

# ‘A MORE EFFECTIVE CORRUPTION-BUSTING TOOL’<sup>1</sup> OR AN EFFECTIVELY BUSTED ICAC? EXAMINING THE 2021 CRIME AND PUBLIC INTEGRITY POLICY COMMITTEE AMENDMENTS TO THE *INDEPENDENT COMMISSIONER AGAINST CORRUPTION ACT 2012 (SA)*

## I INTRODUCTION

With public trust in government at an all-time low,<sup>2</sup> and where our elected representatives, on all sides of politics, have been mired in a seeming litany of scandals,<sup>3</sup> and indeed, where calls to establish a federal integrity commission have never been greater,<sup>4</sup> the time is right for Australian legislatures to re-examine the role of anti-corruption bodies and integrity agencies in ensuring

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<sup>1</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4011 (Frank Pangallo).

<sup>2</sup> Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study* (Report, School of Politics & International Relations, ANU College of Arts & Social Studies, December 2019) 15.

<sup>3</sup> See, eg: Michael McGowan, ‘Leppington Triangle: Coalition’s \$30m Purchase of Airport Land “Incompetent or Corrupt”’, *The Guardian* (online, 29 April 2021) <<https://www.theguardian.com/australia-news/2021/apr/29/leppington-triangle-coalitions-30m-purchase-of-airport-land-incompetent-or-corrupt>>; Anne Davies, ‘Former NSW Labor Ministers Eddie Obeid and Ian Macdonald Found Guilty of Corruption Charges’, *The Guardian* (online, 19 July 2021) <<https://www.theguardian.com/australia-news/2021/jul/19/former-nsw-labor-ministers-eddie-obeid-and-ian-macdonald-found-guilty-of-corruption-charges>>; ‘Gladys Berejiklian Resigns as NSW Premier after ICAC Probe into Her Relationship with Daryl Maguire Announced’, *ABC News* (online, 1 October 2021) <<https://www.abc.net.au/news/2021-10-01/icac-investigating-gladys-berejiklian-daryl-maguire/100506956>>; Nino Bucci, ‘Adem Somyurek “Living Proof” of the Consequences of Labor’s “Unethical Culture”’, *Ibac Commissioner Says*, *The Guardian* (online, 11 November 2021) <<https://www.theguardian.com/australia-news/2021/nov/11/adem-somyurek-living-proof-of-the-consequences-of-labors-unethical-culture-ibac-commissioner-says>>.

<sup>4</sup> Katharine Murphy, ‘Eighty-One Per Cent of Australian Voters Want a Federal ICAC, Guardian Essential Poll Shows’, *The Guardian* (online, 3 November 2020) <<https://www.theguardian.com/australia-news/2020/nov/03/eighty-one-per-cent-of-australian-voters-want-a-federal-icac-guardian-essential-poll-shows>>. See also ‘Open Letter: 59 Eminent Australians and Legal Fraternity Call on PM To Fulfil Election Promise and Legislate National Integrity Commission’ (Media Release,

accountability, good governance, and public confidence in public administration. In South Australia, the recent amendments to the *Independent Commissioner Against Corruption Act 2012 (SA)*<sup>5</sup> (the ‘ICAC Act’) are said by some to achieve this end. The amendments make significant changes to the jurisdiction, functions, and powers of the Independent Commissioner Against Corruption (the ‘ICAC’), create exemptions to the stringent confidentiality provisions under the *ICAC Act*, and introduce new mechanisms for review and oversight of the ICAC.

Despite its benign appearance, the passage of this legislation has created a clear divide between Parliament and the ICAC. The chief architect of the amendments was Frank Pangallo MLC, the presiding Member of the Crime and Public Integrity Policy Committee (‘CPIPC’).<sup>6</sup> Pangallo claimed the amendments reflected the recommendations of a recent CPIPC report (the ‘CPIPC amendments’), and made the now-titled Independent Commission Against Corruption a ‘more effective corruption-busting tool’.<sup>7</sup> He also asserted that under the amended legislation, the ICAC would be ‘more effective’ in investigating wrongdoing, ‘more efficient’ in preventing waste of taxpayer dollars, and ‘more accountable’ to Parliament than ever before.<sup>8</sup> On this account, the CPIPC amendments appear to be perfectly sensible measures which any fair-minded person should support. Surely this view is reflected in the amendments’ swift and unanimous passage through both Houses of Parliament?<sup>9</sup>

However, in a stunning rebuke of the legislation, the current ICAC, Ann Vanstone KC, claimed that the true purpose and effect of the amendments was to dismantle the ICAC<sup>10</sup> — to ‘protect corrupt politicians’.<sup>11</sup> In a similar vein, Vanstone’s

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The Australia Institute, 22 June 2021) <<https://australiainstitute.org.au/post/open-letter-59-eminant-australians-legal-fraternity-call-on-pm-to-fulfil-election-promise-and-legislate-national-integrity-commission>>.

<sup>5</sup> The short title of the Act has been amended to the *Independent Commission Against Corruption Act 2012 (SA)* (‘ICAC Act’); *Independent Commissioner Against Corruption Act 2012 (SA)* s 1, as amended by *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act 2021 (SA)* s 5 (‘Amending Act’).

<sup>6</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4011 (Frank Pangallo).

<sup>7</sup> Ibid.

<sup>8</sup> South Australia, *Parliamentary Debates*, Legislative Council, 22 September 2021, 4320 (Frank Pangallo).

<sup>9</sup> “‘Extraordinary’ Bill To Reduce Powers of SA’s Anti-Corruption Commissioner Passes Parliament’, *ABC News* (online, 23 September 2021) <<https://www.abc.net.au/news/2021-09-23/sa-icac-bill-passes-parliament/100487668>>.

<sup>10</sup> Ann Vanstone, ‘ICAC’s Ability To Hold Politicians to Account Is under Threat’, *InDaily* (online, 23 September 2021) <<https://indaily.com.au/opinion/2021/09/23/icacs-ability-to-hold-politicians-to-account-is-under-threat/>>.

<sup>11</sup> ‘Mixed Reactions to SA Parliament’s Changes to the Independent Commissioner Against Corruption’, *ABC News* (online, 24 September 2021) <<https://www.abc.net.au/news/2021-09-24/sa-icac-bill-passing-fuels-debate/100489280>>.

predecessor, Bruce Lander KC, claimed the amendments to the *ICAC Act* would ‘set back the anti-corruption cause in South Australia’.<sup>12</sup> The stark conflict between the views of Parliament and the ICAC raise one central question for the public to ask themselves: do these amendments bust corruption, as claimed by Pangallo, or bust the ICAC, as claimed by Vanstone?

To that end, Part II of this comment begins by explaining the legislative history of the *ICAC Act* and outlines the impetus and rationale which underpinned its enactment. Part III provides a digest of changes to the *ICAC Act* and explains the background and effect of the CPIPC amendments. Finally, Part IV submits that the CPIPC amendments, though timely and perhaps well-intentioned, considerably weaken the ability of the ICAC to investigate and root out wrongdoing in public administration.

## II INDEPENDENT COMMISSIONER AGAINST CORRUPTION ACT 2012 (SA)

### *A Background*

On 2 May 2012, the Weatherill Government introduced the Independent Commissioner Against Corruption Bill 2012 (SA) (the ‘ICAC Bill’) before Parliament with a view to establish the ICAC and the Office for Public Integrity (‘OPI’).<sup>13</sup> The introduction of the ICAC Bill came after several years of firm opposition by the Rann Government.<sup>14</sup> It also followed considerable public debate,<sup>15</sup> a series of crossbench

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<sup>12</sup> Tom Richardson, ‘Ex-ICAC Hits Out at Reforms as Vanstone Flags Resignation’, *Indaily* (online, 23 September 2021) <<https://indaily.com.au/news/2021/09/23/ex-icac-hits-out-at-reforms-as-vanstone-flags-resignation>>.

<sup>13</sup> South Australia, *Parliamentary Debates*, House of Assembly, 2 May 2012, 1356–7 (Tom Kenyon).

<sup>14</sup> See, eg: South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1413 (John Rau); South Australia, *Parliamentary Debates*, Legislative Council, 21 November 2007, 1504–5 (Bernard Finnigan); South Australia, *Parliamentary Debates*, Legislative Council, 26 November 2008, 963–4 (Bernard Finnigan); South Australia, *Parliamentary Debates*, Legislative Council, 15 July 2009, 2911–12 (Bernard Finnigan). See also South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2012, 1833–4 (Vickie Chapman).

<sup>15</sup> See, eg: Michael Kelliedy, ‘Strong Case for SA Corruption Commission’, *The Advertiser* (Adelaide, 4 September 2007) 18; Dean Jaensch, ‘All States Need Protection from Corruption’, *The Advertiser* (Adelaide, 2 January 2008) 18; David Davidson, ‘Anti-Corruption Commission Necessary’, *The Advertiser* (Adelaide, 1 March 2008) 78; David Coombe, ‘Anti-Corruption Call’, *The Advertiser* (Adelaide, 16 March 2008) 85; Independent Commissioner Against Corruption (SA), ‘Review of Legislative Schemes: Oversight of Complaints Relating to the Conduct of Members of SA Police Complaints and Reports about Public Administration’ (Discussion Paper, February 2015) 4.

and opposition Bills,<sup>16</sup> and the publication of a 2010 discussion paper by the South Australian Attorney-General's Department. That discussion paper recommended the establishment of 'an independent Commissioner for Public Integrity, with Royal Commission powers', and a 'Public Integrity Office' as a 'single entry point for members of the public for complaints involving public bodies'.<sup>17</sup> The ICAC Bill adopted the model of the Australian Crime Commission in its formulation.<sup>18</sup>

At the time the ICAC Bill was introduced, South Australia was the only state in the nation which had not already established a state-based anti-corruption body or integrity commission.<sup>19</sup> Prior to the ICAC Bill, the public integrity framework in South Australia was piecemeal and fragmented. There was no single entity in South Australia responsible for investigating complaints about corruption in public administration.<sup>20</sup> Generally, complaints involving corruption were internally investigated by the agencies themselves.<sup>21</sup>

<sup>16</sup> Parliament has considered nine Bills for establishing an ICAC: Independent Commission Against Crime and Corruption Bill 2005 (SA) (introduced by Ian Gilfillan); Independent Commission Against Crime and Corruption Bill 2007 (SA) (introduced by Sandra Kanck); Independent Commission Against Crime and Corruption Bill 2007 (SA) (introduced by Kris Hanna); Independent Commission Against Crime and Corruption Bill 2008 (SA) (introduced by Isobel Redmond); Independent Commission Against Corruption Bill 2008 (SA) (introduced by Sandra Kanck); Independent Commission Against Corruption Bill 2009 (SA) (introduced by Robert Brokenshire); Independent Commission Against Corruption Bill 2010 (SA) (introduced by Stephen Wade); Independent Commission Against Corruption Bill 2010 (SA) (introduced by Robert Brokenshire); Independent Commission Against Corruption Bill 2010 (SA) (introduced by Isobel Redmond).

<sup>17</sup> Attorney-General's Department (SA), 'An Integrated Model: A Review of the Public Integrity Institutions in South Australia and an Integrated Model for the Future' (Discussion Paper, November 2010) 45–6 ('AGD Discussion Paper'), discussed in South Australia, *Parliamentary Debates*, House of Assembly, 2 May 2012, 1358 (Tom Kenyon).

<sup>18</sup> South Australia, *Parliamentary Debates*, House of Assembly, 2 May 2012, 1358 (Tom Kenyon).

<sup>19</sup> Ibid 1357; *Independent Commission Against Corruption Act 1988* (NSW); *Crime and Corruption Act 2001* (Qld); *Integrity Commission Act 2009* (Tas); *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic); *Corruption, Crime and Misconduct Act 2003* (WA).

<sup>20</sup> AGD Discussion Paper (n 17) 11 [2.0.1]–[2.0.2]. Further, the number of independent bodies designed to resolve complaints and ensure standards of conduct (eg, the Ombudsman, Police Complaints Authority (now known as the Police Ombudsman), Health and Community Services Complaints Commissioner etc) invariably created navigational issues for complainants. For example, the Ombudsman noted in its annual report for 2009–10 that approximately 64% of all approaches to the Ombudsman were outside its scope and were referred to the appropriate body: Ombudsman South Australia, *Annual Report 2009/2010* (Report, 2010) 3. The establishment of the Office for Public Integrity as a 'one stop shop' would assist members of the public to raise complaints with the most appropriate body at first instance: AGD Discussion Paper (n 17) 35 [5.1.1].

<sup>21</sup> AGD Discussion Paper (n 17) 35 [5.1.1].

External agencies, such as the Ombudsman and the Auditor-General, could also respond to complaints or discover corrupt conduct, but only in narrow circumstances, and often only as a collateral function of their primary activities.<sup>22</sup> For example, before the creation of the ICAC, a complaint raising issues of corruption could only be investigated by the Ombudsman in circumstances where the complainant was *directly affected* by an *administrative act*,<sup>23</sup> and where they had exhausted all rights of appeal or review.<sup>24</sup> Even when a complaint satisfied this threshold, the Ombudsman, despite having powers of a Royal Commission,<sup>25</sup> could only remediate the complaint by way of non-binding recommendations. This complaint resolution outcome entrusted the agencies themselves with the responsibility to act upon recommendations.<sup>26</sup> While the Ombudsman could also investigate matters on its own initiative, the resolution options available were similarly limited.<sup>27</sup>

Likewise, the exercise of the Auditor-General's oversight function was largely confined to the auditing of accounts of publicly funded bodies and publicly funded projects in terms of their efficiency, economy and effectiveness.<sup>28</sup> This scope may encompass corrupt conduct or other forms of misbehaviour in public office, but the discovery of such matters would properly be regarded as a 'beneficial by-product' of the Auditor-General's primary role.<sup>29</sup> The Auditor-General could not investigate complaints, however pertinent to its role, as there was no formal complaints mechanism to the Auditor-General, nor was there a statutory mandate for the Auditor-General to investigate such matters.<sup>30</sup>

On the other hand, complaints which disclosed allegations of criminal corruption could be investigated by South Australia Police ('SAPOL'), who possess powers of arrest, entry, and search,<sup>31</sup> as well as the ability to conduct covert operations and install surveillance devices.<sup>32</sup> In the context of public integrity investigations, SAPOL's powers bring unique advantages which are unavailable to other agencies, but unlike inquiry bodies, SAPOL lacks coercive powers to compel a person to attend

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<sup>22</sup> Ibid 11 [2.0.5]–[2.0.6]. See also: *Ombudsman Act 1972* (SA) s 25(1), as at 31 August 2013; *Public Finance and Audit Act 1987* (SA) ss 31–3, as at 31 August 2013; Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 137.

<sup>23</sup> *Ombudsman Act 1972* (SA) ss 3(1) (definitions of 'act', 'administrative act'), 15(3a), 17(2)(c), as at 31 August 2013.

<sup>24</sup> Ibid s 13(3).

<sup>25</sup> Ibid s 19.

<sup>26</sup> Ibid s 25(2).

<sup>27</sup> Ibid ss 13(2), 25(2).

<sup>28</sup> *Public Finance and Audit Act 1987* (SA) s 32(1).

<sup>29</sup> AGD Discussion Paper (n 17) 18 [2.5.6]. See also South Australia, *Parliamentary Debates*, Legislative Council, 12 June 2012, 1459 (Stephen Wade).

<sup>30</sup> AGD Discussion Paper (n 17) 18 [2.5.5].

<sup>31</sup> *Summary Offences Act 1953* (SA) pts 15, 18.

<sup>32</sup> *Surveillance Devices Act 2016* (SA) pt 3.

and give evidence at an inquiry hearing, or compel the production of documents.<sup>33</sup> Even so, other forms of non-criminal misbehaviour in public administration (i.e., misconduct and maladministration) would escape the reach of SAPOL.

Put simply, prior to the establishment of the ICAC, the existing South Australian public integrity framework lacked the necessary investigative jurisdiction and capacity to effectively identify and root out corruption or systemic failures in public administration.

### B *Enactment*

On 28 November 2012, Parliament passed the *ICAC Act*, establishing the ICAC and OPI with the following primary objects: (1) to identify and investigate corruption in public administration; (2) to prevent or minimise corruption, misconduct, and maladministration in public administration; and (3), to 'achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person's reputation'.<sup>34</sup> In pursuit of these objects, the *ICAC Act* conferred a number of powers and functions on the ICAC. These included: powers to refer a corruption investigation for prosecution, or for investigation and prosecution; advisory functions to assist inquiry agencies and public authorities to identify and deal with misconduct and maladministration;<sup>35</sup> and educative functions to prevent or minimise corruption, misconduct, and maladministration.<sup>36</sup>

The third primary object of the *ICAC Act* responded to the significant misgivings of Parliament about the possible destruction of reputation which could result from the establishment of the ICAC, especially if it was to hold public hearings. Many Members of Parliament, on all sides of the chamber, expressed concern that the nature of allegations investigated by the ICAC, if ventilated in a public forum, could result in undue prejudice to the reputations of those who appeared before the ICAC.<sup>37</sup> This risk was heightened by the significant media interest that public hearings would inevitably generate, as well as the possibility for malicious actors to make frivolous or vexatious complaints.<sup>38</sup> To mitigate this risk, the *ICAC Act* included a number of protections. First, it required examinations into corruption

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<sup>33</sup> See *Royal Commissions Act 1917* (SA) s 10.

<sup>34</sup> *ICAC Act* (n 5) s 3(1), as enacted.

<sup>35</sup> *Ibid* s 7(1).

<sup>36</sup> *Ibid*.

<sup>37</sup> South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2012, 1835 (John Rau, Attorney-General); South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2012, 1819–22 (Isobel Redmond, Leader of the Opposition); South Australia, *Parliamentary Debates*, Legislative Council, 28 June 2012, 1609 (Mark Parnell); South Australia, *Parliamentary Debates*, Legislative Council, 28 June 2012, 1616–17 (Ann Bressington).

<sup>38</sup> See above n 37.



to be held in private.<sup>39</sup> Second, it created stringent confidentiality provisions and imposed severe financial penalties for contravention.<sup>40</sup> Third, it allowed the ICAC to make a public statement to allay the risk of prejudice to a person's reputation if, after having regard to certain considerations, the ICAC was satisfied that it was in the public interest to do so.<sup>41</sup> Fourth, the *ICAC Act* did not require the ICAC to investigate matters assessed by the OPI as trivial, vexatious, or frivolous.<sup>42</sup>

The threshold of corruption under the *ICAC Act* was also the subject of some debate. The definition of 'corruption' supplied by s 5(1) of the *ICAC Act* created two categories of corrupt conduct. The first category of corrupt conduct included any criminal offence committed by a 'public officer'<sup>43</sup> while acting in their official capacity.<sup>44</sup> The second and much narrower category of corrupt conduct specifically included: offences of dishonesty,<sup>45</sup> such as theft, dishonest dealing with documents, or deception;<sup>46</sup> offences contrary to the *Public Sector (Honesty and Accountability) Act 1995* (SA) and the *Public Corporations Act 1993* (SA);<sup>47</sup> and offences relating to public officers, including, bribery or corruption of public officers, threats and reprisals against public officers, abuse of public office, and demanding or requiring benefit on the basis of public office.<sup>48</sup>

This criminal standard of corruption was critiqued as somewhat defeating the overarching object of the *ICAC Act*, which is focussed on 'preserving and safeguarding confidence and the integrity of ... public officers, agencies and authorities in the State of South Australia'.<sup>49</sup> The opposition in particular argued that the criminal standard of corruption set too high a bar for matters to be investigated by the ICAC, therefore placing most matters beyond its reach. The opposition also contended that this definition was deficient as it did not capture the full spectrum of corrupt conduct, nor did it accord with internationally recognised definitions of corruption,<sup>50</sup>

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<sup>39</sup> *ICAC Act* (n 5) sch 2 s 3(3), as enacted.

<sup>40</sup> *Ibid* s 56.

<sup>41</sup> *Ibid* s 25. See also South Australia, *Parliamentary Debates*, Legislative Council, 28 June 2012, 1616–17 (Ann Bressington).

<sup>42</sup> *ICAC Act* (n 5) s 24(4), as enacted.

<sup>43</sup> *Ibid* sch 1.

<sup>44</sup> *Ibid* s 5(1)(c). This definition also captured conduct which constituted complicity, inducement or a conspiracy to commit any of the mentioned offences: *ibid* s 5(1)(d), as enacted.

<sup>45</sup> *Ibid* s 5(1)(c), as enacted; *Criminal Law Consolidation Act 1935* (SA) pt 5 ('*CLCA*').

<sup>46</sup> *CLCA* (n 45) pt 7 div 4.

<sup>47</sup> *ICAC Act* (n 5) s 5(1)(b), as enacted.

<sup>48</sup> *Ibid* s 5(1)(a).

<sup>49</sup> South Australia, *Parliamentary Debates*, House of Assembly, 2 May 2012, 1356 (Tom Kenyon).

<sup>50</sup> 'What Is Corruption?', *Transparency International* (Web Page) <<https://www.transparency.org/en/what-is-corruption>>.

let alone community expectations.<sup>51</sup> In a similar vein, crossbench Members highlighted the opaque nature of corruption and the difficulty of precisely delineating corrupt conduct from other forms of misbehaviour in public office, like maladministration and misconduct.<sup>52</sup> Striving to avoid a ‘semantic argument’, however, the government contended that ‘corruption’ should be referred to as ‘a criminal act, something known to the criminal law which is currently capable of being prosecuted’.<sup>53</sup>

In the end, Parliament considered that the ICAC Bill got the balance right,<sup>54</sup> and on 2 September 2013, the ICAC commenced operations.<sup>55</sup> The *ICAC Act*, as enacted, empowered the ICAC to investigate matters raising a potential issue of corruption,<sup>56</sup> and refer matters raising a potential issue of misconduct or maladministration to an inquiry agency or the public authority concerned.<sup>57</sup>

### III 2021 CRIME AND PUBLIC INTEGRITY POLICY COMMITTEE AMENDMENTS

On 25 August 2021, Frank Pangallo MLC introduced the Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Bill 2021 (SA) before Parliament, proposing significant changes to the powers and functions of the now-titled Independent Commission Against Corruption (the ‘Commission’).

<sup>51</sup> South Australia, *Parliamentary Debates*, Legislative Council, 12 June 2012, 1462 (Stephen Wade); South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2012, 1786 (Isobel Redmond, Leader of the Opposition).

<sup>52</sup> South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2012, 1828–9 (Bob Such); South Australia, *Parliamentary Debates*, Legislative Council, 28 June 2012, 1609 (Mark Parnell). See also: South Australia, *Parliamentary Debates*, House of Assembly, 2 May 2012, 1356 (Tom Kenyon); South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2012, 1786 (Isobel Redmond, Leader of the Opposition).

<sup>53</sup> South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2012, 1836 (John Rau, Attorney-General).

<sup>54</sup> Ibid 1835; South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2012, 1819–22 (Isobel Redmond, Leader of the Opposition); South Australia, *Parliamentary Debates*, Legislative Council, 28 June 2012, 1609 (Mark Parnell).

<sup>55</sup> South Australia, *South Australian Government Gazette*, No 31, 23 May 2013, 2006.

<sup>56</sup> *ICAC Act* (n 5) s 24(1), as enacted.

<sup>57</sup> Ibid s 24(2). On 1 April 2017, s 24(2) was amended to empower the ICAC to investigate matters raising potential issues of *serious* or *systemic* misconduct or maladministration in public administration: *Independent Commissioner Against Corruption (Miscellaneous) Amendment Act 2016* (SA) s 11. See also Bruce Lander, *Oakden: A Shameful Chapter in South Australia’s History* (Report, Independent Commissioner Against Corruption (SA), 28 February 2018) 27–31.



The CPIPC amendments sought to implement recommendations contained in the CPIPC report,<sup>58</sup> and arose from the context of revelations about the conduct of the ICAC in its investigation of Chief Superintendent Doug Barr in 2017, as well as its conduct of Operation Bandicoot, a joint ICAC-SAPOL investigation of eight police officers accused of stealing property from crime scenes.<sup>59</sup>

On 23 September 2021, just over a month after its introduction, Parliament unanimously passed the Bill.<sup>60</sup> On 7 October 2021, the *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act 2021 (SA)* (the ‘*Amending Act*’) commenced operation, enacting 57 amendments to the *ICAC Act* and 64 related amendments to other Acts.<sup>61</sup> The background and effects of the amendments are discussed below.

### A *Jurisdiction and Powers*

#### 1 *Misconduct and Maladministration*

Sections 7 and 24 of the *ICAC Act* have been amended to restrict the Commission’s jurisdiction. Under the amended *ICAC Act*, the Commission may only investigate matters of corruption in public administration, where previously it could also investigate maladministration and misconduct.<sup>62</sup> Those maladministration and misconduct<sup>63</sup> functions are now vested with the Ombudsman.<sup>64</sup>

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<sup>58</sup> South Australia, *Parliamentary Debates*, Legislative Council, 22 September 2021, 4321 (Frank Pangallo), discussing Crime and Public Integrity Policy Committee, Parliament of South Australia, *Report of the Crime and Public Integrity Committee into Matters of Public Integrity in South Australia* (Report No 5, December 2020).

<sup>59</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4012 (Frank Pangallo); Stephanie Richards, ‘ICAC’s Refusal To Let Aggrieved Widow Speak “High Catalyst” for Reform’, *InDaily* (online, 29 September 2021) <<https://indaily.com.au/news/2021/09/29/icacs-refusal-to-let-aggrieved-widow-speak-high-catalyst-for-reform>>; Nigel Hunt, ‘Police Union Seeks Legal Costs Payout over Cleared Officers’, *The Advertiser* (online, 12 March 2020) <<https://www.adelaidenow.com.au/truecrimeaustralia/police-courts/police-union-seeks-legal-costs-payout-over-cleared-officers/news-story/5a08bd38a6e45a8db6e1e7efdafbfe52>>.

<sup>60</sup> See (n 9).

<sup>61</sup> South Australia, *Parliamentary Debates*, House of Assembly, 23 September 2021, 7761; South Australia, *Parliamentary Debates*, Legislative Council, 23 September 2021, 4419; *Amending Act* (n 5). See *ICAC Act* (n 5) Legislative History.

<sup>62</sup> *ICAC Act* (n 5) s 7, as amended by *Amending Act* (n 5) s 11(1); *ICAC Act* (n 5) s 24, as amended by *Amending Act* (n 5) s 23(3).

<sup>63</sup> *ICAC Act* (n 5) s 24(2), as at 6 October 2021. The definition of misconduct in public administration now has a higher threshold and involves an element of intention and seriousness: *Ombudsman Act 1972* (SA) s 4(1).

<sup>64</sup> *Ombudsman Act 1972* (SA) ss 4, 5A, as inserted by *Amending Act* (n 5) sch 1 pt 12 items 28, 29.

This amendment appears to reflect recommendations 1 and 2 of the CPIPC *Inquiry into Matters of Public Integrity in South Australia*. The CPIPC accepted that the Ombudsman was the 'most appropriate office for dealing with matters of misconduct and maladministration', and that the conferral of same upon the Ombudsman would clarify public understanding of the Commission's functions.<sup>65</sup>

## 2 Definition of 'Corruption in Public Administration'

The Commission's amended jurisdiction is narrowed even further by changes to the definition of 'corruption in public administration' under s 5. Section 5 has been amended so that dishonesty offences, or any criminal offence committed by a public officer while acting in their official capacity, do not amount to corruption within the meaning of the *ICAC Act*.<sup>66</sup>

This amendment goes much further than the definition of corruption proposed by recommendation 6 of the CPIPC report,<sup>67</sup> reflecting a concern that the ICAC is focussed on 'trifling' corruption rather than serious and systemic corruption.<sup>68</sup>

## 3 Office for Public Integrity and Own-Motion Investigations

The CPIPC amendments also make the OPI, the Commission's clearing house for complaints concerning public officers, a standalone body.<sup>69</sup> Under the amended legislation, the OPI is now responsible for the assessment of complaints and reports, which was previously the responsibility of the Commission.

The amendments also do away with s 23(2) which, in a roundabout way, empowered the Commission to conduct investigations into corruption, maladministration or misconduct on its own initiative.<sup>70</sup> As a consequence of this change and the broader amendments to the Commission's jurisdiction, the Commission may now only investigate complaints which *have been assessed* by the OPI as raising a potential issue of corruption in public administration.<sup>71</sup>

This change appears to reflect recommendation 3 of the CPIPC report, which proposed that the OPI be established as a separate entity without reporting responsibilities to the Commissioner.<sup>72</sup> The CPIPC considered that the disaggregation of

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<sup>65</sup> Crime and Public Integrity Policy Committee (n 58) 148–50.

<sup>66</sup> *ICAC Act* (n 5) s 5(1), as amended by *Amending Act* (n 5) s 8(1).

<sup>67</sup> Crime and Public Integrity Policy Committee (n 58) 158.

<sup>68</sup> South Australia, *Parliamentary Debates*, Legislative Council, 22 September 2021, 4320–1 (Frank Pangallo).

<sup>69</sup> *ICAC Act* (n 5) pt 3, as amended by *Amending Act* (n 5) s 17.

<sup>70</sup> *ICAC Act* (n 5) s 23(2), as repealed by *Amending Act* (n 5) s 22. See also Lander (n 57) 27–31.

<sup>71</sup> *ICAC Act* (n 5) s 24(1).

<sup>72</sup> Crime and Public Integrity Policy Committee (n 58) 152.

assessment and investigation functions into separate, independent bodies would operate as an ‘integrity measure’ in the event of ‘corruption or other failures’ within the Commission.<sup>73</sup>

#### 4 *Parliamentary Privilege*

Another amendment relevant to the Commission’s jurisdiction is the strengthening of protections for parliamentary privilege under s 6. The amended s 6 now makes clear that powers under the *ICAC Act* ‘may not be exercised in relation to any matter to which parliamentary privilege applies’.<sup>74</sup> Section 6 continues by explaining in a newly introduced legislative note: ‘[e]xamples of material that falls within this section include statements made or documents or material tabled or received in the course of the proceedings of the Parliament or a committee of the Parliament’.<sup>75</sup>

This amendment does not appear to implement any recommendation of the CPIPC report, but affirms the CPIPC’s support for ‘clear recognition’ of parliamentary privilege.<sup>76</sup>

#### 5 *Post-Investigation Referral Pathways*

In addition, the Commission is no longer permitted to refer a corruption investigation direct to the Office of the Director of Public Prosecutions (‘DPP’).<sup>77</sup> Instead, upon completion of an investigation, the Commission must refer the matter to a law enforcement agency for *further investigation* and potential prosecution.<sup>78</sup>

This amendment is not attached to any recommendation of the CPIPC report, but responds to, and abrogates the Full Court of South Australia’s decision in *Bell v The Queen* (‘*Bell*’).<sup>79</sup> *Bell* involved an appeal by a Member of Parliament, Troy Bell, who had been charged with several corruption offences stemming from his employment at the South Australian Department of Education and Children’s Services. Bell argued that his prosecution should be permanently stayed on the basis that it was an abuse of process. This abuse was said to arise from, amongst other things, the ICAC’s referral of its corruption investigation direct to the DPP, which Bell argued was unlawful and beyond power, as opposed to referring the matter first to SAPOL, with potential subsequent referral onto the DPP. Following the Full Court’s review of the text, context, and evident purpose of the *ICAC Act*, Kourakis CJ, Peek and Blue JJ rejected

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<sup>73</sup> Ibid.

<sup>74</sup> *ICAC Act* (n 5) s 6, as amended by *Amending Act* (n 5) s 9.

<sup>75</sup> Ibid.

<sup>76</sup> Crime and Public Integrity Policy Committee (n 58) 157.

<sup>77</sup> *ICAC Act* (n 5) s 7(1), as amended by *Amending Act* (n 5) s 11(1). Cf *Bell v The Queen* [2020] SASFC 116, [145], [152]–[153] (Kourakis CJ, Peek and Blue JJ) (‘*Bell*’).

<sup>78</sup> *ICAC Act* (n 5) s 7(1), as amended by *Amending Act* (n 5) s 11(1).

<sup>79</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4012, 4014 (Frank Pangallo), discussing *Bell* (n 77); South Australia, *Parliamentary Debates*, Legislative Council, 22 September 2021, 4320 (Frank Pangallo).

Bell’s submission and held that the ICAC was authorised by s 7(1)(a)(i) of the *ICAC Act* to refer a matter for prosecution direct to the DPP.<sup>80</sup> Pangallo claimed that the Full Court’s construction of the *ICAC Act* was never the intent of Parliament.<sup>81</sup>

I briefly pause here to note that the amendments preserve the status quo ante for complaints or reports already received, or investigations already on foot.<sup>82</sup>

### B Public Statements

The CPIPC amendments prohibit the Commission from making public statements in connection with a particular matter, subject to one exception.<sup>83</sup> Under the amended *ICAC Act*, the Commission may only make a public statement if the Commissioner is satisfied that no criminal proceedings, or proceedings for the imposition of a penalty or disciplinary action, will be commenced as a result of an investigation.<sup>84</sup> The public interest test that formerly applied to all contemplated public statements now applies exclusively in respect of this exception.<sup>85</sup>

The amendments also prohibit the Commission from making a public statement or publishing a report which includes findings or suggestions of criminal or civil liability.<sup>86</sup>

These amendments are not supported by the CPIPC report, but appear to respond to the events of Operation Bandicoot.<sup>87</sup> That operation concerned a joint ICAC-SAPOL investigation into whistle-blower allegations that eight SAPOL officers had been stealing property from crime scenes.<sup>88</sup> The ICAC was heavily criticised

<sup>80</sup> *Bell* (n 77) [196], [367]–[368], [374].

<sup>81</sup> See (n 79).

<sup>82</sup> *Amending Act* (n 5) sch 1 pt 21 item 70(1). The current Director of Public Prosecutions of South Australia, Martin Hinton KC, noted there were only eight cases and 11 accused that were captured by this provision: Transcript of Proceedings, *Bell v The Queen* [2022] HCATrans 030 (Martin Hinton KC) (during argument) (*‘Bell Special Leave to Appeal’*).

<sup>83</sup> *ICAC Act* (n 5) s 25, as amended by *Amending Act* (n 5) s 11(1).

<sup>84</sup> *ICAC Act* (n 5) s 25(3)(b).

<sup>85</sup> *Ibid* s 25(4); cf above n 41 and accompanying text.

<sup>86</sup> *ICAC Act* (n 5) s 42(1a)(b), as amended by *Amending Act* (n 5) s 39(3); *ICAC Act* (n 5) s 25(5)(b), as amended by *Amending Act* (n 5) s 24.

<sup>87</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4012 (Frank Pangallo).

<sup>88</sup> In 2014, the ICAC and the SAPOL Anti-Corruption Branch arranged for the officers involved to attend fictitious crime scenes as part of two ‘targeted integrity tests’. A subsequent search of the Sturt Mantle office at the Sturt Police Station located several items from the fictitious crime scenes that had not been recorded or documented as being seized or booked into exhibit property: Select Committee on Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations, Parliament of South Australia, *Report of the Select Committee on Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations* (Report, 30 November 2021) 11–12.

for making a ‘jaw-dropping prejudicial’ media release on the day of the officers’ arrest.<sup>89</sup> That media release advised that six unidentified police officers had been arrested and were facing charges of theft.<sup>90</sup>

### C Transparency

The CPIPC amendments introduce a new requirement for the Commission to take reasonable steps to ensure that any person under investigation is informed of a determination to take no further action in relation to a particular matter.<sup>91</sup>

This amendment is not related to any recommendation proposed by the CPIPC, but its origins can be traced to the ICAC’s handling of its investigation of Doug Barr in 2017 (the ‘Recruit 313 investigation’).<sup>92</sup> That investigation concerned a complaint to the OPI that several senior police officers, including Barr, had engaged in corrupt processes as part of a SAPOL recruitment project.<sup>93</sup> In 2019, following a decision by the DPP not to prosecute Barr in relation to corruption allegations (a fact which Barr was unaware of), and following a further misconduct and maladministration investigation in 2018 (which would subsequently clear Barr of wrongdoing), Barr would take his own life.<sup>94</sup> Barr passed away while waiting for the ICAC to provide ‘draft findings’ of its misconduct and maladministration investigation.<sup>95</sup>

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<sup>89</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4012 (Frank Pangallo); Chris Merritt, ‘Reputational Damage at Heart of ICAC Probe into Operation Bandicoot’, *The Australian Business Review* (online, 18 February 2021) <<https://www.theaustralian.com.au/business/legal-affairs/reputational-damage-at-heart-of-icac-probe-into-operation-bandicoot/news-story/7d51781f46036d524e5a54dd9d1b7904>>.

<sup>90</sup> Independent Commissioner Against Corruption (SA), ‘Six South Australian Police Officers Arrested as a Result of Investigation Headed by the Independent Commissioner Against Corruption’ (Media Release, 13 October 2014) 1 <[http://www.icac.sa.gov.au/sites/default/files/20141013\\_six\\_police\\_officers\\_arrested.pdf](http://www.icac.sa.gov.au/sites/default/files/20141013_six_police_officers_arrested.pdf)>, archived at <[https://web.archive.org/awa/20160302152200mp\\_/http://www.icac.sa.gov.au/sites/default/files/20141013\\_six\\_police\\_officers\\_arrested.pdf](https://web.archive.org/awa/20160302152200mp_/http://www.icac.sa.gov.au/sites/default/files/20141013_six_police_officers_arrested.pdf)>.

<sup>91</sup> *ICAC Act* (n 5) s 39A, as inserted by *Amending Act* (n 5) s 35.

<sup>92</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4013 (Frank Pangallo).

<sup>93</sup> Select Committee on Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations (n 88) 13. One such allegation was that a SAPOL member had altered a candidate’s test results to help a relative of a senior SAPOL officer: Evidence to Select Committee on Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations, Parliament of South Australia, Adelaide, 27 September 2021, 407 (Debbie Barr).

<sup>94</sup> Select Committee on Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations (n 88) 13; Evidence to Select Committee on Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations, Parliament of South Australia, Adelaide, 27 September 2021, 409–10 (Debbie Barr).

<sup>95</sup> Evidence to Select Committee on Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations, Parliament of South Australia, Adelaide, 27 September 2021, 407 (Debbie Barr). The ICAC provided Barr’s family with the report following

### D Confidentiality

The *Amending Act* relaxes the confidentiality provisions which govern the disclosure of information relevant to a complaint, assessment, investigation, and to other similar processes or actions under the *ICAC Act*.<sup>96</sup> The category of disclosures exempt from the confidentiality obligations under s 54 has been broadened to include disclosures to employers, business partners and fiduciaries, as well as disclosures for the purpose of managing a workers compensation claim.<sup>97</sup> The amendments also permit disclosures about a summons or notice, inter alia, to close family members or to medical practitioners and psychologists for the purpose of obtaining medical or psychological assistance.<sup>98</sup>

Notably, the amendments now require the Commission to grant a person authorisation to disclose information in two circumstances: (1) where the information relates to the applicant, or; (2) where the applicant learns of information from, and which is relevant to, a close family member who is either deceased or is otherwise unable to apply for authorisation.<sup>99</sup> In either of these circumstances, an application for authorisation must be granted if the decision-maker is reasonably satisfied that disclosure of the information would not result in prejudice to any further action in respect of the matter.<sup>100</sup>

These amendments reflect recommendation 5 of the CPIPC report.<sup>101</sup> The CPIPC accepted that ‘further exemptions may be required to provide for persons to make disclosures where they would otherwise have moral or ethical obligations to do so’. The CPIPC also noted the risk of exacerbating mental health issues and other workplace injuries under the previous confidentiality regime.<sup>102</sup> The amendments also appear to be catalysed by the events of the Recruit 313 investigation. In evidence to the Select Committee on Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations, Barr’s widow, Debbie Barr, expressed dissatisfaction with the ICAC’s refusal to grant her authorisation under s 54 to speak with Pangallo about the investigation.<sup>103</sup>

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his death. The timing of the ICAC in providing the report was sharply criticised as the report was dated eight days prior to Barr’s death, meaning the ICAC were theoretically in a position to provide the report to Barr prior to his passing: at 409–10.

<sup>96</sup> *ICAC Act* (n 5) s 54, as amended by *Amending Act* (n 5) s 48. See also *ICAC Act* (n 5) sch 2 cl 7.

<sup>97</sup> *ICAC Act* (n 5) ss 54(3)(b)(v)–(vii), as inserted by *Amending Act* (n 5) s 48(5).

<sup>98</sup> *ICAC Act* (n 5) sch 2 cl 7(2), as amended by *Amending Act* (n 5) s 57(8).

<sup>99</sup> *ICAC Act* (n 5) s 54(3a), as inserted by *Amending Act* (n 5) s 48(6).

<sup>100</sup> *ICAC Act* (n 5) ss 54(3a)(a)(ii), (b)(iv), as inserted by *Amending Act* (n 5) s 48(6).

<sup>101</sup> Crime and Public Integrity Policy Committee (n 58) 155–7.

<sup>102</sup> *Ibid.*

<sup>103</sup> Evidence to Select Committee on Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations, Parliament of South Australia, Adelaide, 27 September 2021, 413 (Debbie Barr).



### E *Review and Oversight*

The amended *ICAC Act* replaces the body responsible for overseeing the operations of the ICAC and the OPI, the ICAC Reviewer, and creates the Office of Inspector, which has enhanced powers of review and oversight of the Commission and the OPI.<sup>104</sup> The Inspector is empowered to conduct annual reviews, investigate complaints, and conduct investigations on its own motion or at the request of the Attorney-General or the CPIPC.<sup>105</sup>

The amended *ICAC Act* provides the Inspector with ‘sweeping powers’ to carry out reviews,<sup>106</sup> including the power to issue summonses to appear and give evidence, the power to compel the production of documents, and the power to enter and search premises or vehicles occupied by the Commission.<sup>107</sup> The amendments also enable the Inspector to publish a statement, or recommend the payment of compensation, where the Commission or the OPI has caused undue prejudice to the reputation of a person.<sup>108</sup>

This amendment reflects recommendation 9 of the CPIPC report, and seeks to model legislation in other States which are said to confer similar powers on comparable review bodies.<sup>109</sup>

### F *Miscellaneous*

Finally, the *Amending Act* inserts a new sch 5 into the *ICAC Act*. Schedule 5 creates a reimbursement scheme for government employees, government board appointees, and Ministers or Members of Parliament who incur legal costs as part of a corruption investigation.<sup>110</sup>

Section 7 of the *Judicial Conduct Commissioner Act 2015* (SA) has also been amended to preclude the Independent Commissioner Against Corruption from holding a concurrent office as the Judicial Conduct Commissioner.<sup>111</sup> This particular amendment implemented recommendation 17 of the CPIPC report.<sup>112</sup>

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<sup>104</sup> *ICAC Act* (n 5) sch 4, as amended by *Amending Act* (n 5) s 59. The Office of Inspector is yet to commence operations: *Amending Act* (n 5) s 2(2).

<sup>105</sup> *ICAC Act* (n 5) sch 4 item 2(1), as amended by *Amending Act* (n 5) s 59.

<sup>106</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4014 (Frank Pangallo).

<sup>107</sup> *ICAC Act* (n 5) sch 4, as amended by *Amending Act* (n 5) s 59.

<sup>108</sup> *Ibid.*

<sup>109</sup> Crime and Public Integrity Policy Committee (n 58) 162–4.

<sup>110</sup> *ICAC Act* (n 5) sch 5, as inserted by *Amending Act* (n 5) s 60.

<sup>111</sup> *Judicial Conduct Commissioner Act 2015* (SA) s 7(8), as repealed by *Amending Act* (n 5) sch 1 item 16(2).

<sup>112</sup> Crime and Public Integrity Policy Committee (n 58) 176.

## IV COMMENT

It is common ground between Vanstone and Parliament that the *ICAC Act* was in need of reform.<sup>113</sup> There is no doubt that the unfortunate circumstances of Barr’s death called for changes to the existing confidentiality regime, as well as for the requirement to inform a person if they have been cleared of an investigation.<sup>114</sup>

The problem, however, is that the CPIPC amendments throw the proverbial baby out with the bath water. In my view, the CPIPC amendments are not a reasonable nor proportionate response to the problem said to be the catalyst of the amendments. For the reasons that follow, the small number of positive changes introduced by the CPIPC amendments are greatly overshadowed by measures which severely impair the Commission’s ability to investigate and root out wrongdoing in public administration.

*A Narrow Definition of Corruption*

Not only do these amendments restrict the kind of wrongdoing the Commission can investigate by removing misconduct and maladministration from its scope, they also decimate what little is left of the Commission’s jurisdiction by narrowing the definition of corruption.<sup>115</sup>

According to Pangallo, this change was to ensure that the Commission was focussed on investigating ‘serious and systemic corruption’, rather than the ‘5¢ and 10¢ stuff’, such as speeding offences, which would constitute corruption under the previous iteration of the *ICAC Act*.<sup>116</sup> Although this may be true in theory, this argument necessarily relies on the assumption that the Commission has previously pursued ‘trifling’<sup>117</sup> corruption (if there ever was such a thing) to the exclusion of serious and systemic corruption. This assumption is flawed and erroneous because it ignores the inter- and intra-agency dialogue that inevitably occurs when an investigation is referred for further action.

For example, as part of the two-stage test which applies to all contemplated prosecutions, the DPP must consider the public interest of such a prosecution. In determining this question, the DPP considers as the first consideration, the ‘seriousness or, conversely, the triviality of the alleged offence’.<sup>118</sup> If the Commission

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<sup>113</sup> See, eg: Vanstone (n 10); South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4011 (Frank Pangallo).

<sup>114</sup> See above Part III(C).

<sup>115</sup> See above Part III(A)(1)–(2).

<sup>116</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4011–12, 4014 (Frank Pangallo); South Australia, *Parliamentary Debates*, Legislative Council, 22 September 2021, 4321 (Frank Pangallo).

<sup>117</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4014 (Frank Pangallo).

<sup>118</sup> Director of Public Prosecutions South Australia, *Statement of Prosecution Policy and Guidelines* (Policy and Guidelines, October 2014) 6.

had investigated and referred a matter so trivial as to not warrant prosecution, any decision by the DPP not to prosecute the matter (and the enormous waste of resources that would follow such a decision) would naturally inform and adjust the Commission's threshold of seriousness for an investigation. Conversely, any decision by the DPP to prosecute confirms, at the very least, that the matter is sufficiently serious.

Indeed, there is no conceivable incentive for the Commission to investigate matters which are objectively trivial. In truth, there are only disincentives. The continued investigation of trivial matters would not only run contrary to the natural desire of an investigator to root out serious corruption, but it would almost certainly result in a sustained pattern of refusals to prosecute. That unsatisfactory course would defeat the primary objects of the *ICAC Act*, as well as the Commission's twofold interests to see the progression of its investigations and the successful prosecution of offenders. In addition, the review provisions and annual reporting requirements under the *ICAC Act*,<sup>119</sup> as well as the threat of the Commission *itself* being subject to a misconduct or maladministration investigation,<sup>120</sup> are quite obviously strong deterrents against the continued pursuit of trivial matters.

It is also worth noting that despite claiming the amendments 'follow [sic] recommendations made by the [CPIPC]',<sup>121</sup> the amended definition of corruption does not accord with the more principled definition of corruption recommended by the CPIPC.<sup>122</sup> If Parliament were truly concerned with the ills that follow the continued investigation of trivial corruption, why not, as the CPIPC recommended, redefine corruption to exclude offences not punishable by imprisonment or those with a short maximum term of imprisonment? Or impose a more stringent test requiring a direct nexus between the particular offence committed and the discharge of public duties? It is a blunt instrument, in my view, to measure the triviality of an offence by reference to its penalty alone, but that is a far more preferable result than to arbitrarily remove nearly all criminal offences from the definition of corruption because they are not sufficiently 'serious' according to some undefined standard.

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<sup>119</sup> *ICAC Act* (n 5) s 45, sch 4, as at 6 October 2021.

<sup>120</sup> *Ibid* ss 5(3), (4), as at 6 October 2021.

<sup>121</sup> South Australia, *Parliamentary Debates*, Legislative Council, 22 September 2021, 4321 (Frank Pangallo).

<sup>122</sup> Recommendation 6 provides:

The CPIPC recommends that consideration be given to deleting s 5(1)(c) of the *ICAC Act* and inserting the following:

(c) any other offence for which a penalty of two or more years imprisonment may be imposed committed by 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, or an attempt to commit such an offence.

If anything, what this change does is exacerbate the problems identified with the definition of corruption when the *ICAC Act* was first passed.<sup>123</sup> Now that offences of dishonesty and nearly all other criminal offences no longer amount to ‘corruption’ under s 5, there is even more force to the proposition that s 5 is deficient for the reasons contended by then Leader of the Opposition, Isobel Redmond MP, and Stephen Wade MLC;<sup>124</sup> the latter of whom would vote to pass the CPIPC amendments.<sup>125</sup>

### B *Erosion of Independence*

Making matters worse, by requiring that all completed corruption investigations be referred to SAPOL for *further investigation* and prosecution,<sup>126</sup> the CPIPC amendments not only create inefficiencies stemming from the duplication of investigations — not to mention the prolonging of an investigation and the concomitant stress, uncertainty, and reputational damage involved, which I note was a key concern of Pangallo — but more significantly, the amendments erode the Commission’s independence.

From what can be gathered from Pangallo’s second reading speech, the apparent rationale of this amendment was that ‘[P]arliament had never intended for ICAC to bypass police when it came to laying charges’.<sup>127</sup> Beyond this perfunctory statement, it is unclear what public policy necessitates this amendment. The matter is not substantively addressed in the CPIPC report, nor was it discussed in the report of the Select Committee on Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations, which Pangallo chairs.<sup>128</sup> In light of what the Full Court said in *Bell*, perhaps for good reason.

In *Bell*,<sup>129</sup> Kourakis CJ, Peek and Blue JJ considered that the independence<sup>130</sup> of the Commission, and its obligations to perform its functions in a manner that is open, accountable<sup>131</sup> and expeditious<sup>132</sup> would be greatly compromised if, at the conclusion of an investigation, the decision to refer a matter for prosecution was at

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<sup>123</sup> See above nn 49–52 and accompanying text.

<sup>124</sup> See above n 51 and accompanying text.

<sup>125</sup> See above nn 9, 60 and accompanying text.

<sup>126</sup> See above nn 77–8 and accompanying text.

<sup>127</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4014 (Frank Pangallo). See also South Australia, *Parliamentary Debates*, Legislative Council, 22 September 2021, 4320 (Frank Pangallo).

<sup>128</sup> Select Committee on Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations (n 88) 5.

<sup>129</sup> *Bell* (n 77).

<sup>130</sup> *ICAC Act* (n 5) s 7(2). See also South Australia, *Parliamentary Debates*, House of Assembly, 2 May 2012, 1356–7 (Tom Kenyon).

<sup>131</sup> *ICAC Act* (n 5) s 7(4)(a).

<sup>132</sup> *Ibid* s 7(4)(b).

the sole discretion of SAPOL, and further bound to its timing and priorities.<sup>133</sup> In their Honours' view, to require an independent agency to be 'wholly dependent on SAPOL to complete investigation of corruption offences and determine whether they should be prosecuted', would 'defeat the evident purpose of the Act'.<sup>134</sup> This was especially so given that SAPOL officers might themselves be the subject of an investigation.<sup>135</sup> Indeed, in the mind of Tom Koutsantonis MP, the argument that the Commission should not refer matters directly to the DPP was 'ridiculous'.<sup>136</sup>

While the Full Court's observations in *Bell* certainly stand for themselves, the High Court's decision to revoke Bell's grant of special leave,<sup>137</sup> strengthens their force. The High Court decided to revoke its grant of special leave consequent upon an undertaking by the DPP to not 'make any further requests of the Commission for assistance' in the prosecution of offences referred prior to the enactment of the CPIPC amendments. This decision is significant because it clearly shows that the High Court's concern was not with the policy of referring corruption investigations direct to the DPP, but rather, the prosecutorial practice of seeking assistance (e.g., in obtaining statements, or pursuing new lines of inquiry etc.) from Commission staff in the prosecution of corruption offences.<sup>138</sup> This was the limit of the High Court's concern, and yet the amendments pursue a much more dramatic change in excising the Commission's ability to refer matters direct to the DPP.

The amendments also render the Commission subservient to the OPI by stripping its power to investigate corruption on its own initiative.<sup>139</sup> Such an amendment, if viewed retrospectively, would have prevented important, independently initiated ICAC investigations from possibly ever seeing the light of day. Chief among those include the Oakden inquiry,<sup>140</sup> which revealed 'systemic failings' in the care and treatment of the 'most frail and vulnerable in our community' at the Oakden Older Persons Mental Health Service,<sup>141</sup> and the investigation of Ministers' and Members' erroneous claims (which totalled in the tens of thousands of dollars)<sup>142</sup>

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<sup>133</sup> *Bell* (n 77) [147]–[149].

<sup>134</sup> *Ibid* [150].

<sup>135</sup> *Ibid*.

<sup>136</sup> Evidence to Crime and Public Integrity Policy Committee, Parliament of South Australia, Adelaide, 10 December 2020, 680 (Tom Koutsantonis).

<sup>137</sup> On 13 August 2021, the High Court of Australia granted Bell special leave to appeal the Full Court's decision: 'Special Leave Applications Results 2021', *High Court of Australia* (online, 13 August 2021) <[https://cdn.hcourt.gov.au/assets/registry/special-leave-results/2021/13-08-21\\_SLA\\_Canberra.pdf](https://cdn.hcourt.gov.au/assets/registry/special-leave-results/2021/13-08-21_SLA_Canberra.pdf)>.

<sup>138</sup> *Bell Special Leave to Appeal* (n 82). See also above n 82 and accompanying text.

<sup>139</sup> See above nn 70–1 and accompanying text.

<sup>140</sup> See Lander (n 57) 27–8.

<sup>141</sup> *Ibid* 14.

<sup>142</sup> 'SA Corruption Watchdog To Investigate Accommodation Allowance for Country MPs' *ABC News* (online, 23 July 2020) <<https://www.abc.net.au/news/2020-07-23/icac-to-investigate-country-members-accommodation-allowance/12486562>>.

under the Country Members Accommodation Allowance.<sup>143</sup> Absent a complaint and assessment by the OPI, this amendment would also, absurdly enough, prevent the Commission from investigating an allegation of corruption which it learns from intelligence reports, media reporting, or even SAPOL — no matter how credible or serious the allegation.

Then, in the same breath the amendments scrap the Commission’s ability to initiate investigations independently, the CPIPC amendments create a new Office of Inspector with the power to conduct own motion reviews of the Commission,<sup>144</sup> apparently to make the Commission ‘more accountable’.<sup>145</sup> This is so despite the absence of any finding by either the courts or the ICAC Reviewer that the Commission had ever engaged in an abuse of process,<sup>146</sup> and notwithstanding that such changes, according to the Reviewer, John Sulan KC, were ‘probably not’ required.<sup>147</sup> Instead, in his evidence to the CPIPC, the ICAC Reviewer stated that the Commission had always fully cooperated with reviews and had a culture of self-reporting.<sup>148</sup> Certainly a far cry from the unaccountable ‘star chambers’ that Pangallo claimed the Commission to be.<sup>149</sup>

### C *Integrity of Amendments*

Beyond the substance of the CPIPC amendments, there are also difficulties with the integrity of the legislation.

It is questionable whether the CPIPC amendments have received the full scrutiny of Parliament. Although the Bill was before Parliament for a month, it was passed less

<sup>143</sup> Evidence to Crime and Public Integrity Policy Committee, Parliament of South Australia, Adelaide, 22 September 2021, 716–17 (Ann Vanstone, Independent Commissioner Against Corruption). See also: Bruce Lander, ‘Investigation Commenced’ (Public Statement, Independent Commissioner Against Corruption, 23 July 2020) 1 <[https://www.icac.sa.gov.au/\\_\\_data/assets/pdf\\_file/0005/370742/ICAC\\_Public\\_Statement\\_-\\_Investigation\\_commenced.pdf](https://www.icac.sa.gov.au/__data/assets/pdf_file/0005/370742/ICAC_Public_Statement_-_Investigation_commenced.pdf)>; Ann Vanstone, ‘Investigation Update’ (Public Statement, Independent Commissioner Against Corruption, 29 September 2021) 1 <<https://www.icac.sa.gov.au/public-statement/investigation-update/ICAC-Public-Statement-29-September-2021.pdf>>.

<sup>144</sup> See above nn 104–5 and accompanying text.

<sup>145</sup> South Australia, *Parliamentary Debates*, Legislative Council, 22 September 2021, 4320 (Frank Pangallo).

<sup>146</sup> Evidence to Crime and Public Integrity Policy Committee, Parliament of South Australia, Adelaide, 22 September 2021, 719 (Ann Vanstone, Independent Commissioner Against Corruption).

<sup>147</sup> Evidence to Crime and Public Integrity Policy Committee, Parliament of South Australia, Adelaide, 10 December 2020, 699–700 (John Sulan, Reviewer of the Independent Commissioner Against Corruption).

<sup>148</sup> *Ibid* 698, 703.

<sup>149</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 2021, 4011–12 (Frank Pangallo).



than 24 hours after it came on for debate in the Legislative Council.<sup>150</sup> In addition, Parliament adopted the ‘unusual’ and ‘quite rightly often rail[ed] against’ practice of considering amendments — the sum of which described by the now Attorney-General, Kyam Maher, as ‘reasonably significant’ — filed on the same day that the Bill was debated, and would later be passed.<sup>151</sup> The process by which the CPIPC amendments were enacted becomes all the more unusual given that neither the Commission, SAPOL, or the Ombudsman were forewarned or consulted on the precise terms of the legislation.<sup>152</sup> As observed by one Member of Parliament, ‘[i]f the public does not have faith in the manner in which this legislation is passed, that weakens the intent of the bill’.<sup>153</sup> In my view, this observation has considerable force.

It also does not bode well that the amendments were passed with the support of Members who are either facing investigation by the Commission, or criminal prosecution for corruption offences. It may well be that these amendments are well-intended; in the absence of contrary evidence, that view should be accepted on the face of it. Indeed, Pangallo’s impassioned second reading speech excites a level of sympathy for that view. In my mind, however, these perceived conflicts of interest, in combination with the irregularities set out above, create an appearance of politicians acting in their own self-interest, rather than for the good order and operation of an effective anti-corruption framework.

How could it be otherwise? Putting aside the fact the Commission’s powers and jurisdiction have been comprehensively neutered, what bona fide public interest is served by empowering the Office of Inspector to enter and search Commission’s premises or vehicles ‘for the purposes of a review’ of the Commission, let alone to use ‘reasonable force’ if necessary ‘to break into or open’ said premises or vehicles?<sup>154</sup> To be clear, Parliament has empowered the Office of Inspector with the same search and entry powers that are available to law enforcement agencies

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<sup>150</sup> See above nn 9, 60 and accompanying text.

<sup>151</sup> South Australia, *Parliamentary Debates*, Legislative Council, 22 September 2021, 4316 (Kyam Maher).

<sup>152</sup> Letter from Ann Vanstone, Commissioner to the Crime and Public Integrity Policy Committee, 15 December 2021, 1 <<https://www.icac.sa.gov.au/documents/correspondence-to-cpipc-15-december-2021.pdf>>; Evidence to the Crime and Public Integrity Policy Committee, Parliament of South Australia, Adelaide, 22 September 2021, 720 (Ann Vanstone, Independent Commissioner Against Corruption); Evidence to Select Committee on Damage, Harm or Adverse Outcomes Resulting from ICAC Investigations, Parliament of South Australia, Adelaide, 24 September 2021, 355 (Grantley Stevens, Commissioner of Police, South Australia Police); Evidence to Crime and Public Integrity Policy Committee, Parliament of South Australia, Adelaide, 22 September 2021, 707 (Wayne Lines, Ombudsman).

<sup>153</sup> South Australia, *Parliamentary Debates*, House of Assembly, 23 September 2021, 7755 (Tom Koutsantonis).

<sup>154</sup> *ICAC Act* (n 5) sch 4, as amended by *Amending Act* (n 5) s 59.

in respect of *suspected criminals*.<sup>155</sup> What more is the absurdity of that proposition when there is not a shred of evidence to suggest even one abuse of process by the Commission,<sup>156</sup> or an instance of criminal conduct, never mind at a systemic level; when there is less than reluctant support by the current ICAC Reviewer for such powers;<sup>157</sup> and particularly when those 'reviews' — the existence of which is a precondition to the exercise of said powers — can be instituted at the behest of political figures, being the Attorney-General or CPIPC members of the day.<sup>158</sup>

And that is to say nothing of the perverse results that could abound from the changes to protections for parliamentary privilege. What exactly is stopping a shrewd politician from relying on s 6 to bring a corruption investigation to an end by simply tabling material relating to that investigation in Parliament? And what of the new legal fees reimbursement scheme under sch 5 of the *ICAC Act*? The scheme in its present form could see a politician convicted of deception (an offence which *no longer* amounts to 'corruption in public administration' under s 5), but acquitted of a separate charge of abuse of public office (an offence which *does* amount to 'corruption in public administration' under s 5) arising from the same facts and conduct, be entitled to the reimbursement of legal costs for their acquittal on the substantive 'corruption' charge.<sup>159</sup> Such a perverse result would surely shock the public conscience and bring the administration of justice into disrepute.

## V CONCLUSION

To say that the CPIPC amendments are paradoxical does not even begin to scratch the surface. On any view of the legislation, the CPIPC amendments are completely at odds with public policy, community expectations, and judicial sentiment. Despite growing national support for greater oversight of public officials,<sup>160</sup> the CPIPC amendments instead strengthen protections for politicians, and bizarrely, increase oversight of the independent body which oversees the conduct of politicians and public officials. Indeed, despite calls to legislate integrity commissions with teeth, the CPIPC amendments instead curtail the Commission's jurisdiction and independence to a chilling and unwarranted degree.

Rather than address the historic low of community trust in public administration, Parliament railroaded legislation which, on any view, weakens the very body designed to promote that trust, without the input of said body. And therein lies the paradox of this legislation. In its stated quest to create a 'more effective corruption-busting

<sup>155</sup> See, eg: *Summary Offences Act 1953* (SA) s 67(4); *Controlled Substances Act 1984* (SA) s 52(1); *Firearms Act 2015* (SA) ss 57(9), (13).

<sup>156</sup> See above n 146 and accompanying text.

<sup>157</sup> See above nn 147–8 and accompanying text.

<sup>158</sup> *ICAC Act* (n 5) sch 4, as amended by *Amending Act* (n 5) s 59.

<sup>159</sup> *ICAC Act* (n 5) sch 5 item 3, as amended by *Amending Act* (n 5) s 60.

<sup>160</sup> See (n 4).

tool',<sup>161</sup> the CPIPC amendments, regrettably, and by every measure, achieve the exact opposite — an effectively busted anti-corruption commission.

One that cannot investigate misconduct or maladministration, or nearly all criminal offences committed by a public officer in the course of public duties; or conduct own-motion investigations. Nor can it make public statements, even if it is demonstrably in the public interest to do so. An anti-corruption commission whose powers may not be exercised without the approval of a separate body, or in relation to any statements, documents or material tabled or received in the course of parliamentary proceedings. An integrity body which is prohibited from referring matters direct to an independent prosecution authority, despite the Full Court's observations in *Bell*; and whose corruption investigations may only be prosecuted through a referral from an agency who may themselves be the subject of an investigation.

What is evident in the passage of these amendments is a clear disconnect between Parliament on one side, and the public, the judiciary, and good sense on the other — one which suggests that the CPIPC amendments should be regarded as a deeply regrettable development for public integrity in South Australia.

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<sup>161</sup> See (n 1).