



**ICAC**

Independent Commission  
Against Corruption  
SOUTH AUSTRALIA

# Commissioner's response

to three reports of the Inspector  
tabled 30 April 2024

A report by the Hon. Ann Vanstone KC  
Commissioner

4 June 2024



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## Letter of transmittal

4 June 2024

**The Hon. Terence Stephens MLC**  
President  
Legislative Council  
Parliament House  
North Terrace  
ADELAIDE SA 5000

**The Hon. Leon Bignall MP**  
Speaker  
House of Assembly  
Parliament House  
North Terrace  
ADELAIDE SA 5000

Dear President and Speaker

In accordance with section 42 of the *Independent Commission Against Corruption Act 2012 (SA)* I present this report entitled 'Commissioner's response to three reports of the Inspector tabled 30 April 2024.'

Section 42(3) of the Act requires that the President of the Legislative Council and the Speaker of the House of Assembly lay the report your respective Houses on the first sitting day after 28 days (or such shorter number of days as the Attorney-General approves) have passed after receiving such a report.

I intend to publish the report on the Commission's website once it has been tabled.

Yours sincerely



The Hon. Ann Vanstone KC  
**Commissioner**

# Introduction

On 30 April 2024, the Inspector of the Independent Commission Against Corruption, the Office for Public Integrity and Ombudsman SA, Mr Philip Strickland SC, concluded his term.

I thank Mr Strickland for his contribution to the South Australian public integrity scheme.

It is worth pausing to note the scale and scope of the Inspector's work which is likely unprecedented for an office such as his.

Since the Inspector's appointment considerable public resources have been committed to his review of the Hanlon investigation and proceedings, and his historical reviews of two other investigations, and a third matter.



At all times the size of the Inspector's legal team far exceeded that of the Commission. Up to eight legal officers were engaged to assist the Inspector and his Deputy. By contrast, the Inspector of the NSW Commission (a much larger body than our Commission) has only two staff – a legal advisor and business coordinator – who are shared with the Inspector of the state's Law Enforcement Conduct Commission.

During his reviews the Inspector had access to all relevant Commission holdings.

The Inspector took evidence from a number of witnesses, including two sitting Supreme Court Justices, the Director of Public Prosecutions and the former Commissioner. For these purposes the Inspector was able to utilise coercive examination powers under the *Independent Commission Against Corruption Act 2012 (SA)*, as well as his right to require the production of statements and other information. I am not aware of another Inspector elsewhere in the country exercising powers of that kind to this extent.

The scope of the Inspector's reviews can fairly be described as exhaustive.

Despite this, the Inspector found no evidence of corruption and no evidence of misconduct in public administration on the part of the former Commissioner or any of his employees. He found evidence of systemic maladministration in respect of two discrete aspects of the Hanlon investigation, but no impropriety in the decision to investigate that matter or to refer it for prosecution.

Given this, the community and the Parliament might reflect on the accuracy of some of the assertions, assumptions and suppositions which were offered to justify the 2021 amendments to the *Independent Commission Against Corruption Act* and *Ombudsman Act 1972 (SA)*.

As I said at the time, those amendments decimated the public integrity scheme on which the community relies to safeguard public administration from corruption, misconduct and maladministration. It is worth noting that, as well as impacting upon the Commission's ability to prevent corruption, the changes significantly altered the scheme under which the Ombudsman performs her work.

From the community's viewpoint it would be unfortunate if such consequential changes were based on incorrect assumptions.

A proper forum for this reflection could be the independent review of the legislative scheme which the former Ombudsman, the Director of the Office for Public Integrity and I called for by letter to the Attorney-General in October last year. Both the Attorney-

General and the Premier have since advised me that there is no present plan to review the legislation.

On his last day in office, Mr Strickland published three reports following the reviews I mentioned. Two of those reports related to investigations undertaken by the former Commissioner, the Hon. Bruce Lander KC,<sup>1</sup> and one related to a matter that was not investigated by the Commissioner.<sup>2</sup>

Having had the opportunity to consider Mr Strickland's reports, I think it appropriate that I respond by way of this report to Parliament. I make this report in accordance with s 42 of the *Independent Commission Against Corruption Act 2012*.

“*The scope of the Inspector's reviews can fairly be described as exhaustive.*”

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1 The investigation of former Department of Planning, Transport and Infrastructure public officer, Mr Trent Rusby and the investigation of Chief Superintendent Douglas Barr.

2 A complaint by Mr Michael Fuller.

# Review of the investigation and prosecution of Mr Trent Rusby

In 2014, the former Commissioner commenced an investigation into the conduct of public officers from the Marine Operations and Response Section of the Department of Planning, Transport and Infrastructure. Ultimately Commissioner Lander referred a brief of evidence relating to the conduct of five public officers to the Director of Public Prosecutions. The Director determined to charge Mr Rusby with one count of failing to act honestly and three counts of theft. The other four public officers were also charged with various offences. The Director later determined to withdraw all charges against Mr Rusby.

Although Mr Strickland found no evidence of corruption, misconduct or maladministration on the part of the former Commissioner and his staff,<sup>3</sup> he took the view that Commissioner Lander erred in referring Mr Rusby for prosecution because 'there was no or insufficient evidence gathered ... to prove that Mr Rusby committed any corruption offence'.<sup>4</sup>

I do not accept this assertion. I consider that Commissioner Lander had the absolute discretion to make the referral. The Inspector's suggestion has no apparent basis in the *Independent Commission Against Corruption Act 2012* (SA) ('The Act'), law, or any policy rationale, and could have damaging consequences for the Commission's operations and those of law enforcement more generally.

It is not the role of the Commissioner, or any investigating agency, to set themselves up as some sort of *quasi* prosecuting authority, applying a prosecution guideline of an indeterminant nature and without any statutory or policy basis. And, moreover, what is the point? Is it to save the Director of Public Prosecutions from falling into error? As the Inspector stated, the decision to refer 'is not, and cannot be, a decision to prosecute a person, which the Commissioner has no power to do'.<sup>5</sup> The Inspector went on to acknowledge that the assessment of evidence and the decision to prosecute was solely a matter for the Director.<sup>6</sup>

In evidence given to the Inspector, the then Director of Public Prosecutions stated that the opinions of the Commissioner outlined in the referral communications had no bearing on the Director's consideration of the matter.<sup>7</sup> Furthermore, having examined the matter, the Director determined to lay charges. It is difficult to reconcile the suggestion that there was no evidence to support the charges with the fact that charges were laid. The Director's decision to lay charges indicates, at the least, that different points of view about the matter were available. However, I need not dwell on that observation.

Moreover, it is difficult to see what the former Commissioner could have done to avoid the Inspector's criticism. As I see it, the evidence relevant to Mr Rusby had to be provided to the Director, because it was relevant to the other charges he was considering. Failure to furnish the whole brief could have misled the Director.

There are good policy reasons why a law enforcement agency should be able to seek the views of the Director of Public Prosecutions on a matter before determining to refer it. The Director's view on a significant or complex legal question might be critical to the progress of the matter. In those circumstances, the investigative agency might wish to seek the Director's views before investing further resources in the investigation. This approach promotes the efficient use of the agency's and the Director's resources, because unnecessary further investigations will likely be avoided. This is a practice commonly engaged in by police and other investigative bodies.

On my reading, Commissioner Lander's referral of Mr Rusby was of this kind.

3 Report 2024/01:Review of the investigation and prosecution of Mr Trent Rusby, paragraph 325

4 Ibid. paragraphs 19 and 317

5 Ibid. paragraph 179

6 Ibid. paragraph 266

7 Ibid. paragraph 272

## Review of the investigation of Chief Superintendent Douglas Barr

In 2017 the former Commissioner commenced an investigation into a South Australia Police recruitment drive known as Recruit 313. He inquired into the conduct of several senior police officers including Chief Superintendent Barr. In essence, the allegations subject to investigation were that some officers interfered in the usual recruitment processes to favour applicants connected to certain serving police officers. Initially this was an investigation of potential corruption. Later the corruption investigation was closed and a misconduct and maladministration investigation undertaken by the then Commissioner. Investigations of the latter type are not any longer conducted by the Commission. In carrying out such investigations the former Commissioner used the powers of the *Royal Commissions Act 1917 (SA)* and not those given within the *Independent Commission Against Corruption Act 2012 (SA)*.

The principal complaint examined by the Inspector was of delay in the investigation.

The Inspector determined that it was appropriate to commence the investigation, that it was not attended by unreasonable delay and that there was not undue prejudice to the reputation of Chief Superintendent Barr. The Inspector found no evidence of bias, or any unreasonable invasion of privacy, or any corruption, misconduct or maladministration on the part of the Commissioner or his staff.<sup>8</sup>

In his report the Inspector found that the former Commissioner made a clear statement to Chief Superintendent Barr when Barr appeared before him, to the effect that the Commissioner was not investigating corruption, but rather misconduct and maladministration. Therefore, Chief Superintendent Barr was or should have been aware that the allegations were not of a criminal nature. That statement was made in the examination room in front of Chief Superintendent Barr's counsel,<sup>9</sup> and was recorded and transcribed.

The Inspector noted in his report that, while the final submissions of the Commissioner's Senior Counsel set out that findings of misconduct and maladministration were available against Chief Superintendent Barr, the former Commissioner was not prepared to make such findings as, due to Chief Superintendent Barr's death, he had not been afforded procedural fairness regarding those findings.<sup>10</sup>

This did not amount to an exoneration of Chief Superintendent Barr.

On the topic of whether Chief Superintendent Barr was told or believed that he was not able to discuss the investigation with other persons, the Inspector found that advice on the obligation not to disclose such information accompanied the summons issued to him on 24 May 2019. That advice was that discussion could be had with a close family member, which included a spouse, parent, grandparent or sibling. In addition, the investigation could be disclosed for the purpose of obtaining assistance from a medical practitioner or psychologist. Chief Superintendent Barr did discuss the investigation with psychologists.<sup>11</sup>

The Inspector made five recommendations to the Commission resulting from his review of this investigation.

The first three related to the setting, publishing and reporting on key performance indicators in terms of time taken for the assessment of complaints and reports, and any subsequent investigation of them. The Inspector recommended the Act be amended to

<sup>8</sup> Report 2024/02: Review of the investigation of Chief Superintendent Douglas Barr, paragraphs 22 and 398–406

<sup>9</sup> *Ibid.* paragraphs 336–338

<sup>10</sup> *Ibid.* paragraphs 114–117

<sup>11</sup> *Ibid.* paragraphs 371–373



require the Commission to publish its performance against such indicators in the Annual Report.

The Commission has employed key performance indicators for investigation lengths since it commenced in 2013. Adherence to them has been reported upon in every Annual Report. The Commission does not have a key performance indicator for the assessment of complaints and reports because the Commission does not assess complaints and reports. That is done by the Office for Public Integrity, now a separate agency.

I support the Commission's continued use of key performance indicators. However, I do not support the legislating of such measures. It is not appropriate to set these in stone. Indeed when I commenced as Commissioner, one of my first tasks was reviewing and resetting these indicators. As it happens, I tightened them. The critical feature of a key performance indicator is that it must be set taking into account the infinite number of situations and factors which will dictate the length of time taken for investigations. I see no value in legislating such measures.

The Inspector also made a recommendation relating to witness welfare. He acknowledged that the Commission has in place appropriate procedures to guide investigators in dealing with distress of witnesses and persons investigated. The Commission is currently undertaking work in relation to witness welfare. This recommendation will be considered as part of that work.

Recommendation 5 suggested consideration be given to amending the Act so that I am empowered 'to issue guidelines relating to the conduct of inquiries of the Commission to members of staff of the Commission and counsel appointed to assist the Commission'.<sup>12</sup>

It is suggested the guidelines deal with five topics: the investigation of evidence that might exculpate affected persons, the disclosure of exculpatory and other relevant evidence to affected persons, providing affected persons and other witnesses with access to relevant documents and a reasonable time to prepare before giving evidence, and any other matter necessary to ensure procedural fairness.

I assume without being entirely sure that by using the term 'inquiries' the Inspector intends that the proposed guidelines apply only to examinations of witnesses within the Commission. If so, I note that the recommendation appears to be closely modelled on s 31B of the *Independent Commission Against Corruption Act 1988* (NSW) which governs the New South Wales Commission. That section requires the NSW Commissioners to issue guidelines that apply to their conduct of 'public inquiries'.

If that is the Inspector's meaning, then the recommendation implies a misunderstanding.

Commission examinations are held to obtain evidence; not for the purpose of making findings as they are in New South Wales. Here, the witness is not usually the subject of any allegation, but rather someone who has declined to provide evidence voluntarily. The examination must be conducted in private and no findings are made.<sup>13</sup> Our examinations more closely resemble police interviews than public inquiries of the type conducted by other integrity agencies, or a Royal Commissions Act hearing of the kind discussed in the Inspector's report.

In these circumstances the proposed guidelines will have little utility. There will be no 'allegations' about which findings may be made or against which the exculpatory potential of evidence can be assessed. As I said, usually, the witness will not be a person the subject of any allegation at all. Because there are no proposed findings, the hearing rule will not apply. Other requirements of procedural fairness are already either implied or expressly required in the Act.

<sup>12</sup> Ibid. page 102

<sup>13</sup> *Independent Commission Against Corruption Act 1988* (NSW) sch 2 cl 3(3)

It follows that I do not support the recommendation. However, if Parliament is minded to consider it, that could be done as part of the review jointly requested by the Director of the Office for Public Integrity, the Ombudsman and me.<sup>14</sup>

## Complaints of Mr Michael Fuller

The various complaints made by Mr Michael Fuller, sometimes in conjunction with Mr Ian Lawton, in relation to the affairs of Lawton have been reviewed by a former Director of the Office for Public Integrity, the former Commissioner, the Deputy Commissioner, the Commissioner's first Reviewer, the Hon. Kevin Duggan AM KC RFD, at least twice by the Commissioner's second Reviewer, the Hon. John Sulan KC, a Parliamentary Committee, and now the Commission's Inspector.<sup>15</sup> None has found any evidence of corruption, misconduct or maladministration. Enough time has been spent and ink spilled on this matter.

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14 Available on the Commission's website: [Correspondence-to-Attorney-General-Request-for-a-review-of-the-integrity-scheme.pdf \(icac.sa.gov.au\)](#)

15 Report 2024/03: Review of PIR18/E17253 and Complaint of Mr Michael Fuller





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