



PUBLIC INTEGRITY REFORM

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THE ROLE OF THE OMBUDSMAN

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Acknowledgements

Thanks to IPAA for the opportunity to address you today.

Slide 2. What I will speak about

I thought it would be most helpful if I took some time to compare and contrast the way in which ICAC/OPI and Ombudsman SA will work under the new legislative scheme.

I will also outline the amendments to the *Ombudsman Act 1972* and the *Local Government Act 1999* made by the *Independent Commissioner Against Corruption Act 2012 (the ICAC Act)*. There are some significant changes hidden away in the amendments schedule.

Slide 3. ICAC, the Ombudsman and the Parliament

Let me start with two similarities between the offices.

First, both the Independent Commissioner Against Corruption and the Ombudsman are independent statutory officers, appointed following an inquiry process by the Statutory Officers Committee of the Parliament.¹

In the case of the Ombudsman, it's still necessary for there to be a resolution made by both Houses of Parliament – which opens up the possibility of a Parliamentary debate about a proposed appointment.²

A Parliamentary resolution is not necessary in the case of the Commissioner. It's sufficient if the Statutory Officers Committee approves the appointment – or at least, fails to object.³

¹ Section 8(5) and (6) of the ICAC Act, and section 6(1a) of the Ombudsman Act.

² Section 6(1) of the Ombudsman Act.

³ Section 8(5)(b) of the ICAC Act.

The second similarity is that both the Commissioner and the Ombudsman are accountable to the Crime and Integrity Policy Committee of Parliament.⁴ This committee has been newly created through the ICAC Act, but as far as I know its membership hasn't been determined as yet.

So far as the Ombudsman is concerned, the new committee replaces the Statutory Officers Committee, which used to be required to report annually on the operation of the Ombudsman's office.⁵

And it's salutary to note that the new committee has a responsibility to examine every Ombudsman report which is tabled in the Parliament. The obligations of the Statutory Officers Committee formerly extended only to an annual review of the operation of the Ombudsman's office.

Either House of Parliament, or a Parliamentary committee, can refer a matter to the Ombudsman for investigation and report: provided it's within the Ombudsman's jurisdiction.⁶ There's no equivalent provision in relation to the ICAC.

Further, the Crime and Integrity Policy Committee is expressly excluded from investigating 'a matter relating to particular conduct', or 'reconsidering a decision of the Commissioner or any other person or body' – which includes the Ombudsman.⁷

And so to some differences between the 2 offices.

Let's start with the obvious. The Ombudsman is 40 years older than the Commissioner. We celebrated our birthday last December, as the second oldest Ombudsman office in the country.

But a more significant difference is the difference in jurisdiction.

Slide 4. Differences in jurisdiction

As we've heard, the jurisdiction of ICAC is contained within the definition of 3 terms:

- corruption in public administration
- misconduct in public administration
- maladministration in public administration.

I'll deal with each of these 3 limbs in turn.

First, and by contrast with ICAC, the Ombudsman has no role in investigating corruption.

In common with many other public sector agencies, where a disclosure is made under the Whistleblowers Protection Act that relates to fraud or corruption, we have always been obliged to pass that information on as soon as practicable to the Anti-Corruption Branch of the police force.

Just a word of warning for all of us. That obligation still exists, notwithstanding the commencement of ICAC.

⁴ Section 150(1)(a) and (d) of the *Parliamentary Committees Act 1991*.

⁵ Section 31 of the Ombudsman Act, in operation prior to 1 September 2013.

⁶ Section 14(1) of the Ombudsman Act.

⁷ Section 150(3)(a) and (c) of the *Parliamentary Committees Act 1991*.

However, my office also now has an obligation under the ICAC Direction and Guidelines⁸ to report any matter which I reasonably suspect involves corruption in public administration.

If there's no suspicion that corruption may be involved, the Ombudsman jurisdiction may be invoked. It revolves around the twin concepts of an 'administrative act' on the part of 'an agency to which the Act applies'.⁹

In the initial consideration of whether the Ombudsman has jurisdiction, there's no suggestion of possible fault, in the way there is with misconduct or maladministration in ICAC terms.

Hence, unlike the ICAC, there's no need for the concept of 'reasonable suspicion' before the Ombudsman has jurisdiction. As we've heard, the ICAC Directions and Guidelines do require that.

An Ombudsman investigation is targeted towards 'administrative error'. I'll talk more about that later too.

But first, let me mention the second limb of the ICAC jurisdiction, misconduct.

Slide 5. Misconduct

ICAC misconduct is broadly defined. It 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'; or 'other misconduct of a public officer while acting in his or her capacity as a public officer'.¹⁰ That last paragraph covers pretty much anything that you might do at work.

By contrast, there's no definition of misconduct in the Ombudsman Act, and thus at Ombudsman SA we give the term its ordinary dictionary meaning.

In general terms, I have an obligation to report any evidence of breach of duty or misconduct on the part of a public officer which I might uncover during an investigation, to the principal officer of the agency.¹¹

But the ICAC Act itself conferred a specific misconduct jurisdiction on the Ombudsman, in relation to elected members of local government councils. This now extends not just to conflict of interest (as used to be the case under the old sections 263 and 264 of the *Local Government Act 1999*¹²) but also to:

- any breach of an elected member's general duties
- any failure to comply with the new single legislated elected member code of conduct
- any failure to comply with the elected member register of interest provisions.

In some ways this is a curious situation. On one hand, the Parliament has conferred jurisdiction on the ICAC Commissioner in relation to anything which can be described as 'other misconduct' by a public officer. On the other hand, in the same Act it has required that no proceedings can be taken in

⁸ Section 8 of the Directions and Guidelines.

⁹ Sections 13(1) and 3 of the Ombudsman Act.

¹⁰ Section 5(3) of the ICAC Act.

¹¹ Section 18(5) of the Ombudsman Act.

¹² Section 263 and 264 of the Local Government Act, as it was before 1 September 2013.

the District Court for misconduct by an elected member of a council unless another body(i.e. the Ombudsman) has first investigated the matter.¹³

But this is what the ICAC Act has done. The ICAC Directions and Guidelines deal with this issue by requiring me to report only a **reasonable suspicion of serious or systemic** misconduct to OPI.

There are similar subtleties in relation to the third limb of ICAC's jurisdiction, namely maladministration in public administration.

Slide 6. Maladministration

Whilst it doesn't appear in the Ombudsman Act, maladministration is a term which is often applied to the Ombudsman jurisdiction. I don't warm to it, because it's imprecise, and since I've been Ombudsman we having been using the shorthand phrase 'unlawful, unreasonable or wrong' to describe the various types of administrative error under the Ombudsman Act; rather than 'maladministration'.

The ICAC term 'maladministration in public administration' encompasses 2 elements:

- the first is 'irregular and unauthorised use of public money or substantial mismanagement of public resources'
- the second is 'substantial mismanagement'.¹⁴

These elements seem to be derived from the definitions in the Whistleblowers Protection Act, and are quite restricted. The use of the term 'substantial mismanagement' suggests a level of seriousness which goes well beyond a simple administrative error; and many administratively erroneous acts occur without the irregular and unauthorised use of public moneys.

By contrast, an Ombudsman Act 'unlawful, unreasonable or wrong' finding can be made in respect of any 'administrative act' by 'an agency to which the Act applies'.

We look for administrative error: or what I call the 7 administrative sins, which reflect long-standing notions of good administration at common law.

Slide 7. The seven administrative sins

These sins do not extend to policy matters¹⁵ but they include all acts which:

- are contrary to the law
- are unreasonable, unjust, oppressive, or improperly discriminatory
- are done in accordance with an unreasonable, unjust, oppressive or improperly discriminatory law or practice
- are done for an improper purpose, or based on irrelevant grounds
- are done without giving reasons for the decision
- are based wholly or in part on a mistake of law or fact
- are wrong.

¹³ Section 264(2)(a) of the Local Government Act.

¹⁴ Section 5(4) of the ICAC Act.

¹⁵ *City of Salisbury v. Biganovsky* (1990) 54 SASR 117.

Clearly this is a very different scope to the ICAC substantial mismanagement'; or 'irregular and unauthorised use of public moneys'. The Ombudsman's jurisdiction is much wider, and the Ombudsman can investigate administrative acts which are not within the investigative jurisdiction of ICAC.

But whilst the Ombudsman's jurisdiction is much broader in this respect, there are some other important limitations on the Ombudsman which don't apply to ICAC.

Slide 8. Limitations on Ombudsman's jurisdiction

These limitations arise where a complaint is made to the Ombudsman. They do not apply in the case of an own initiative investigation; and they can be removed by Parliamentary resolution in the case of a referral from Parliament. They include:

- the complaint must not have come to the complainant's notice more than 12 months before it's lodged - although I have a discretion to investigate a complaint if that seems to me to be proper in all the circumstances¹⁶
- the complainant must not have an alternative remedy available - although again I have a discretion to investigate the complaint if I form the opinion that it is not reasonable for the complainant to have to exercise that remedy¹⁷
- the complainant must be 'directly affected' by the administrative act to which the complaint relates¹⁸
- if the administrative act is done in the agency's capacity as the employer of the complainant, it's not within my jurisdiction.

In each case, these limitations are expressed in mandatory terms. The Ombudsman Act specifies that I **must not** investigate if the particular limiting factor exists.

So how do these jurisdictional features play out in practice?

Here are some figures on the number of matters which we dealt with last financial year:

Slide 9. Ombudsman matters

Category	Number opened 2012-13	Target timeframe
Registration	8,720	2 days
Assessment	2,905	14 days
Preliminary investigation	87	4 months
Full investigation	11	6 months

¹⁶ Section 16(1) of the Ombudsman Act.

¹⁷ Section 13(3) of the Ombudsman Act.

¹⁸ Section 13(3a) of the Ombudsman Act.

Section 25 report finding administrative error	64	NA
FOI	171	4 months
Total	11,960	

To summarise the significance of that table: of the nearly 12 000 approaches which we received last financial year, 3 067 were Ombudsman Act complaints. 162 of those complaints resulted in a preliminary investigation, and of those 162 we found administrative error on 64 occasions.

In other words, I considered that - after my office conducted what can be a fairly detailed assessment – 2 905 complaints, or 95% of the complaints within my jurisdiction, should not be formally investigated.

In many of those 2 905 matters, my office was able to achieve a satisfactory resolution without commencing an investigation, through providing advice; through referring the complainant back to the agency; or through informal conciliation.

This points to an important difference in focus between ICAC and Ombudsman work.

Slide 10. Differences – focus of work

Under the ICAC Act, the primary object of the Commissioner is investigative – that is, preparing a brief of evidence for a potential prosecution. The Act says explicitly that the Commissioner’s primary object should be ‘to investigate serious or systemic corruption in public administration, and to refer serious or systemic misconduct or maladministration to the relevant body’.¹⁹

The Commissioner also has a preventive and educative role,²⁰ and can give directions or guidance to, and evaluate the practices, policies and procedures of, inquiry agencies and public authorities.²¹

By contrast, at Ombudsman SA, investigation is only one element of complaint resolution – conciliation, for example, is another.²² Whilst I rarely exercise the formal conciliation power provided by the Ombudsman Act, conciliation is at the heart of the early resolution that occurs with 95% of the complaints which don’t make it to investigation.

Further, the focus of an Ombudsman investigation is to make findings and recommend a remedial outcome. I make findings and recommendations for administrative improvement, and I don’t collect evidence for prosecutions. My broad aim is the same as most of you here – to ensure and enhance the standard of public administration in this state, for the benefit of the South Australian people.

¹⁹ Section 3(2) of the ICAC Act.

²⁰ Section 7(1)(e) of the ICAC Act.

²¹ Section 7(1) (c) and (d) of the ICAC Act.

²² Section 17A of the Ombudsman Act confers a formal conciliation power.

There is another significant difference between ICAC and the Ombudsman in the fact that my office undertakes the external review role under the FOI Act. Apart from sending a good message about transparency generally, the fact that the 2 jurisdictions are carried out by one office in my view is significant, for 2 reasons.

First, there is considerable synergy between the jurisdictions. In both cases, I am making judgements about where the balance of the public interest should lie. There is often overlapping content as well – the subject of an Ombudsman Act complaint frequently is closely related to an FOI application. Examples include the report on state planning procurement processes concerning Mount Barker, which I released earlier this year.

Second, there is benefit in applying some practical techniques across the 2 jurisdictions. Because there is an appeal right to the District Court from my FOI determinations, the process is necessarily more legalistic than many Ombudsman investigations need to be.

However, a more legalistic approach can assist in ensuring the necessary rigour in more significant investigations.

Having 2 jurisdictions also gives me and my staff the opportunity to work across them. I think this is beneficial for my health and sanity.

The final difference in focus of work is the conduct of audits. Over the last 3 years, I have conducted audits of complaint handling in the Department for Correctional Services and in local government; and in relation to meeting and document confidentiality in local government.

Whilst the ICAC has power to evaluate public authority practices, policies and procedures, this must be done with a view to ‘advancing comprehensive and effective systems for preventing or minimising corruption, misconduct and maladministration in public administration’.²³

There’s no similar specific purpose required under the Ombudsman Act. I can conduct an audit simply if I think it is in the public interest to do so.²⁴ We are currently doing one on the implementation by state departments of the FOI Act.

The next area in which I’d like to contrast the approach of the 2 pieces of legislation is in relation to the respective powers of ICAC and the Ombudsman.

Slide 11. Differences – powers

ICAC has extensive investigatory powers, as you would expect.²⁵ As we have heard, these include requiring production of a ‘written statement of information’,²⁶ conducting examinations and requiring the production of documents,²⁷ requiring disclosure of identity,²⁸ search powers,²⁹ seizure

²³ Section 7(1)(d) of the ICAC Act.

²⁴ Section 14A(1) of the Ombudsman Act.

²⁵ See Part 4, Subdivision 2 Investigation of corruption (especially sections 28-33) of the ICAC Act.

²⁶ Section 28 of the ICAC Act.

²⁷ Section 29 of the ICAC Act.

²⁸ Section 30 of the ICAC Act.

²⁹ Section 31 of the ICAC Act.

and retention orders.³⁰ ICAC also has powers available under the *Listening and Surveillance Devices Act 1972*, and in relation to telecommunications interception.

But these powers can only be exercised in respect of corruption investigations. It seems to me that this means that the Commissioner will need to form a 'reasonable suspicion' of corruption before these wide powers become available.

I do not envy the Commissioner his ability to exercise coercive powers only in respect of one element of his jurisdiction.

In my experience, it is often not until after all the evidence is collected that I am able to form a view about the nature of the administrative error which is in issue.

By contrast to the ICAC situation, under the Ombudsman Act, Royal Commission powers are available in any investigation into any administrative act. I rarely need to use these powers, but their existence can be very helpful on occasion.

If the Commissioner decides that he needs such powers to investigate misconduct or maladministration in public administration, it seems to me that he will need to exercise powers under the Ombudsman Act, because none exist under the ICAC Act.

Of course, he's perfectly entitled to do this, under the ICAC Act.³¹ But the same jurisdictional limits apply – there needs to be an identifiable administrative act, and an agency to which the Ombudsman Act applies.

The final area of contrast relates to confidentiality and the conduct of investigations. Here the differences are perhaps not so great, but they are still significant.

Slide 12. Differences – confidentiality

As we've heard, in relation to an ICAC investigation:

- it's an offence to mention that a matter has been referred there
- investigations are to be conducted in private
- in most cases there will be no publication of the results of an investigation, namely the brief of evidence to be provided to the prosecutor
- during the course of an investigation, only very limited public comment can be made.

By contrast, in an investigation under the Ombudsman Act:

- investigations must be conducted in private³²
- I have a statutory obligation to report to the complainant about the result of an investigation³³

³⁰ Sections 31 and 32 of the ICAC Act.

³¹ Section 24(2)(a) of the ICAC Act.

³² Section 18(3) of the Ombudsman Act.

³³ Section 17(3) and 27 of the Ombudsman Act. See also section 8 of the Whistleblowers Protection Act.

- where I find error, I am obliged to publish a report to the principal officer of the agency, and to the relevant Minister;³⁴ and I may publish the report in any other manner which I see fit if I am of the opinion that it is in the public interest to do so³⁵
- I can also make other public comment about an investigation where I am of the opinion that it is 'in the public interest' for me to do so.³⁶

So what is happening in practice?

I'll speak first about the matters which we report to OPI, for it to recommend to ICAC how they should be handled.

Slide 13. 'Reports' by the Ombudsman to OPI.....

It is unlikely that Ombudsman SA will be reporting significant numbers of matters to OPI. We have reported 7 matters so far, and this includes matters which were received as far back as December last year.

It is clear that ICAC and the ACB will continue to deal with any matter that may involve corruption, and that I need to report any such matter to both OPI and the ACB. The relationship between those bodies is a subject which others can address.

For misconduct and maladministration matters, we are required to report only serious or systemic examples. Given that from our nearly 12 000 approaches last financial year, we ended up formally finding administrative error in 64 matters, I don't expect that there will be many occasions when the ICAC and Ombudsman's respective responsibilities will intersect.

However, on the occasions when I report a matter to OPI, it will need to consider whether misconduct or maladministration (in ICAC terms) may be present; and if so, whether it should be investigated by ICAC, or whether it should be referred back to me.

In doing so, OPI will need to reach a well-informed view about the nature of the matter, and the issues which it raises. If it is considering referring a matter back to me, it will need to be mindful of identifying the administrative act and agency to which the Ombudsman Act applies.

Slide 14. Referrals to the Ombudsman from OPI.....

However, I haven't received any of these referrals so far. Indeed, ICAC must consult with me before referring any matter to me,³⁷ and that hasn't happened yet either. So it's very early days. But I'll make some comments in anticipation.

First, when it does want to consider whether to refer a matter to me, it seems to me that OPI/ICAC will first need to determine what the misconduct or maladministration issue (in ICAC terms) is.

This is because ICAC's obligations are different depending on whether such an issue exists or not.³⁸ ICAC has no power to issue Directions and Guidelines to me in relation to matters that are not within

³⁴ Section 25(2) and (3) of the Ombudsman Act.

³⁵ Section 26(3) of the Ombudsman Act.

³⁶ Section 26(3) of the Ombudsman Act.

³⁷ Section 37(1) of the ICAC Act.

its jurisdiction. It can simply refer those matters to me for me to deal with in accordance with the Ombudsman Act.

As well as identifying the ICAC issues of misconduct and/or maladministration which are raised, before a matter is referred it would be helpful if OPI/ICAC is mindful of the Ombudsman Act jurisdictional issues – namely the administrative (or non-policy) act and the agency to which the Ombudsman Act applies.

Once a matter is referred, I will also need to assess it, under both the ICAC Act and the Ombudsman Act.

The Directions and Guidelines currently require me to assess a matter under the ICAC Act, when ICAC refers it to me.³⁹ Whilst this may appear duplicatory of OPI/ICAC's role, I assume it is necessary because the issues which I decide to investigate may be different from those which are referred to me. This seems sensible, as issues may change as an investigation unfolds.

As well as assessing the matter under the ICAC Act, I will also need to assess the matter under the Ombudsman Act, to ensure that the administrative act and agency are appropriately identified as ones within my jurisdiction.

However, whilst both OPI/ICAC and I will therefore need to undertake a 2-step assessment process in the case of each referred matter, as a matter of practice these duplicatory assessments are not likely to be overly difficult.

In any event, I anticipate that any questions can be resolved in the consultation which the Commissioner is obliged to undertake before referring a matter to me. I'm sure that will be an effective and open process.

The ICAC Act also made some amendments to the Ombudsman Act, which I consider will be very helpful to me. In summary, these are:

Slide 15. Amendments to the Ombudsman Act

- new section 26 – confidentiality, disclosure of information and publication of reports
- new section 19A – 'injunctive' directions to agencies
- new section 12(2a) – directions to staff
- 'agency to which the Act applies' – new definition
- reporting to the Crime and Public Integrity Policy Committee, not the Statutory Officers Committee

I note also – for the sake of completeness – that the ICAC Act also amended the Local Government Act, to expand the role of the Ombudsman. In summary, these amendments are:

³⁸ Section 24(2) of the ICAC Act deals with matters which are within ICAC's jurisdiction. Section 24(3) deals with other matters which OPI becomes aware of, but which are not within ICAC's jurisdiction.

³⁹ Section 13(1) of the D&G.

Slide 16. Amendments to the Local Government Act

- the replacement of sections 63 and 110 to provide for single codes of conduct for elected members, and for council staff. The elected member one is now in operation
- new section 263A provides for Ministerial referral of complaints against elected members of councils to my office for investigation
- new section 263B permits me to recommend less serious sanctions for breaches of elected member obligations, and amended sections 263, 264 and 267 extend the powers of the District Court to deal with more serious elected member misconduct. Section 264 requires that a public official can't commence proceedings in the District Court unless there has been an Ombudsman investigation into the matter⁴⁰
- replacement sections 272-4 provide that any Ministerial investigation of a council or subsidiary is to be carried out by the Ombudsman rather than a separate investigator – as happened in relation to the City of Burnside investigation.

I will finish with some thoughts from another place. Queensland has – of necessity – been dealing with these issues for considerably longer than us; and I declare an interest as a close associate – my father – was the inaugural head of the Criminal Justice Commission in that State nearly 25 years ago.

Following a review of the *Crime and Misconduct Act 2001 (Qld)*, carried out by the former High Court judge the Hon. Ian Callinan AC and Professor Nicholas Aroney, Queensland is now conducting a review of the way in which open government and the integrity system operate in that state.

In the context of simplifying complaints management in that system, the Queensland Department of Premier and Cabinet recently published an information paper, which contains the following summary table:

Slide 17. In conclusion - some thoughts from Queensland.....

- What works well in the current system?
 - comprehensive network of bodies ensures integrity system is not dominated by one player
 - entities with specific technical expertise to respond to complex complaints
- What are the problems in the current system?
 - confusion about who does what undermines accessibility
 - time delays
 - duplication⁴¹

I'll leave you to read that, and to reflect on it. I think it contains some good advice for all of us.

ENDS

⁴⁰ Section 264(2)(a) of the Local Government Act.

⁴¹ Queensland Department of Premier and Cabinet, *Open government reform – Simplifying complaints management*, Information Paper No 3, July 2013.