

The South Australian Independent Commissioner Against Corruption

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Since December 2012, South Australia has had Independent Commissioner Against Corruption (ICAC) legislation in place — the Independent Commissioner Against Corruption Act 2012 (SA) (ICAC Act). The ICAC is expected to be operational from 1 September 2013. In the meantime, the Hon Lander J, currently of the Federal Court, has been appointed as the first Commissioner.

The establishment of an independent anti-corruption body within South Australia had long been advocated. Family First MLC Robert Brokenshire introduced an ICAC Bill in 2009, with Liberal MLC Stephen Wade following suit and introducing a similar ICAC Bill in 2010. However, with the Rann Labor government opposing the introduction of a state-based anti-corruption body, both Bills stalled in the Lower House. South Australia experienced changes in leadership in 2010 and 2011, with John Rau replacing Michael Atkinson as Attorney-General and Jay Weatherill deposing Mike Rann as Premier. This shift in leadership allowed for the discussion of an ICAC to be revisited with renewed interest.

On 2 May 2012, the Weatherill government introduced the Independent Commissioner Against Corruption Bill 2012 (SA) (ICAC Bill 2012) into the SA Parliament. However, an impasse between the Upper and Lower Houses ensued, with the government and the opposition disagreeing over the process by which a commissioner would be appointed. Initially, the government had proposed a cabinet-only appointment process, which the opposition argued would diminish the independence of the ICAC. After lengthy debate, the government agreed to support an amendment moved by Robert Brokenshire. This amendment was that the government appoints the Commissioner, but with confirmation required from the Statutory Officers Committee. Previously, the Committee had been criticised for consisting predominantly of government MPs. In order to ensure the Committee's independence and facilitate the passage of the ICAC Bill 2012, the government moved to confirm that the Committee would comprise two government, two opposition and two independent MPs. Following this compromising amendment, the Bill was

passed by both Houses of Parliament on 28 November 2012 and assented to on 6 December 2012. Subsequently, the ICAC Act was proclaimed on 20 December 2012. However, the operation of a majority of the provisions of the ICAC Act has been suspended until a day to be fixed by subsequent proclamation(s).

The final adaptation of the ICAC Act, as proclaimed, has not been without criticism. A primary object of the ICAC Act is to achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in the public sector, and the public interest in avoiding unnecessary prejudice to a person's reputation. In an attempt to achieve this balance, the Act requires that proceedings and examinations are to be held in private. Additionally, the publication of information relating to a complaint or report under the ICAC Act is prohibited, with harsh penalties to apply for any breach. However, the ICAC may make a public statement in relation to a particular matter, so long as the Commissioner believes it is in the public interest to do so.

Wayne Martin, Chief Justice of Western Australia, has warned against private hearings, noting that public confidence in the integrity of the justice system depends on transparency. Additionally, former NSW ICAC Commissioner Jerrold Cripps QC has suggested that the provisions will result in low public confidence, stating:

... when findings are made of corrupt conduct or conclusions are drawn about it, the general public are entitled to know why it is that the commissioner has reached this result and how he has reached this result ... That can only happen if you have public hearings.¹

Attorney-General John Rau has defended the legislation, remarking that it is not modelled on equivalent legislation in place in other states, but is instead based on the Australian Crime Commission, which also conducts secret hearings. Mr Rau has noted that the ICAC is an investigative agency, not a prosecuting agency:

We know that investigations may (and often do) produce unreliable or blatantly false leads. These need to be sorted from evidence that will support a prosecution in court.²

Where an ICAC investigation results in the commencement of court proceedings, the usual rules of

public disclosure afforded by the courts will apply. However, NSW Liberal Premier Barry O'Farrell has suggested that the SA Labor government is putting political interests ahead of the public interest.³

South Australian professionals have also expressed concern in relation to the "secretive" nature of the new ICAC. The President of the Law Society of South Australia, John White, has noted that other states generally gather evidence in private, then, when there is enough evidence to make a case, conduct the hearing in public. Flinders University professor Dr Dean Jaensch has gone so far as to say that the SA ICAC will be the most secretive anti-corruption body in the nation.⁴ In defence of such allegations, Mr Rau has stated that the ICAC is intended to investigate allegations of corruption and make appropriate referrals, not to "smear reputations without a trial".⁵

The impact of the secrecy provisions will not be tested until the remainder of the ICAC Act comes into force later this year. It is a requirement of the ICAC Act that, within five years of the commencement of any provision of the Act, the Attorney-General review and report on the operation of the Act. Such a review may allow for insight into the efficiency of the government's current model.

The primary functions of the ICAC Act include the identification and investigation of corruption in public administration, and the prevention or minimisation of corruption, misconduct and maladministration in public administration. For the purposes of the ICAC Act, corruption in public administration means conduct that constitutes:

- an offence against Pt 7 Div 4 (offences relating to public officers) of the Criminal Law Consolidation Act 1935 (SA) (including, for example, bribery);
- an offence against the Public Sector (Honesty and Accountability) Act 1995 (SA) or the Public Corporations Act 1993 (SA), or an attempt to commit such an offence;
- any other offence committed by a public officer;
- attempting, aiding, abetting, counselling, procuring, inducing or being knowingly involved with the commission of any of the abovementioned offences; or
- conspiring with others to effect the commission of any of the abovementioned offences.

Interestingly, the Act covers the corrupt conduct of a public officer while acting in his or her capacity as a public officer, or by a former public officer and related to his or her former capacity as a public officer, or by a person before becoming a public officer and related to his or her capacity as a public officer. The Act also applies retrospectively.

Misconduct in public administration means contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer, which constitutes a ground for disciplinary action against the officer. Misconduct in public administration also includes other misconduct of a public officer while acting in his or her capacity as a public officer.

For the purposes of the ICAC Act, maladministration in public administration means conduct by a public officer that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources, or involves substantial mismanagement in relation to the performance of official functions. This includes conduct resulting from impropriety, incompetence or negligence.

Public officers are listed in Sch 1 of the Act. The list includes members from the judicial and legislative arms of government, local government officers, public servants and police officers. In line with contemporary accountability mechanisms, the Act also extends to contractors working for a public authority or the Crown.

Under the ICAC Act, an "inquiry agency" is taken to mean the Ombudsman, the Police Ombudsman, the Commissioner for Public Sector Employment or a person declared by regulation to be an inquiry agency.

Independent Commissioner Against Corruption

The ICAC has a number of principal functions under the ICAC Act. First, the ICAC is responsible for identifying and investigating corruption in public administration, and referring such corruption either for prosecution, or to the Police or Police Ombudsman for investigation and prosecution. Second, the ICAC is to assist inquiry agencies (including, for example, the Ombudsman) and public authorities to identify and appropriately manage misconduct and maladministration in public administration. Such assistance includes providing directions and guidance to, and evaluating the practices, policies and procedures of, inquiry agencies and public authorities. Notably, the ICAC may also exercise the powers of an inquiry agency in respect of a matter referred to it, as the ICAC considers appropriate. Third, the ICAC is to conduct and facilitate educational programs designed to prevent or minimise corruption, misconduct and maladministration in public administration. While the ICAC may investigate any issue, as mentioned above, the dominant objective of the ICAC is to investigate serious or systemic corruption, misconduct or maladministration in public administration. It has the power to undertake investigation of corruption and maladministration by public officials that investigatory agencies have previously been ill-equipped to take on.

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The ICAC is required to perform his or her functions in a manner that is as open and accountable as is practicable, subject to a number of exceptions that are designed to maintain the integrity of investigations. Accordingly, complaints, reports or investigations of the ICAC or the Office for Public Integrity (OPI) containing details of the identity of an informant must be kept confidential, examinations are to be held in private, and information obtained in the administration of the Act is not to be publicly disclosed.

The ICAC is appointed by the Governor, with the approval of the Statutory Officers Committee. Appointment will be for a term not exceeding seven years, and an ICAC cannot hold office for consecutive terms that exceed 10 years in total. The ICAC must be a legal practitioner of at least seven years' standing or a former judge, but must not be a member of an Australian Parliament. The Commissioner can be removed from office by the Governor, on the address of both Houses of Parliament, on grounds including misconduct or a failure to satisfactorily carry out official duties.

The Commissioner is to be assisted by a Deputy Commissioner, who will be appointed by the Governor and subject to the same requirements as the ICAC. The ICAC has authority to engage staff and to appoint investigators and examiners, and may also make use of administrative units of the Public Service, including the utilisation of staff from SA Police and the Director of Public Prosecutions. The Commissioner may delegate a function or power under the Act, other than a function or power under s 31 (search warrants) or a prescribed function or power.

Office for Public Integrity

The primary functions of the OPI under the ICAC Act are to receive and assess complaints about public administration from members of the public and to receive and assess reports about corruption, misconduct and maladministration in public administration from inquiry agencies, public authorities and public officers. The OPI will then be responsible for making recommendations to the ICAC as to whether and by whom complaints and reports should be investigated.

The ICAC is required to establish a system that governs the way in which members of the public are to make a complaint about public administration to the OPI. Additionally, the ICAC will be responsible for establishing directions and guidelines that outline the matters required to be reported by an inquiry agency, public authority or public officer, and provide guidance as to the manner in which such matters should be reported. These guidelines will be made available on the ICAC website. It is an offence under the Act to prevent or obstruct a person from making a complaint or report,

to make a false or misleading statement in a complaint or report, and to make a groundless complaint or report. Each of these offences is punishable by a maximum penalty of \$10,000 or two years' imprisonment.

The Act provides guidance on the manner in which the OPI is to assess and make recommendations regarding complaints and reports. Where the OPI identifies a matter as raising a potential issue of corruption in public administration that could be the subject of a prosecution, the matter must be either investigated by the Commissioner or referred to the SA Police, the Police Ombudsman or another appropriate law enforcement agency. If a matter is assessed as raising a potential issue of misconduct or maladministration in public administration, the matter must be referred either to an inquiry agency or to the public authority concerned. In each of these instances, if the Commissioner considers it appropriate, the Commissioner may give directions or guidance to the authority or agency in respect of the matter, or exercise the powers of the agency in respect of the matter. Where a matter is assessed as raising other issues that should be dealt with by an inquiry agency, public authority or public officer, the matter must be referred to the agency, authority or officer. In the case that the OPI assesses a matter as trivial, vexatious or frivolous, the matter has previously been dealt with by an inquiry agency or public authority, and there is no reason to re-examine the matter, or there is other good reason why no action should be taken in respect of the matter, no action needs to be taken by the OPI or the ICAC.

The OPI will be comprised of public sector employees and employees of ICAC who are assigned to the OPI by ICAC. There are no prescribed qualifications for, or limitations upon numbers of, OPI staff.

Public statement

The Commissioner may make a public statement regarding a particular matter if, in the Commissioner's opinion, it is in the public interest to do so. Before making such a statement, the Commissioner must have regard to how the public statement might benefit the investigation of a matter, risk prejudicing a person's reputation, redress prejudice caused to a person's reputation by a public allegation of corruption or misconduct, or risk adversely affecting a potential prosecution.

Investigation

An investigation into corruption, misconduct or maladministration in public administration may be triggered by a complaint or report received by the OPI that has been assessed and forwarded to the ICAC, by the ICAC exercising its own discretion, or by the Attorney-General referring a matter directly to the ICAC for his or her consideration.

The Commissioner has the power to appoint suitable persons to be examiners or investigators for the purposes of the ICAC Act. The Commissioner is also responsible for preparing standard operating procedures that govern the exercise of powers by investigators for the purposes of an investigation, and making those operating procedures freely available on the internet.

Where the Commissioner decides to investigate a potential issue of corruption in public administration, the Commissioner must oversee the investigation. The Commissioner may also appoint one or more legal practitioners to assist as counsel in relation to the investigation.

The Commissioner has substantially the same powers as the Australian Crime Commission, on which Attorney-General Rau has acknowledged the ICAC is modelled. The ICAC has sweeping investigative powers. These powers allow investigators to:

- compel a public authority or public official to provide information;
- compel the production of documents or things;
- obtain warrants to enter and search properties and vehicles in public and private places;
- seize and retain items;
- use surveillance devices and intercept telephone calls; and
- compel a witness to answer questions during an examination.

In the course of carrying out an investigation, the investigator also has the authority to require a public authority or a person to produce:

- a written statement of information;
- a document or thing; and
- evidence of a person's personal details.

A warrant will only be issued where the ICAC or a judge of the Supreme Court is satisfied that the warrant is reasonably required in the circumstances for the purposes of conducting an investigation. The Commissioner may, on application by an investigator or his or her own motion, issue a warrant to enter, search, seize and retain property. However, a warrant to enter and search a property or vehicle in a private place may only be issued by a Supreme Court judge.

The Commissioner may require a South Australian law enforcement agency, inquiry agency or public authority to refrain from taking action or to conduct a joint investigation with the Commissioner in respect of a matter being investigated by the ICAC. Where the Commissioner does not think it appropriate to require an agency or authority to refrain from taking action, the Supreme Court may, on application made by the Commissioner, grant an injunction restraining a person from

engaging in conduct that is the subject of, or affects the subject matter of, an investigation by the ICAC.

At any time during an ICAC investigation or on completion of an investigation, the Commissioner may refer a matter to the relevant law enforcement agency or a public authority for further investigation.

Before referring a matter to an inquiry agency or public authority, the Commissioner is required to obtain the views of the agency or authority in relation to the referral. The Commissioner can provide directions or guidance to the agency or authority, which may make a recommendation as to the action that should be taken. The Commissioner can also exercise the powers of an inquiry agency in respect of a matter that has been referred to the agency. Where the Commissioner is not satisfied that an inquiry agency or public authority has taken appropriate action in relation to a matter referred to it by the ICAC, the Commissioner is required to inform the agency or authority of the grounds of the Commissioner's dissatisfaction and to provide the agency or authority with an opportunity to respond. If the Commissioner is not satisfied with the comments provided in response, the Commissioner may submit a report to the Minister responsible for the agency or authority. If, after receiving comments from the responsible Minister, the Commissioner is still not satisfied, he or she may provide a report outlining the grounds for dissatisfaction to be laid before both Houses of Parliament.

The Commissioner may decide, in the course of exercising his or her functions, to evaluate the practices, policies and procedures of an inquiry agency or a public authority. Before such an evaluation occurs, the ICAC is obliged to notify the relevant agency or authority of the nature and timing of the evaluation. The relevant agency or authority must assist the ICAC during an evaluation. At the conclusion of an evaluation, the ICAC must prepare a report to be provided to both Houses of Parliament. This provision allows for unprecedented levels of public scrutiny of the internal policies and procedures of inquiry agencies and public authorities. In addition to this reporting requirement, the ICAC may also recommend that the relevant agency or authority change its practices, policies or procedures in a specified way or participate in educational programs designed to achieve specific outcomes.

Obstructing an investigation under the Act is an offence with a maximum penalty of a \$10,000 fine or two years' imprisonment.

Examination

The ICAC has the power to undertake examinations in the course of an investigation. An examination must be held in private and the examiner may give directions

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as to who may be present during the examination. Persons giving evidence before an examiner are entitled to legal representation. An examiner has the power to issue a summons for persons to appear before an examination, and to produce documents. Failure to comply with directions of an examiner and providing false or misleading information in an examination are offences that carry a maximum penalty of \$20,000 or four years' imprisonment and can also constitute contempt of the Commissioner. Further, a person who is served with a summons, if instructed, must not disclose the existence of the summons or any information about it. Such disclosure is an offence under the Act, with a maximum penalty of \$5000 or one year's imprisonment.

These sweeping investigative powers and harsh penalties stimulate doubt as to whether the public interest in protecting the reputation of individuals appearing before the ICAC and the public interest in exposing corruption, maladministration and misconduct in public administration are evenly balanced.

Accountability

In order to remain accountable, the ICAC is required to report annually to Parliament on the number and general nature of complaints, reports, investigations and other matters (such as examinations and the issuing of warrants) that the Commissioner has dealt with under the Act. Additionally, the Attorney-General must appoint a person to undertake an annual review of the exercise of the Commissioner's powers. These reports will consider the efficiency and utility of the ICAC and OPI and will be reviewed by the Crime and Public Integrity Policy Committee of Parliament. It is also a function of the Commissioner to perform his or her functions in a manner that is as open and accountable as is practicable, subject to a number of exceptions.

Closed hearings and confidentiality

The ICAC Act provides that proceedings for an application for a warrant or injunction under the Act, proceedings for contempt of the Commissioner, and other proceedings under the Act (other than for an offence) must be heard in private. As noted above, the secretive nature of proceedings under the Act has attracted much criticism. Proceedings for an offence against the Act are required to be heard in public, unless a public hearing would prejudice an investigation under the Act or unduly prejudice the reputation of a person other than the defendant.

The ICAC Act affords protections to persons who make complaints and give evidence under the Act. It is an offence to prevent, hinder or obstruct another person from making a complaint or report. Additionally, it is an

offence to commit an act of victimisation. Committing an "act of victimisation" means to cause detriment to another because they have made a complaint or report, or intend to make a complaint or report, under the Act. An examiner has power to make arrangements to protect any person who appears at an examination or otherwise provides information to the ICAC or the OPI.

The ICAC Act creates a new offence in relation to the confidential information obtained in the course of the administration of the Act. Specifically, a person must not, directly or indirectly, disclose information obtained in the course of the administration of the Act that relates to a complaint, report, assessment, investigation, referral or evaluation under the Act. The offence carries a maximum penalty of \$10,000 or two years' imprisonment. However, exceptions include the disclosure of information for the purpose of the administration or enforcement of the Act, or for the purposes of a criminal proceeding or a proceeding for the imposition of a penalty. The Commissioner also has the power to authorise the provision of information where he or she believes it is appropriate to do so.

A person must not, other than as authorised, publish or cause to be published any of the following information:

- information tending to suggest that a particular person is, has been, may be, or may have been the subject of a complaint, report, assessment, investigation or referral under the Act;
- information that might reveal the identity or location of a person who has made a complaint or report;
- the fact that a person has made, or may make, a complaint or report;
- information that might reveal the identity or location of a person who has provided, or may be about to provide, evidence under the Act; or
- any other information publication of which is prohibited by the Commissioner.

A breach of this provision carries a harsh penalty, being \$150,000 for a body corporate or \$30,000 in the case of a natural person. Such strict secrecy provisions are intended to prevent the publication of sensitive information that may not result in further action being taken.

Related amendments

The ICAC Act amends a number of related Acts in order to ensure consistency in terminology across legislation and aid the ICAC and the OPI in the execution of their powers and functions.

Notably, the Act amends the Freedom of Information Act 1991 (SA), the Criminal Investigation (Covert

Operations) Act 2009 (SA) and the Listening and Surveillance Devices Act 1972 (SA) to ensure that documents provided to the ICAC during an investigation are kept confidential, and to allow investigators to secretly record private conversations in the course of an investigation.

The ICAC Act amends the Ombudsman Act 1972 (SA), confirming the Ombudsman as a relevant “inquiry agency” to which the ICAC may refer matters of misconduct or maladministration in public administration. Accordingly, the Act operates to extend the definition of an “agency to which the [Ombudsman Act] applies” to include any statutory incorporated or unincorporated body that is established or continued in existence for a public purpose. This is a wide definition that encompasses bodies such as the South Australian Local Government Association, which has not previously been subject to investigation by the Ombudsman. Amendments to the Ombudsman Act also ensure that the Ombudsman does not have powers to investigate the ICAC or the OPI.

Significant amendments to the Local Government Act 1999 (SA) address mandatory codes of conduct for elected members and staff, the ability of elected members to obtain legal advice in connection with their duties, changes to the grounds for complaints against individual members, and the investigation of members and councils.

Miscellaneous

The Commissioner may prepare a report that outlines recommendations for the amendment or repeal of a law or other matters arising in the course of the performance of the ICAC’s functions that the Commissioner considers to be in the public interest to disclose. Such a report may be provided to the Attorney-General and both Houses of Parliament for consideration.

It is intended that the Commissioner of Police and the Police Ombudsman are to enter into arrangements with the ICAC under which the Commissioner, the Deputy Commissioner, examiners and investigators are provided

with access to confidential information and databases for the purposes of investigations under the Act.

Current activity in South Australia has seen the release of the draft Mandatory Codes of Conduct for council elected members and staff, probably the most significant provisions of which related to the receipt of gifts and benefits. Additionally, the Commissioner has recently appointed the Director of Operations, who will lead the investigation team.

It is now a matter of developing all of the required codes, systems and guidelines and appointing or seconding the necessary staff to ensure that the ICAC can be fully operational from 1 September 2013. The Commissioner has a busy few months ahead!



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Footnotes

1. B Crouch, “South Australia’s ICAC shame under the microscope”, *Adelaide Now*, 24 November 2012, available at www.adelaidenow.com.au.
2. J Rau, “No media feeding frenzy for SA’s Independent Commissioner Against Corruption”, *Adelaide Now*, 22 November 2012, available at www.adelaidenow.com.au.
3. Above, n 1.
4. D Jaensch, “ICAC secrecy an affront to democracy”, *Adelaide Now*, 20 November 2012, available at www.adelaidenow.com.au.
5. Above, n 2.