
The power to report — Oakden: A Shameful Chapter in South Australia’s History

Tracy Riddle and Tyler Johns KELLEDYJONES LAWYERS

It was the report that some say ended 16 years of Labor Government in South Australia; however, *Oakden: A Shameful Chapter in South Australia’s History*¹ (the Oakden Report), also contained some pertinent comments from the Independent Commissioner Against Corruption (ICAC) with respect to the application and interpretation of the Independent Commissioner Against Corruption Act 2012 (SA) (the ICAC Act).

In App 1 of the Oakden Report, the ICAC has included a preliminary determination that was provided to three parties some weeks prior to the release of the Oakden Report (the determination). The determination sought to address contentions by those parties as to whether the ICAC had the necessary statutory power to prepare and publish a report identifying relevant persons without their consent.

The ICAC dismissed the argument and explained, in detail, why he considered it to be misplaced.

Legislative regime

In South Australia, the ICAC may undertake investigations into matters of serious or systemic misconduct or maladministration in public administration.

Relevantly, s 24(2) of the ICAC Act provides that:

If a matter is assessed as raising a potential issue of misconduct or maladministration in public administration, the matter *must be* dealt with in 1 or more of the following ways:

- (a) the matter may be *referred* to an *inquiry agency*;
- (b) in the case of a matter raising potential issues of serious or systemic maladministration in public administration — the Commissioner may *exercise the powers of an inquiry agency* in dealing with the matter if satisfied that it is in the public interest to do so;
- (c) in the case of a matter raising potential issues of serious or systemic misconduct in public administration — the Commissioner may *exercise the powers of an inquiry agency* in dealing with the matter if the Commissioner is satisfied that the matter must be dealt with in connection with a matter the subject of an investigation of a kind referred to in subsection (1)(a) or a matter being dealt with in accordance with paragraph (b);

- (d) the matter may be *referred* to a public authority and directions or guidance may be given to the authority in respect of the matter [emphasis added].

Insofar as the ICAC elects to exercise the powers of an inquiry agency pursuant to s 24(2)(b), it then follows that he seeks to exercise the powers of the Ombudsman, as no other inquiry agency has been declared by regulation.²

Accordingly, if the ICAC determines to exercise the powers of the Ombudsman, he must proceed in accordance with s 36A of the ICAC Act.

In these circumstances, the ICAC is entitled to exercise *all* of the powers of the Ombudsman,³ and is “bound by any statutory provisions governing the exercise of those powers”⁴ as if the ICAC was the Ombudsman.

Relevantly then, pursuant to s 19 of the Ombudsman Act 1972 (SA) (the Ombudsman Act), the Ombudsman is bestowed all of “the powers of a commission as defined in the *Royal Commissions Act 1917*”. This necessarily *includes* the power to publish such information obtained in the course of an investigation as the Ombudsman thinks fit⁵ but *excludes* the power to take evidence in public⁶ by virtue of s 18(2) of the Ombudsman Act.

The Ombudsman’s power to report on an investigation is also contained in the Ombudsman Act at s 26(3) where it states that:

The Ombudsman may, if of the opinion that it is in the public interest to do so, cause a *report on an investigation*, or a statement about an investigation, or a decision not to investigate or to discontinue an investigation, *to be published* in such manner as the Ombudsman thinks fit [emphasis added].

Insofar as these powers may be exercised by the Ombudsman, it then follows that they may also be exercised by the ICAC when conducting an investigation pursuant to s 24(2) of the ICAC Act. That is, the ICAC may publish a report on an investigation in a manner he thinks fit.

Separately, yet also by reference to the ICAC's powers of reporting, s 42 of the ICAC Act provides that:

- (1) The Commissioner *may prepare a report* setting out —
 - (a) recommendations, formulated in the course of the performance of the Commissioner's functions, for the amendment or repeal of a law; or
 - (b) findings or recommendations resulting from *completed investigations* by the Commissioner in respect of matters raising potential issues of corruption, misconduct or maladministration in public administration; or
 - (c) other matters arising in the course of the performance of the Commissioner's functions that the Commissioner considers to be in the public interest to disclose.
- (1a) The Commissioner *must not* —
 - (a) prepare a report under this section setting out findings or recommendations resulting from a completed investigation into a potential issue of corruption in public administration unless—
 - (i) all criminal proceedings arising from that investigation are complete; or
 - (ii) the Commissioner is satisfied that no criminal proceedings will be commenced as a result of the investigation, in which case the report must not identify any person involved in the investigation; or
 - (b) *prepare a report* under this section setting out findings or recommendations resulting from a completed investigation into a potential issue of misconduct or maladministration in public administration that *identifies any person* involved in the particular matter or matters the subject of the investigation *unless the person consents* [emphasis added].

It was the application, interpretation and interaction of these provisions of the ICAC Act and Ombudsman Act that certain parties to the investigation leading to the Oakden Report raised their contentions.

The contentions

By reference to the abovementioned legislative regime, it was contended by the three parties that the powers of the Ombudsman conferred on the ICAC pursuant to s 24(2) of the ICAC Act were only applicable insofar as they were not inconsistent with provisions of the ICAC Act.

That is, as noted by the ICAC:

... it was contended that the effect of section 42 (1a) means that, notwithstanding section 26(3) of the Ombudsman Act, the ICAC cannot prepare any report setting out findings or recommendations resulting from a completed investigation into a potential issue of misconduct or maladministration in public administration that identifies [any persons] involved in the particular matter or matters the subject of the investigation [unless the person consents].⁷

Of course, in relation to the Oakden Report, the parties *did not* consent to being identified and subsequently sought to rely on this argument to prevent the ICAC from preparing his report and identifying them in same.

As noted above, a report pursuant to s 26(3) may be prepared with respect to any investigation insofar as the ICAC (when exercising the powers of the Ombudsman pursuant to s 24(2) of the ICAC Act) considers it to be in the public interest to do so. The ICAC may subsequently cause that report to be published in any manner he thinks fit.

In addition, as previously stated, when exercising the powers of the Ombudsman, the ICAC also “inherits” the powers of a Royal Commission, to the extent that their powers might be exercised by the Ombudsman. To that end, the ICAC is also able to publish a report in accordance with s 5 of the Royal Commissions Act 1917 (SA) (RCA).

Importantly, we note that there is *no requirement* under the Ombudsman Act for the Ombudsman (or the ICAC, as the case may be) to first obtain the consent of the persons he intends to identify in a report published pursuant to s 26(3) of the Ombudsman Act or, in the alternative, pursuant to s 5 of the RCA.

However, despite these powers being broadly conferred on the ICAC by virtue of s 24(2) of the ICAC Act, it was contended that the *only power* available to the ICAC in relation to publication of reports is that contained in s 42 of the ICAC Act and the powers of the Ombudsman and/or a Commission under the RCA are not available to the ICAC as a result of the same.⁸

In unravelling this argument, the ICAC explained the purpose of s 42 of the ICAC Act and, importantly, why it “is a different power and given for a different purpose to the power given in section 26(3) of the Ombudsman Act.”⁹

Relevantly, it is the position of the ICAC that the power to report under s 26(3) of the Ombudsman Act may be distinguished from the power in s 42(1) which:

... contemplates a report by the ICAC which addresses *more than one investigation*. It empowers me, at my discretion, to prepare a report setting out findings or recommendations from *completed investigations* into corruption, misconduct or maladministration. It is *clearly not a power intended to be used to address a particular investigation* that would necessarily include a great level of detail as to the investigation together with any findings and recommendations. Section 42 expressly contemplates a report about *more than one investigation* and addressing findings and recommendations made[emphasis added].¹⁰

Properly understood, the ICAC is referring to a summary report, whereby he may advise the parliament of any trends, concerns and recommendations arising

from completed investigations. It is in these circumstances where, pursuant to s 42(1a)(b) of the ICAC Act, he would be required to obtain the consent of a person prior to identifying them in the report. However, as concluded by the ICAC:

In most cases that would not present a difficulty because the report would address a range of investigations and be directed towards what has been learned from those investigations, rather than specifically identifying who engaged in misconduct or maladministration.¹¹

In addition, there is no power in s 42 of the ICAC Act to publish a report publicly. Instead, it must be provided:

... to the public authority responsible for any public officer to whom the report relates and to the Minister responsible for the public authority and in any case to the Attorney-General, the President of the Legislative Council and the Speaker of the House of Assembly.¹²

The ICAC's determination

At this juncture, we take the opportunity to remind readers that the argument pursued by the three parties was that s 42 of the ICAC Act had the effect of prevailing over the powers conferred on the ICAC by the Ombudsman Act. However, as noted by the ICAC:

The argument therefore is that the Ombudsman can report publicly on an investigation referred by the ICAC under the ICAC Act but the ICAC who would necessarily be investigating serious or systemic misconduct or maladministration could not do so. *That would be a most odd result [emphasis added].*¹³

In light of the above, the ICAC ultimately determined that:

There is nothing in s42 that would suggest Parliament intended to limit all the powers given to the ICAC by s36A(2)(b)(i). Any contention to the contrary should be rejected.

...
To read section 42 as denying the right of the ICAC to exercise one of the three powers under s26(3) of the Ombudsman Act to prepare or cause a report to be published, would be *inconsistent* with section 36A(2)(b)(i). To read section 42 of the ICAC Act as meaning that the ICAC cannot exercise the powers under section 26(3) requires a construction of section 36A(2)(a) as meaning that the ICAC has all the powers of the Ombudsman except the powers given to the Ombudsman under section 26(3). There is *no reason* to read the section that way [emphasis added].¹⁴

Accordingly, the ICAC found *he did* have the power to prepare and publish a report identifying the three parties, without their consent, in reliance on s 26(3) of the Ombudsman Act.

The ICAC concluded the determination by inviting the contending parties to make an application to the Supreme Court to restrain him from identifying them in

the Oakden Report. Whilst we are unaware as to whether any of the parties made such an application, we note that the Oakden Report was ultimately released 26 days after the determination was provided, thus tending to indicate that if such an application was made, it was not pursued.

Conclusion

The determination provides unequivocal guidance to lawyers and public officers as to the ICAC's approach to reporting on investigations, together with his interpretation of the guiding legislation.

However, we note that the determination would have been wholly unnecessary if the (former) state government had acted on the recommendation of the ICAC to amend the ICAC Act, providing further clarity regarding the ICAC's powers to report on investigations involving misconduct or maladministration, other than by reference to the Ombudsman Act.

As was noted by the ICAC in the Oakden Report: "The current regime creates some legislative tensions and it is a clumsy and overly complicated way of empowering the ICAC to investigate serious or systemic misconduct or maladministration."¹⁵

In light of these comments and given there is a newly minted Liberal Government in South Australia, it will come as no surprise to readers that one of the first matters Premier Marshall attended to, upon taking office, was to meet with the ICAC.

It will now be interesting to see what might follow, given the Liberal Party's election promise to reform the ICAC Act, including proposed amendments which would operate to enable the ICAC to conduct public hearings, and access Cabinet documents, as necessary.



Tracy Riddle

Lawyer

KelleyJones Lawyers

triddle@kelleyjones.com.au

www.kelleyjones.com.au



Tyler Johns

Lawyer

KelleyJones Lawyers

tjohns@kelleyjones.com.au

www.kelleyjones.com.au

Footnotes

1. Independent Commissioner Against Corruption *Oakden: A Shameful Chapter in South Australia's History* (28 February 2018) https://icac.sa.gov.au/sites/default/files/ICAC_Report_Oakden.pdf.

2. ICAC Act, s 4.
3. ICAC Act, s 36A(2)(b)(i).
4. ICAC Act, s 36A(2)(b)(ii).
5. Royal Commissions Act 1917 (SA), s 5.
6. Royal Commissions Act, s 6.
7. Above n 1, App 1 para 97.
8. Above n 1, App 1 paras 63–64.
9. Above n 1, App 1 para 135.
10. Above n 1, App 1 para 120.
11. Above n 1, App 1 para 125.
12. Above n 1, App 1 para 128.
13. Above n 1, App 1 para 178.
14. Above n 1, App 1 paras 147 and 149–50.
15. Above n 1, at 31.