



ICAC

Independent Commission
Against Corruption
SOUTH AUSTRALIA

A Dependent Commission Against Corruption

The problems with being unable to brief the
Director of Public Prosecutions

August 2024



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Against Corruption**

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to brief the Director of Public
Prosecutions

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Commissioner's foreword

When I commenced as Commissioner in September 2020, one of the functions of the Commissioner¹ was to identify corruption in public administration and to investigate and refer it for prosecution.² The Commissioner could refer a matter *directly* to the Director of Public Prosecutions (the Director) for him to decide whether to institute a prosecution.

Ordinarily following a referral there would be communication between the Director's prosecutors and the Commissioner's investigators while the Director was considering the matter. Ultimately though, the decision was the Director's alone.

If a prosecution was initiated, the Commissioner's investigators would assist the Director by gathering any further evidence or other material required for the prosecution. They would further assist by arranging the attendance of witnesses at proofings and trial, and by being on hand to answer any queries or locate any material during the prosecution.

Since the commencement on 7 October 2021 of the major amendments to the *Independent Commission Against Corruption Act 2012 (SA)* (ICAC Act), that is no longer the case.³ If the Commission is to refer a matter for prosecution, it must now refer the matter to South Australia Police (SAPOL). It is then for SAPOL to determine whether to refer the matter to the Director or take some other course.

SAPOL could decide no charge should be laid and that would be the end of the matter. This is a significant limitation on the independence of the Commission.

It is also absurd. It means the Commission is the only body in South Australia expressly prohibited from bringing information about alleged crime to the attention of the Director. It makes the Commission the only integrity and anti-corruption agency precluded from briefing the Director in its state or territory. This situation directly contravenes one of the 12 principles the nation's Anti-Corruption Commissioners consider fundamental to the ability of anti-corruption commissions to undertake their functions independently and effectively.⁴

¹ Now the Commission.

² *Independent Commissioner Against Corruption Act 2012 (SA)* section 7.

³ At this time the Independent Commission Against Corruption came into existence. I will refer to this as "the Commission".

⁴ *Anti-corruption chiefs announce fundamental principles*, Media Release, 31 July 2024, Principle 6. <https://www.nacc.gov.au/news-and-media/anti-corruption-chiefs-announce-fundamental-principles>.

Criticism of this kind has not only been made by me. The 2021 amendments to the ICAC Act also created the Office of the Inspector to review the Commission's activities.⁵ In the Inspector's Annual Report for 2022–23, he recommended that the Commission's power to refer matters directly to the Director should be reinstated.⁶ The Inspector stated that referrals to SAPOL have caused significant inefficiencies and duplication of work and costs.⁷

The complicated nature of corruption investigations, the expertise and experience of Commission investigators, and the need for expediency, provide strong reasons for the original position to be restored. In fact, in my view more (and earlier) cooperation between the Director and the Commissioner than there was prior to the amendments, not less, is to be preferred.

This report is prepared pursuant to section 42 of the ICAC Act. I determined to write this report to explain how the restriction impacts on the independence, effectiveness and efficiency of the Commission.

It is an issue I have addressed publicly and raised with the Attorney-General many times. It is in the public interest that I do so again.

5 As well as the activities of the Office for Public Integrity and the Ombudsman.

6 Office of the Inspector I Annual Report 2022–23 p 38.

7 Ibid p 37.

The ICAC Act prior to 7 October 2021

From the commencement of the office of the Independent Commissioner Against Corruption in 2013, the Commissioner could refer a matter to the Director. Whether to institute a prosecution was an independent decision made by the Director.

Naturally, an investigation proceeds on the basis that a particular charge or charges is being investigated. Sometimes the Director determined to lay the same charge or charges on which an investigation proceeded. On other occasions he determined to lay a different charge or charges, or to lay no charge.

The Director was (and is) bound to adhere to the Director's Statement of Prosecution Policy & Guidelines.⁸ He is bound to do so irrespective of the agency from which the referral comes.

The 2021 amendments to the ICAC Act took the highly unusual step of expressly prohibiting the Commission from referring matters to the Director. The Commission may now only refer a matter to a law enforcement agency. In practice, matters are now referred to SAPOL.⁹ Whether a matter is then referred to the Director is SAPOL's decision.

Before I set out the legislative provisions that impose the restriction on referrals to the Director, I shall explain how this position came to be. In doing so it becomes plain that the real genesis of the restriction and the reasons for it are unclear.

In 2020, a District Court Judge was asked by a defendant to stay a criminal proceeding, partly on the basis that the Commissioner had acted beyond its powers when it referred the matter to the Director. The Judge found that the Commissioner had no power to refer a matter to the Director and that it could only refer a matter to SAPOL.¹⁰ The Director appealed that decision to the Full Court of the Supreme Court.

The Full Court overruled the District Court Judge's decision.¹¹ All three Justices of the Court concurred in their reasons. They found the Commissioner did have the capacity to refer a matter to the Director.¹² In relation to the ICAC Act prior to the 2021 amendments, the Full Court stated:¹³

If the Act did not give to the Commissioner the capacity to refer a matter for prosecution to the Director, but made the Commissioner dependent on the decision of SAPOL whether to prosecute or refer a matter for prosecution, the mischief to which the Act was directed would not be achieved.

The High Court subsequently granted special leave to appeal the Court of Appeal's decision.¹⁴ Prior to the High Court appeal being heard, Parliament amended the ICAC Act. One of the amendments was the removal of the capacity to refer a matter to the Director.¹⁵

The amendments purport to implement recommendations contained in the Report of the Crime and Public Integrity Policy Committee into matters of public integrity in South Australia.¹⁶ However, the Report contained no recommendation for the removal of the capacity to refer a matter to the Director.

8 Director of Public Prosecutions South Australia, Statement of Prosecution Policy & Guidelines, October 2014.

9 SAPOL is the only South Australian law enforcement agency pursuant to section 4 of the ICAC Act.

10 *R v Bell* [2020] SADC 107 at [86].

11 *Bell v The Queen; R v Bell; Independent Commissioner Against Corruption v Bell* [2020] SASFC 116.

12 *Ibid* at [196].

13 *Ibid* at [179].

14 This gives permission for a party to appeal to the High Court. A full hearing of the appeal follows.

15 *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act 2021* (SA) section 11.

16 The long title of the amending Act states exactly that.

The ICAC Act post 7 October 2021

The ICAC Act now provides that one of the functions of the Commission is:¹⁷

- (a) *to identify corruption in public administration and to—*
 - (i) *investigate and refer it to a law enforcement agency for any further investigation and prosecution; or*
 - (ii) *refer it to a law enforcement agency for investigation and prosecution.*

The ICAC Act further provides that the Commission may do either or both of the following:¹⁸

- (a) *refer a matter to the relevant law enforcement agency for further investigation and potential prosecution;*
- (b) *refer a matter to a public authority for further investigation and potential disciplinary action against a public officer for whom the authority is responsible.*

It is made clear that the Commission must not refer a matter directly to a prosecution authority but may only refer it to a law enforcement agency which will be responsible for any further investigation and prosecution of the matter.¹⁹

Following these amendments being enacted, on 15 March 2022 the Director gave an undertaking to the High Court that he would not make any further requests of the Commission for assistance in any existing prosecution. On that basis, special leave to appeal was revoked.

Because of the amendments and the Director's undertaking, Commission investigators are effectively precluded from communicating with the Director's prosecutors. All communication is made through SAPOL as an intermediary. This creates significant barriers to the assistance Commission investigators can give to the Director.

It is clear that Parliament intended to remove the Commission's capacity to refer a matter to the Director. Under the ICAC Act, the only South Australian law enforcement agency is SAPOL. SAPOL of course also prosecutes for the State in matters tried in the Magistrates Court.²⁰

In practice, the Director has always prosecuted matters investigated by the Commission. However, the Director has no obligation to do so if the matter is to be tried in the Magistrates Court.²¹ If the Director chooses not to prosecute a matter, SAPOL will be the prosecution authority.

A curious feature of the amended ICAC Act is that the Commission is both precluded from referring a matter directly to a prosecution authority and yet, for state offences, may only refer a matter to SAPOL, which is partly a prosecution authority and which may end up prosecuting the matter.

17 ICAC Act section 7(1)(a).

18 Ibid section 36.

19 Ibid section 36(1a).

20 Unless the Director chooses to prosecute the matter.

21 Where minor indictable and summary offences are ordinarily heard.

Another curious feature is that section 36(1)(a) read literally makes SAPOL responsible for any further investigation and prosecution following a referral. This has been raised by the Inspector, having had it brought to his attention by the Director.²² The Inspector has called for this to be rectified. It is not clear to me why these calls for change have fallen on deaf ears.

Since 7 October 2021, the Commission is the only anti-corruption body in Australia precluded from referring a matter to its Director of Public Prosecutions. Every other South Australian investigatory body, and in fact anyone, can refer a matter to the Director for consideration of whether to institute a prosecution.

What we are left with is the following process:

1. The Office for Public Integrity refers a potential issue of corruption in public administration to the Commission.
2. The Commission investigates it. In doing so, Commission investigators gain an intimate knowledge of the matter. Commission legal officers give advice during the investigation. I oversee all of this as the Commissioner and bring to bear my legal experience and expertise.
3. At the completion of the investigation, we decide whether the matter should be referred for prosecution. If a referral occurs, the brief is referred to SAPOL.
4. SAPOL considers the brief. If SAPOL decides the matter should be referred for prosecution,²³ the brief is generally referred to the Director. SAPOL could also choose to lay a charge or charges itself.²⁴
5. If there is a referral to the Director, he considers the brief. If the Director decides a charge should be laid, a prosecution is commenced by the filing of an Information.
6. The Director utilises SAPOL officers for any assistance in the prosecution. Any queries or requests of the Commission are communicated to SAPOL and may be passed on to Commission investigators by SAPOL officers. Any response is communicated back to SAPOL officers who pass it on to the Director. Any material is provided to SAPOL officers who pass the material on to the Director.
7. In practice, the Commission receives very little information about consideration of the matter, or about any resultant prosecution.

22 Office of the Inspector | Annual Report 2022–23 p 38.

23 Of a major indictable offence.

24 Of a minor indictable or summary offence.

Other jurisdictions

In the United Kingdom, it was recognised in the 1980s that early collaboration between the investigators and prosecutors of serious fraud offences was critical. The Serious Fraud Office was established in the United Kingdom in 1988²⁵ to tackle top level serious or complex fraud, bribery and corruption. It both investigates and prosecutes matters that come before it.²⁶

The model used by the Serious Fraud Office has been adopted for anti-corruption agencies in New Zealand, Hong Kong and Singapore.

In Victoria, the Independent Broad-based Anti-corruption Commission can both bring criminal proceedings²⁷ and refer matters to the Director.²⁸

The Queensland Crime and Corruption Commission is itself able to charge a person with a corruption offence.²⁹

As I stated earlier, all other anti-corruption bodies around Australia can refer matters to the Director in their jurisdiction.

In fact, and as previously noted, the anti-corruption commissioners of all states and territories declared the following to be one of the 12 fundamental principles necessary for anti-corruption and integrity agencies to independently and effectively undertake their functions:

6. The ability to refer matters to a prosecuting authority

Anti-Corruption Commissions are, by their very nature, investigation agencies. They should be empowered (or not restricted in their ability) to refer briefs of evidence assembled as a result of their investigations directly to a prosecuting authority, such as the Director of Public Prosecutions, for assessment for prosecution action.³⁰

The 12 principles are informed by the Jakarta Principles for Anti-Corruption Commissions, a set of principles to ensure the independence and effectiveness of anti-corruption agencies, as part of countries' commitments and obligations under the United Nations Convention against Corruption (UNCAC). Australia is a signatory to the Convention.

In my view collaboration between investigators and prosecutors is best practice. In some matters it will be appropriate that it occurs prior to an investigation being complete. That Commission investigators cannot even communicate directly with the Director's prosecutors, let alone refer a matter to him, makes the Commission unique both nationally and internationally.

25 By the *Criminal Justice Act 1987* (UK).

26 About us – Serious Fraud Office. <https://www.sfo.gov.uk/about-us>.

27 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) section 190.

28 Ibid section 74.

29 It is yet to implement a recommendation that, before a charge is laid in a corruption investigation, it must seek the opinion of the Director of Public Prosecutions.

30 Fundamental Principles of Australian Anti-Corruption Commissions | National Anti-Corruption Commission (NACC). <https://www.nacc.gov.au/news-and-media/fundamental-principles-australian-anti-corruption-commissions>.

Consequences

There are several significant consequences of the Commission having to refer a matter to SAPOL. The cumulative result of those is that I infrequently refer a matter for prosecution. The likelihood of a conviction under the present system is markedly diminished.

The loss of the Commission's independence

The Commission is not subject to the direction of any person in relation to any matter including the manner in which its functions are carried out or powers exercised under the ICAC Act or any other Act.³¹ The independence of an anti-corruption body is an integral feature.

The Full Court in *Bell* stated that the independence of the Commissioner (now the Commission) would be greatly compromised if the Commissioner had no capacity to refer a matter for prosecution.³²

That statement from the Full Court on 3 December 2020 does not appear to have carried any weight with Parliament. It was only 10 months later that Parliament expressly removed that capacity.

The result is that SAPOL now acts as an intermediary between two independent bodies charged with separate functions. The relevant functions of the Commission are to investigate corruption and refer it for prosecution. The relevant functions of the Director are to lay charges and prosecute. Unfortunately, the link between the two independent bodies has been severed.

The Commission is now completely dependent on SAPOL for any decision as to whether a matter is referred to the Director for prosecution.

Double handling

At the point a matter is referred for prosecution, the investigation is effectively complete. Of course, once a prosecution commences there will usually be further action taken in the investigation, but the bulk of the work is done prior to any referral.

The evidence obtained during the investigation will be assessed by the Commission investigators, legal officers, and the Commissioner, before any referral is made. That evidence will usually be voluminous.

Having a SAPOL officer (or multiple officers) then undertake that assessment again duplicates much of that work. It also duplicates the cost of that work. The Director must then undertake much the same task if a referral is made to him. The inefficiency in this process is self-evident.

31 ICAC Act section 7(2).

32 *Bell* at [147].

Loss of working knowledge of the evidence and the investigation

Commission investigators have considerable expertise with corruption matters. There is further expertise within the Commission that they can draw upon, including legal officers.

Given the complex and lengthy nature of the Commission's investigations, its investigators hold substantial working knowledge of the brief of evidence and the steps taken in an investigation. A SAPOL officer is then required to pick up a brief afresh and make a new assessment.

The SAPOL officer's task is a difficult one. They may not appreciate the significance of some of the evidence on the brief without it being pointed out to them. That is understandable when they have not conducted the investigation themselves. It is difficult to impart that knowledge to the SAPOL officer unless specific questions are asked.

If SAPOL assesses a matter as warranting referral to the Director, then a prosecutor from the Director's office will effectively undertake that same assessment in accordance with the Director's Statement of Prosecution Policy & Guidelines.³³

As things stand, any contact between Commission investigators and the Director or his prosecutors is through a SAPOL officer. The difficulty in imparting the Commission investigator's knowledge to the prosecutor and answering questions via SAPOL is even more pronounced. Detail is often lost in translation. Time is lost. Things are missed. Prosecutions are hampered. This is not in the public interest.

Indeed, the detailed knowledge of the investigation, the steps taken and not taken in it, and the reasons for that, are inevitably lost. None of this is surprising. A SAPOL officer is being asked to be responsible for an investigation they did not commence or undertake. They are asked to be an intermediary in all communication between the Commission investigators and Director's prosecutors. The process is set up to fail.

33 Director of Public Prosecutions South Australia, Statement of Prosecution Policy & Guidelines, October 2014.

Delay

The Commission is to perform its functions in a manner that “deals as expeditiously as is practicable with allegations of corruption in public administration”.³⁴ SAPOL is not bound by this requirement.

The complex nature of corruption investigations means they are usually lengthy. The briefs of evidence are of considerable size. For SAPOL to properly consider a referral will take a significant amount of time. Presently, that can be in the order of a year.

In fact, so too can the Director take a considerable amount of time when determining whether a prosecution should be commenced. That was so whether it was a direct referral under the previous ICAC Act, or a referral via SAPOL as happens now.

The delay that inherently comes with a referral to SAPOL, though, has several consequences itself. Firstly, it means that any determination by SAPOL comes much later than the referral by the Commission. The Director will receive the brief (if at all) much later than he would have from a direct referral.

In some matters the passing of time will mean that the appropriateness of a referral to the Director is diminished. If there is a referral, this delay will naturally inform the Director’s determination as to whether there are reasonable prospects of conviction and whether a prosecution is in the public interest. Inevitably, the longer it takes for a matter to be prosecuted, the less likely it is that the evidence will be able to be presented in full. Memories fade. Witnesses may lose interest, become ill or pass away.

None of this should be taken as a criticism of SAPOL. If SAPOL is being asked to determine whether a matter should be referred for prosecution, its officers need to thoroughly assess the brief. SAPOL has its own work to do. There is no requirement for SAPOL to give priority to matters referred to it by the Commission. Nor should there be.

The fact is this extra step in the process creates significant delay that, of itself, reduces the prospect of a prosecution being instituted and inhibits the full presentation of the evidence.

Much of the delay in the criminal justice system is unavoidable. This delay can be avoided simply by reinstating direct referrals to the Director.

But as I have said, delay is only one part of the problem.

34 ICAC Act section 7(4)(b).

Other consequences

The current process has an impact on witnesses. A court room is a foreign place for most people. During an investigation, Commission investigators will have met and taken statements from the witnesses who will give evidence at trial if a prosecution is commenced. SAPOL officers then become responsible for any contact with those witnesses, including arranging their attendance at trial. The rapport built up by Commission investigators is naturally lost.

Then, the Commission investigates the conduct of SAPOL officers as it does all public officers. Now any decision as to whether the conduct of a SAPOL officer is referred to the Director for prosecution following a Commission investigation is in the hands of the colleagues of that SAPOL officer.

Some matters that the Commission refers for prosecution will now never be referred to the Director. No matter how seriously the Commissioner views the alleged conduct, or how strong the Commissioner believes the prospects of conviction are, SAPOL decides whether the Director ever gets to consider the matter. In my view the result has been that matters that should properly be assessed by the Director have not been referred to him.

An example

A good way of illustrating some of the consequences of the restriction on referring matters to the Director is to use a brief example.

In 2022, I referred a matter to the Anti-Corruption Section of SAPOL “for further investigation and potential prosecution”, as the ICAC Act requires. The investigation was complete.

The matter had taken the Commission investigators four months to investigate, prepare a brief and refer to SAPOL for its consideration. When I referred the matter, I suggested that a charge of Abuse of Public Office³⁵ would be appropriate.

It took SAPOL a further 12 months before a charge of a much less serious, indeed, summary offence was laid. The decision was not referred to the Director. A guilty plea was then entered to that charge. The disposition was a good behaviour bond without a conviction being recorded.

In my view the matter was dealt with in a way that did not address the seriousness of the alleged conduct, especially the abuse of the power entrusted in the person the subject of the investigation. I consider it was a matter that warranted the Director’s consideration.

I have written to the Commissioner of Police requesting the documented reasoning behind SAPOL’s decision. It is yet to be provided and may not be. He has no obligation to do so. This leaves me and my investigators in the dark. It is one of the reasons why I have said publicly that I see little point in referring matters for prosecution in other than exceptional cases.

35 Contrary to section 251 of the *Criminal Law Consolidation Act 1935* (SA).

Conclusion

The current position is out of step with every other anti-corruption body in Australia. It is out of step with international best practice. It is in the public interest that the current position be reversed.

The loss of the Commission's independence, double handling, delay and the lack of direct communication with the prosecutor are all consequences of the current position.

Formerly, the independence of the Director in considering any matter the Commission referred for prosecution was a sufficient safeguard that struck the appropriate balance between protecting the community from corruption and protecting those being investigated from any unwarranted charges being laid.

Recommendation

I make the following recommendation.

RECOMMENDATION

The ICAC Act be amended to reinstate the capacity for the Commission to refer a matter to the Director of Public Prosecutions.





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