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THE ROAD TO ONE

The office of the Independent Commissioner Against Corruption has turned one and, as would be expected, has spent much of the first year growing and learning.

On Monday 2 September 2013, the doors to South Australia's first, and Australia's last independent anti-corruption body swung open. Both the Independent Commissioner Against Corruption and the Office for Public Integrity (OPI) were established by the *Independent Commissioner Against Corruption Act 2012* (the Act).

The ICAC Act had been established not because South Australia was seen as particularly corrupt, but in response to community expectations that government and all of its instrumentalities, be as open and accountable as possible.

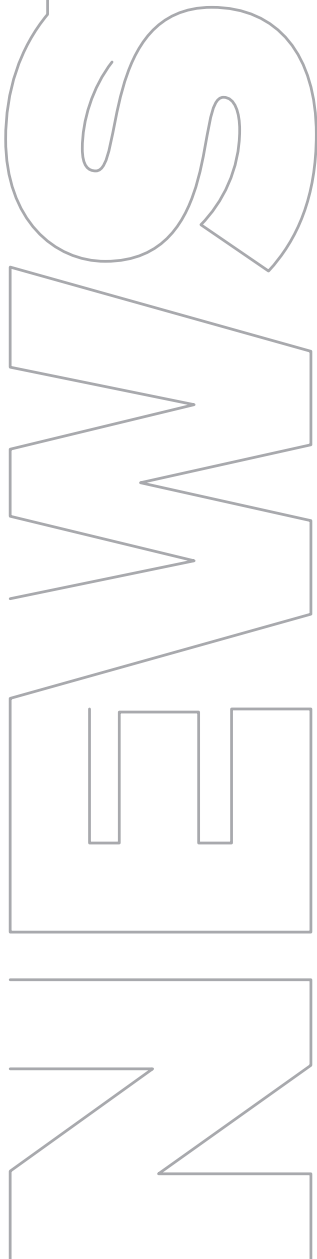
Preparing a new and independent office for operation is not a simple task. Whether or not the organisation had the correct structure, staffing and processes would all be influenced by what happened when the doors opened. Would there be a line up down the street? Would the phones ring non-stop? Exactly what type of complaints and reports would be received? Would they be minor matters or could there be a scandal or conspiracy of a Watergate nature? It was simply impossible to predict what the office would encounter during those early days.

As it turns out the first call came in at 9am. It was not a Watergate. It was a complaint about complaint handling. There were 33 matters in total reported to the Office for Public Integrity on that day.

The action in terms of matters being reported to the OPI has settled down somewhat since the anticipated flurry of the first days. Indeed had it not, the office would have found itself to be overwhelmingly under resourced.

Over the ensuing 15 months both offices have refined their structure and processes and have settled in to the job of receiving, assessing and investigating complaints and reports about corruption, misconduct and maladministration in public administration. Towards the end of 2014 the OPI were receiving on average 22 complaints and reports per week, and at present the Commissioner's office has a number of active investigations into potential matters of corruption.

In October 2014 the Commissioner's investigation activities became public for the first time with the arrest of eight police officers as a result of a joint operation between his office and the Anti-corruption Branch of SAPOL. There have also been many non-public investigations in this time and more matters will be referred for prosecution this year.



PUBLIC INQUIRIES INTO LEGISLATIVE SCHEMES

On 31 October 2014 the Commissioner announced that at the request of the Attorney-General, he would conduct a review of the legislative schemes governing the oversight and management of complaints about police, and the making of complaints and reports about public administration to the Ombudsman, the Police Ombudsman and the Office for Public Integrity (OPI). The Commissioner also announced that he would conduct an evaluation of the practices, policies and procedures of the Police Ombudsman.

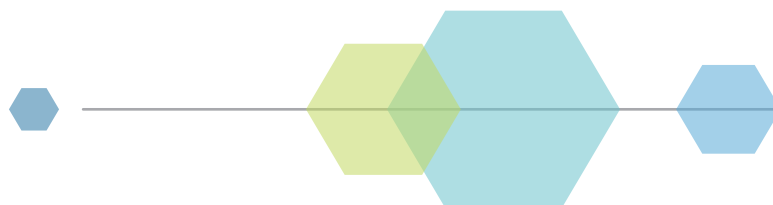
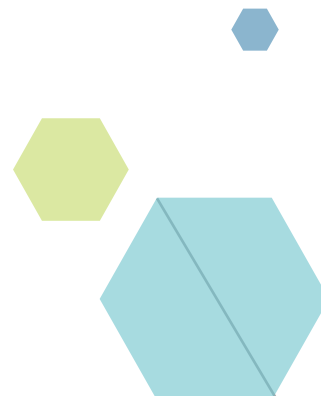
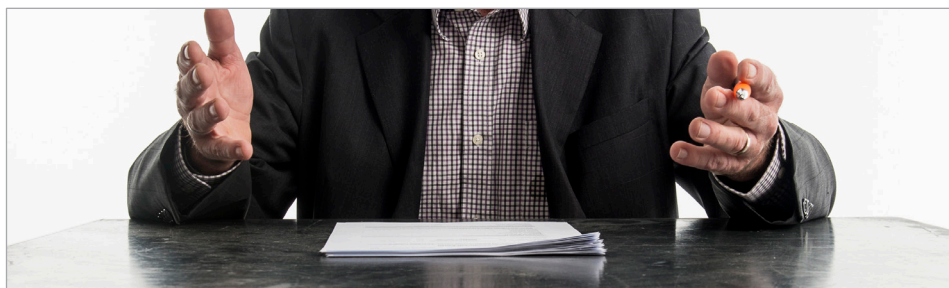
Since announcing the reviews, a small team has been working with the Commissioner to analyse the current South Australian schemes and compare the schemes

to those that exist in other Australian jurisdictions. Key stakeholders have been invited to provide their views regarding those aspects of the scheme that warrant detailed review.

In February 2015, the Commissioner expects to publish a brief discussion paper about the reviews and will then invite submissions from any interested party.

Anyone wishing to be advised that the discussion paper has been published and that submissions have been sought may register online at www.icac.sa.gov.au.

A final report on the reviews and evaluation is anticipated to be completed by July 2015.



PUBLIC VERSUS PRIVATE

The ICAC Act as it currently exists provides that examinations be held in private. This provision has sparked much commentary as many feel that examinations should happen in public.

When asked why they hold such a belief the answer often has something to do with 'that is way it happens in New South Wales', or 'unless corruption is brought to light, it will continue to thrive'.

The comparison between the two acronym sharing ICACs is inescapable. However despite enjoying many similarities in their anti-corruption charters, their specified functions and mechanisms are fundamentally different.



South Australia's Independent Commissioner Against Corruption is a law enforcement agency and the role of the Commissioner is that of an Investigator. Commissioner Lander's role is focussed on gathering evidence on corrupt conduct, which under the ICAC Act, is conduct that is a criminal offence, and referring those matters for prosecution.

The New South Wales Independent Commission Against Corruption includes in its definition of corruption, conduct that is not a criminal offence. Hence, the identification and gathering of admissible evidence for a prosecution is not a primary function of their model.

The New South Wales model is more akin to a rolling Royal Commission. Commissioner Megan Latham can make a decision about conduct under investigation that South Australia's Commissioner, Bruce Lander, cannot. Commissioner Latham is empowered to form and publish an opinion as to whether or not someone has acted corruptly. This power does not exist under the South Australian legislation as the role of Commissioner Lander is not to form any public opinion about matters, but to gather enough evidence for a successful prosecution through the courts.

Despite South Australia's Commissioner enjoying a long career as a Judge, he is no longer a Judge and a South Australian ICAC examination is not a court proceeding. An examination is simply an investigative tool. It is used to gather information and evidence not unlike that of a police officer conducting an interrogation. Although there is understandable curiosity about exactly what happens at an ICAC examination, it is counter intuitive that evidence gathering for a potential prosecution occur in public. It is rarely suggested that police officers

conduct public interrogations for there is an innate understanding that to do so would most likely undermine the investigation.

The public gathering of evidence would provide great headlines and sound bites, but real consequences and punishment would be at risk.

As for the argument that public examinations act as deterrence due to the pressure of the public spotlight, the evidence simply does not support this claim. New South Wales has been conducting public examinations for over 25 years and they have yet to be idle.



LEGISLATIVE CHANGE

It is not until legislation becomes fully operational that it can be tested and evaluated to determine whether or not it is working as was intended by the lawmakers.

The practical application of the ICAC Act began on 1 September 2013. Over time it became evident that some sections of the Act required clarification whilst others required amendment, in order for the Commissioner to carry out his functions in the manner intended.

In his inaugural annual report the Commissioner touched on legislative changes that he would be recommending to the Attorney-General. In particular he identified the Act's confidentiality provisions as needing some attention. Section 56 of the ICAC Act prevented the publishing of information about a report made to the OPI. The problem was with the definition of the term publish, which could be interpreted as including one person informing another person.

The Commissioner was of the opinion that the confidentiality provisions had been 'over engineered' and were interfering with the day to day operations of government.

On 27 November 2014 the *Independent Commissioner Against Corruption Act 2012* was amended by the *Independent Commissioner Against Corruption (Miscellaneous) Amendment Act 2014*.

Confidentiality provisions have now changed. Although Section 56 itself has not changed, the problematic definition of 'publish' has been brought into line with the more common understanding of the term. 'Publish', for the purposes of the ICAC Act, now means:

- a) publish by newspaper, radio or television; or
- b) publish by the internet or other electronic means of creating and sharing content with the public or participating in social networking with the public; or
- c) publish by any similar means of communication to the public.

This means that a person is no longer prohibited from informing another person that he or she has made a complaint or report to the OPI.

There have been other amendments to the legislation, which are detailed in the *Independent Commissioner Against Corruption (Miscellaneous) Amendment Act 2014*.

None of the amendments have changed the primary functions of the ICAC Act, but allow for a more effective operation of the ICAC and OPI. The changes are explained further in the factsheet 'Changes to the ICAC Act', which can be accessed from the ICAC website, along with the ICAC Act, as amended.

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CONTRACTORS AS PUBLIC OFFICERS

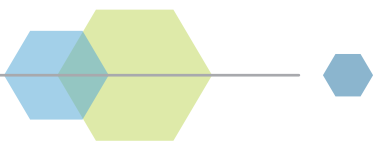
The *Independent Commissioner Against Corruption Act 2012* (the ICAC Act) is concerned with the conduct and practices of public officers and public authorities, in public administration. This is relatively straight forward until you drill down and discover that a public officer includes a person performing contract work for a public authority or the Crown.

The ICAC Act defines contract work as "work performed by a person as a contractor or as an employee of a contractor or otherwise directly or indirectly on behalf of a contractor". Most public authorities engage contractors in this fashion. In fact, there are many thousands of them working on a wide array of projects across the state.

As a public officer a contractor is bound by the same mandatory reporting obligations as other public officers. This means that if a contractor becomes aware of conduct or behaviour of another public officer or a public authority, which they believe may raise a potential matter of corruption, misconduct or maladministration in public administration, then they must report that

matter to the OPI. In addition, a contractor who is a public officer may also be the subject of a complaint or report about corruption, misconduct or maladministration in public administration.

Public officers who are employed by public authorities or the Crown should understand that their obligation to report their knowledge or suspicion of conduct, which may be of the type that the Commissioner is interested in, extends to the behaviour of those people who are performing work under a contractual arrangement.



WHO IS 'ICACING' THE ICAC?

ICAC ACCOUNTABILITY

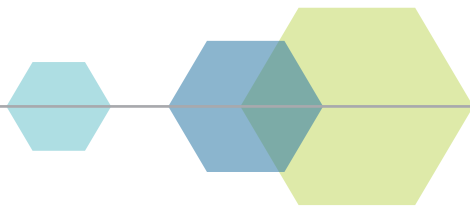
Given the independence and extensive powers of the Commissioner, it is important to have mechanisms in place to ensure the office is held accountable for the way those powers are used and the way the office is run. Part 5 of the *Independent Commissioner Against Corruption Act 2012* outlines these important accountability and oversight provisions.

One of those measures is to publish an annual report which details the operations of the office of the Commissioner and the OPI. That report was prepared and tabled in Parliament on 14 October 2014. You can download a copy of the report from the ICAC website (www.icac.sa.gov.au).

The Commissioner's office and the OPI are also subject to the oversight of the Crime and Public Integrity Policy Committee. This is a Parliamentary committee whose role is to 'examine the performance of functions and the exercise of powers' of both offices. The Commissioner gave evidence before the committee on 31 October 2014. A transcript of that evidence can be found on the Parliament of South Australia website.

In addition, the Act provides that the Attorney-General appoint a person to independently review the operations of the ICAC and the OPI. The Hon. Kevin Duggan QC was appointed to undertake the review. Mr Duggan's report was

tabled in Parliament on 14 October 2014. Mr Duggan reported he was satisfied with the operations of both offices stating "I am satisfied that, in a relatively short period of time, an organisational structure has been created which achieves the purpose of enabling ICAC to carry out its statutory responsibilities in an effective and efficient manner". The full report can be downloaded from the ICAC website.



EDUCATION PROGRAM

An important function of the office of the Commissioner is to implement educational programs, aimed at preventing or minimising corruption, misconduct and maladministration in public administration.

The office holds regular ICAC awareness sessions and other training events. You are encouraged to check the ICAC website for upcoming events, or to contact the office if you would like to arrange for an ICAC speaker to address your conference, board meeting or staff training session.

The ICAC website provides prevention and education resources to assist stakeholders to uphold the integrity standards

of public administration. You are invited to use our video resources and fact sheets. We will shortly be adding case studies to our resource list in addition to an online learning portal.

You can also ensure you don't miss out on the latest news, events and resources by joining the mailing list on the ICAC website (www.icac.sa.gov.au).





IN MEMORIAM

MICHAEL MCGINLAY

In December 2014 ICAC lost a valued and respected member of their investigations team when Michael McGinlay died unexpectedly. The loss of Michael was an incredible shock to everyone in the organisation. He had many friends and he will be missed. Our thoughts are with Michael's family.

THE INFORMATION CONTAINED IN THIS NEWSLETTER IS NOT LEGAL ADVICE.