



The Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Bill 2021 (SA): key modifications to the jurisdiction and powers of the *Independent Commissioner Against Corruption Act 2012 (SA)*

Introduction

1. The Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Bill 2021 (SA) (***the Bill***), which makes significant modifications to the *Independent Commissioner Against Corruption Act 2012 (SA)* (***the Act***), was passed by both Houses of the South Australian Parliament over Wednesday 22 September – Thursday 23 September 2021. As at 5 October 2021, it is awaiting assent.
2. The Bill's long title describes it as an Act "*to amend the Independent Commissioner Against Corruption Act 2012 and to make related amendments to other Acts to implement recommendations contained in the Report of the Crime and Public Integrity Policy Committee into matters of public integrity in South Australia*".
3. This title implies that the amendments introduced by the Bill are based on recommendations contained within the above-described Report (***CPIPC Report***).
4. This briefing paper analyses key modifications made to the ICAC's powers and jurisdiction by the Bill; further, it compares each with the CPIPC Report recommendations.
5. In our view, the narrowed definitions of 'misconduct' and 'corruption', and the elimination of the ICAC's powers to undertake own-motion investigations, refer matters directly for prosecution, make public statements, and report appropriately, constitute a significant reduction in the powers available to pursue corruption and misconduct. Furthermore, many of the amendments appear to be without a basis in the CPIPC Report.
6. If unremedied, the legislation risks having a chilling effect on the ability of the relevant authorities to pursue issues of corruption and misconduct in South Australia.

Abolition of ICAC's jurisdiction in respect of 'misconduct' and 'maladministration'

7. Section 6 of the Bill amends s 3 of the Act, removing the Commission's functions in relation to misconduct and maladministration (as a consequence of which the

Commission will only have jurisdiction in relation to 'corruption', as defined by s 5 of the Act). Related amendments are contained at ss 7(5), 8, 11, 32 and 39 of the Bill.

The CPIPC Report recommended that the Commission's functions relate only to corruption in public administration (recommendations 1 & 2). This a concept not defined in the Report.

Narrowed definition of 'misconduct'

8. The definition of 'misconduct in public administration', which will now be within the jurisdiction of the Ombudsman, has been substantially narrowed.

Section 5(3) of the Act defined 'misconduct' in the following terms:

Misconduct in public administration means—

(a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or

(b) other misconduct of a public officer while acting in his or her capacity as a public officer.

Section 8(3) of the Bill deletes this provision of the Act, and states that 'misconduct' is to have the same meaning as in the *Ombudsman Act 1972* (SA). Item 28 of Schedule 1 to the Bill inserts a new s 4 into the *Ombudsman Act 1972* (SA): s 4(1) provides the following definition of misconduct in public administration:

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

The consequence of this amendment is that unless there is a code of conduct applicable to a public officer, that public officer is not capable of engaging in misconduct. Currently, in South Australia, there is no code of conduct applicable to all parliamentarians (though there is a Ministerial Code of Conduct applicable to Ministers): indeed, the CPIPC Report noted that "*South Australia is the only Australian jurisdiction in which a code of conduct does not apply to members of Parliament*", and recommended that consideration be given to the implementation of such a code.¹ The current absence of a code effectively means that a parliamentarian who is not a Minister is not capable of engaging in misconduct.

We have been unable to locate any corresponding recommendation in the CPIPC Report.

Narrowed definition of 'corruption'

9. Section 8(1) of the Bill deletes paragraph (c) from s 5(1)(c) of the Act. Section 5 contains the Act's definition of 'corruption', and by virtue of paragraph (c) the following was included in this definition:

¹ At 173.

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

As a result of the modification made by s 8(1) of the Bill, offences including (but not limited to) theft, money laundering and dealing in instruments of crime, deception leading to dishonest benefit or dishonestly caused detriment, or dishonest dealings with documents, are no longer within the ICAC's jurisdiction. The MP expenses scandal would not have fallen within the ICAC's jurisdiction, as amended by the Bill.

The CPIPC Report made the following recommendation in respect of s 5(1)(c) of the Act:

RECOMMENDATION 6

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;

The CPIPC also recommends that consideration be given to the definition of persons defined to be a 'public officer' pursuant to sch 1 of the ICAC Act.

No such alternative provision was included in the Bill.

10. Section 8(2) of the Bill deletes s 5(2) from the Act. Section 5 (2) previously provided as follows:

If the Commissioner suspects that an offence that is not corruption in public administration (an incidental offence) may be directly or indirectly connected with, or may be a part of, a course of activity involving the commission of corruption in public administration (whether or not the Commissioner has identified the nature of that corruption), then the incidental offence is, for so long only as the Commissioner so suspects, taken for the purposes of this Act to be corruption in public administration.

11. As a consequence of the modifications set out in paragraphs 9-10 above, the s 5 definition of 'corruption' will – once the Bill is assented to – be limited to the following:

5—Corruption

(1) Corruption in public administration means conduct that constitutes—

(a) an offence against Part 7 Division 4 (Offences relating to public officers) of the Criminal Law Consolidation Act 1935, which includes the following offences:

- (i) bribery or corruption of public officers;
- (ii) threats or reprisals against public officers;
- (iii) abuse of public office;
- (iv) demanding or requiring benefit on basis of public office;
- (v) offences relating to appointment to public office; or

(b) an offence against the Public Sector (Honesty and Accountability) Act 1995 or the Public Corporations Act 1993, or an attempt to commit such an offence; or

(ba) an offence against the Lobbyists Act 2015, or an attempt to commit such an offence; or

(c) any of the following in relation to an offence referred to in a preceding paragraph:

- (i) aiding, abetting, counselling or procuring the commission of the offence;
- (ii) inducing, whether by threats or promises or otherwise, the commission of the offence;
- (iii) being in any way, directly or indirectly, knowingly concerned in, or party to, the commission of the offence;
- (iv) conspiring with others to effect the commission of the offence.

This is a particularly narrow definition compared to the definition of corruption in other Australian jurisdictions. Commissioner Vanstone has described the changes as amounting to a "decimation" of the ICAC's powers to investigate corruption.²

Abolition of ICAC's power to refer a matter to a prosecution authority

12. Section 11(1) of the Bill alters s 7(1) of the Act, which sets out the establishment and functions of the Commission. Previously, the Commissioner was able to refer matters directly for prosecution (presumably to a prosecution authority, though this wasn't explicitly stated; it was, however, clear that it was not to a law enforcement agency, which was the subject of a separate referral power). Now, referral can be made only to "a law enforcement agency" (for investigation and prosecution). This is reinforced by s 30(2) of the Bill, which amends s 36 of the Act by inserting a new paragraph (1a) to make clear that the ICAC may not refer a matter directly to a prosecution authority.

The CPIC Report made no recommendations or findings about removing the ICAC's power to refer a matter directly for prosecution. In fact, it specifically recommended that one of the functions of the Commission be "*to investigate and refer corruption in public administration for **prosecution*** [emphasis added]" as distinct from a power "*to refer corruption in public administration to **law enforcement agencies for investigation and prosecution*** [emphasis added]", which is the subject of a separate recommendation) (recommendation 1).

² ABC interview with Ann Vanstone, ICAC Commissioner Ann Vanstone says powers to investigate corruption have been "decimated", <https://www.abc.net.au/radio/adelaide/programs/breakfast/icac-bill-passes/13556808> accessed 5 October 2021.

Abolition of own-initiative investigation power

13. Section 22 of the Bill repeals s 23 of the Act, which in effect removes the Commissioner's ability to undertake own-initiative investigations.

The CPIPC Report made no recommendations or findings in respect of the own-motion investigation power. It recommended that the Office of Public Integrity "*receive and assess complaints about potential matters of corruption, misconduct or maladministration in public administration from members of the public*" (recommendation 3), but this arguably does not constitute a clear recommendation to abolish the own-initiative power.

Power to make public statements

14. Section 24 of the Bill substitutes s 25 of the Act, and significantly limits the Commissioner's ability to make public statements.

We have been unable to locate a recommendation to this effect in the CPIPC Report.

Constrained reporting powers

15. Section 39(3) of the Bill deletes s 42(1a)(b) of the Act and inserts a new paragraph providing that the Commission must not "*prepare a report under this section that includes any findings or suggestions of criminal or civil liability and must not include any findings that, **if proved to the requisite standard by a court, would constitute a criminal offence or a civil wrong** [emphasis added]*".

The potential impact of this provision is unclear, but the second clause appears to go beyond a prohibition on making findings of criminal or civil liability (as seen, for example, in s 74B(1) of the *New South Wales Independent Commissioner Against Corruption Act 1988* (NSW)). It appears to mean that the Commission cannot in a Report prepared under this section find – for example – that a person accepted a bribe, because if that were proved to the standard required by a court, it would constitute a criminal offence. This is potentially highly problematic: because the Act's definition of 'corruption' is linked to offences, the Commission can only investigate things that would, if proven by a court, constitute a criminal offence or civil wrong. Further, the amendment does not appear to have a basis in the CPIPC Report.

Complaints process

16. Section 17 of the Bill, which substitutes Part 3 of the Act, contains a new s 18A: this section requires that complaints about public administration are made to the OPI. Under ss 18E(1) and 18F(1) of the Bill, the OPI must refer a matter to the ICAC where it assesses that a complaint or report "*raises a potential issue of corruption in public administration that could be the subject of a prosecution*".

The CPIPC Report recommended this modification (recommendation 3).

Conclusion

17. The modifications made by the Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Bill 2021 (SA) to the powers and functions conferred upon the ICAC by the *Independent Commissioner Against Corruption Act 2012* (SA) are inarguably substantial. In addition, some of them appear to have no basis in the CPIPC Report.
18. The narrowed definitions of 'misconduct' and 'corruption', as well as the elimination of the ICAC's powers to undertake own-motion investigations, refer matters directly for prosecution, make public statements, and report appropriately constitute a significant reduction in the powers available to pursue corruption and misconduct. If unremedied, the legislation risks having a chilling effect on the ability of the relevant authorities to pursue issues of corruption and misconduct in South Australia.

About The Centre for Public Integrity

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