Act, which requires agencies and councils to ensure that one or more officers or employees are designated as responsible officers.
- iii. The Commission may publish guidelines for the purposes of the Act (section 14). These may cover matters including the information to be provided to the OPI in connection with a notification under section 7 and circumstances in which the identity of an informant may be disclosed under section 8.
- iv. Under section 16(2)(c), the regulations may ‘provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Commissioner or another specified person’.

In the November report, I questioned the rationale for these roles remaining with the Commission ‘given the primary responsibility for the receipt and assessment of complaints or reports is with the Office, now a separate entity’ (p. 17). It is appropriate that the Commission’s current functions under the Act are transferred elsewhere. The OPI is the most appropriate body to receive these functions, in light of its responsibility for receiving notifications of disclosures under the Act.

#### Recommendation 27

The responsibilities process, obligations and discretions held by the Commissioner under the *Public Interest Disclosure Act* be transferred to the Director of the OPI.

### **Other matters**

For convenience I have gathered my recommendations at the end of this letter.



I have mentioned several times the report I made to the Parliament in November about the changes effected by the amending Act. Not all issues raised in that report are dealt with in this correspondence. This should not be taken to mean that those issues will no longer be pursued; I intend to pursue them with you at a later time. At present we need to inject back into the scheme as much clarity and efficiency as possible.

In the interests of transparency I plan to publish this letter on the Commission's website. I shall also send a copy to the Crime and Public Integrity Policy Committee.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Ann Vanstone', with a stylized flourish at the end.

The Hon. Ann Vanstone QC  
**Commissioner**

## Recommendations

### Recommendation 1

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There be a mandatory reporting requirement, not only for potential corruption but for all three categories of conduct - certainly *serious* or *systemic* maladministration or misconduct - and, to avoid confusion, reporting for all categories should be to the OPI.

### Recommendation 3

The definition of misconduct revert to the former *ICAC Act* definition, namely:

- (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 disciplinary action against the officer; or*
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