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Report of a review of the operations of the Independent Commissioner Against Corruption and the Office for Public Integrity

For the period 1 July 2020 to 30 June 2021



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**REPORT TO THE ATTORNEY-GENERAL
THE HONOURABLE VICKIE CHAPMAN MP PURSUANT TO SCHEDULE 4 OF
THE *INDEPENDENT COMMISSIONER AGAINST CORRUPTION ACT 2012*
FOR THE PERIOD 1 JULY 2020 TO 30 JUNE 2021**

BACKGROUND

The *Independent Commissioner Against Corruption Act 2012* (the Act) came into operation on 1 September 2013.

The Act established the Independent Commissioner Against Corruption (ICAC) and the Office for Public Integrity (OPI).

The Act was amended by the *Independent Commissioner Against Corruption (Miscellaneous) Amendment Act 2016* (the 2016 amendments) which received the Royal Assent on 24 November 2016. Schedule 4 of the Act as amended came into operation on 15 July 2017. Schedule 4 provides for the appointment of a Reviewer of ICAC and prescribes the powers and duties of the Reviewer.

Schedule 4 clause 2(1) states:

2 – Appointment of reviewer

- (1) The Attorney-General must appoint a person (the **reviewer**) –
 - (a) to conduct annual reviews examining the operations of the Commissioner and the Office during each financial year; and
 - (b) to conduct reviews relating to relevant complaints received by the reviewer; and
 - (c) to conduct other reviews at the request of the Attorney-General or the Committee; and
 - (d) to perform other functions conferred on the reviewer by the Attorney-General or by another ICAC.

Schedule 4 clause 3(1) provides:

3 – Reviews

- (1) Without limiting the matters that may be the subject of a review, the reviewer –
 - (a) must, in the case of an annual review, consider the following in relation to the financial year to which the review relates:
 - (i) whether the powers under this Act were exercised in an appropriate manner, including –
 - (A) whether there was any evidence of –

- maladministration in public administration on the part of the Commissioner or employees of the Commissioner or of the Office; or
 - unreasonable delay in the conduct of investigations under this Act; or
 - unreasonable invasions of privacy by the Commissioner or employees of the Commissioner or of the Office; and
- (B) whether undue prejudice to the reputation of any person was caused;
- (ii) whether the practices and procedures of the Commissioner and the Office were effective and efficient;
 - (iii) whether the operations made an appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration in public administration; and
- (b) may examine any particular exercises of power by the Commissioner or the Office; and
- (c) may make any recommendations to the Commissioner or to the Attorney-General that the reviewer thinks fit.

On 2 April 2019 I was appointed as the Reviewer of ICAC pursuant to Schedule 4 of the Act.

This report is based on the annual review which I have conducted with respect to the operations of the ICAC for the period 1 July 2020 to 30 June 2021.

REVIEW OF THE EXERCISE OF POWERS

I have conducted my review in accordance with section 46 and Schedule 4 of the Act. I propose to set out selected provisions of the Act in order to provide context for my comments on the exercise by the ICAC of its powers during the reporting period.

THE PRIMARY OBJECTS OF THE ICAC ACT

The primary objects of the Act are set out in section 3 –

- (1) The primary objects of this Act are –
 - (a) to establish the Independent Commissioner Against Corruption with functions designed to further –
 - (i) the identification and investigation of corruption in public administration; and

- (ii) the prevention or minimisation of corruption, misconduct and maladministration in public administration, including through referral of potential issues, education and evaluation of practices, policies and procedures; and
 - (b) to establish the Office for Public Integrity to manage complaints about public administration with a view to –
 - (i) the identification of corruption, misconduct and maladministration in public administration; and
 - (ii) ensuring that complaints about public administration are dealt with by the most appropriate person or body; and
 - (c) to achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person's reputation (recognising that the balance may be weighted differently in relation to corruption in public administration as compared to misconduct or maladministration in public administration).
- (2) Whilst any potential issue of corruption, misconduct or maladministration in public administration may be the subject of a complaint or report under this Act and may be assessed and referred to a relevant body in accordance with this Act, it is intended –
- (a) that the primary object of the Commissioner be to investigate corruption in public administration; and
 - (b) that matters raising potential issues of misconduct or maladministration in public administration will be referred to an inquiry agency or to a public authority (unless the circumstances set out in section 7(1)(cb) or (cc) apply).

ICAC performs an investigative function and has no power to determine whether an offence has been committed or misconduct or maladministration has taken place except, in the case of alleged misconduct or maladministration, when exercising the powers of an inquiry agency which is defined as the Ombudsman or a person declared by regulation to be an inquiry agency. The powers and functions of ICAC have been the subject of a recent decision of the Supreme Court of South Australia.

In my last annual report I reported that in the matter of *R v Bell* there had been a decision by the District Court relating to the powers and functions of ICAC. The District Court concluded that ICAC's referral of his investigation to the Director of Public Prosecutions (DPP) was beyond power. The Full Court of the Supreme Court determined that the conclusion of the District Court referred to above was in error. The Court determined that the ICAC is authorised, pursuant to section 7(1)(a)(i) of the Act, to refer a matter to the DPP and that any such referral is lawful.

Further, the ICAC is authorised to provide evidentiary material to the DPP, including material obtained using ICAC's comprehensive powers. The Court held that ICAC has power, after criminal proceedings are instituted, to interview witnesses, attend with the DPP to the proofing of witnesses, and obtain records using compulsive powers pursuant to section 29 of the Act.

Further, the ICAC has power to authorise the disclosure and publication of material pursuant to sections 54 and 56 of the Act. The Court also observed that once the prosecution has commenced, the Commissioner should have revoked the non-communication directions given to witnesses who had been examined by ICAC.

The ICAC does not have power to file and serve court documents in a prosecution. This is the function of the DPP.

The High Court of Australia has granted leave to appeal against the judgment of the Full Court.

The Act also established the OPI to manage complaints about public administration. In broad terms, the OPI receives initial complaints and reports alleging conduct contrary to the Act and undertakes an initial assessment of the issues which they raise. In addition, following the passing of the *Police Complaints and Discipline Act 2016* (PCD Act) on 4 September 2017, the OPI now exercises independent oversight of the police, a function which was previously exercised by the Police Ombudsman.

THE CATEGORIES OF CONDUCT WHICH MAY BE INVESTIGATED

As stated above, the Act makes provision for investigations into allegations of three categories of conduct: corruption in public administration, misconduct in public administration and maladministration in public administration. Each category is defined in section 5 of the Act.

Corruption in public administration is defined by reference to offences created by various Acts of Parliament. Section 5 of the Act identifies those offences as follows:

- (2) **“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 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; or

- (d) 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.

Misconduct in public administration is defined in section 5(3) of the ICAC Act as –

- (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 5(4) provides as follows:

Maladministration in public administration

- (a) means –
 - (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or
 - (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
 - (b) includes conduct resulting from impropriety, incompetence or negligence;
- and
- (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

Persons who are “public officers” for the purposes of the above provisions are prescribed in Schedule 1 of the Act.

ACTION WHICH MAY BE TAKEN BY THE COMMISSIONER

The type of action which may be taken by the Commissioner is dependent upon the nature of the potential issue raised by the assessment. In this respect regard must be had to the distinction which is drawn between a potential issue of corruption in public administration and a potential issue of misconduct or maladministration in public administration. Section 24 of the Act sets out the procedure to be followed in this respect.

MATTERS ASSESSED AS RAISING A POTENTIAL ISSUE OF CORRUPTION

Section 24(1) provides that if a matter is assessed as raising a potential issue of corruption in public administration that could be the subject of a prosecution, the matter must be investigated by the Commissioner or referred to South Australia Police (SAPOL) or other law enforcement agency.

MATTERS ASSESSED AS RAISING A POTENTIAL ISSUE OF MISCONDUCT OR MALADMINISTRATION IN PUBLIC ADMINISTRATION

Section 24(2) of the Act provides that if a matter is assessed as raising a potential issue of misconduct or maladministration in public administration, the Commissioner must deal with it in one or more of the following ways:

1. refer the matter to an inquiry agency; or
2. in the case of a matter raising potential issues of serious or systemic maladministration in public administration, exercise the powers of an inquiry agency in respect of the matter if satisfied that it is in the public interest to do so; or
3. in the case of a matter raising potential issues of serious or systemic misconduct in public administration, exercise the powers of an inquiry agency in dealing with the matter.

This course is open only if the Commissioner is satisfied that the matter must be dealt with in connection with the matter which is the subject of an investigation into possible corruption in public administration or a matter in which the Commissioner is exercising the powers of an inquiry agency into possible serious or systemic maladministration in public administration; or

4. refer the matter to a public authority with such directions or guidance as considered appropriate.

ACTION TAKEN BY THE COMMISSIONER DURING THE REPORTING PERIOD

Investigations

During the reporting period 30 new corruption investigations were commenced by the Commissioner. Two of the investigations were commenced as a result of a complaint or report received in the previous financial year. One investigation was conducted as a joint investigation with another agency. Twenty-five corruption investigations were carried over from the previous year.

The Commissioner also observed that during 2020-21 five persons who had been referred to the ODPP for prosecution were sentenced.

During 2020-21, six investigations were referred to the ODPP. The ODPP determined to commence a prosecution in respect of five of those matters, and one additional matter which had been referred in the previous reporting period.

As at 30 June 2021, one matter referred in the 2020-21 financial year was awaiting a determination by the ODPP.

During 2020-21, 10 persons were charged with corruption offences while four matters before the courts were finalized. One matter was referred to a public authority to consider disciplinary action following a corruption investigation.

Referral to police for investigation

Complaints and reports assessed as raising a potential issue of corruption may be referred to SAPOL. During the reporting period 31 complaints and reports were referred to SAPOL for investigation.

Misconduct and maladministration referrals

During the reporting period 213 matters were referred to the Ombudsman or a public authority raising a potential issue of misconduct or maladministration, of which 26 referrals were made to the Ombudsman and 187 matters were referred to a public authority.

During the reporting period the Commissioner did not exercise the powers of an inquiry agency. Six investigations were carried over from previous years.

Matters in which no action or further action was taken

The Commissioner or the OPI determined to take no action in 833 matters. Four hundred and seventy four of these matters were complaints and 350 were reports. Nine matters were considered at the ICAC's own initiative.

The decision not to take any further action was made for one or more of the following reasons:

- the matter did not raise a potential issue of corruption, misconduct or maladministration in public administration;
- the matter was trivial, vexatious or frivolous;

- the matter was previously dealt with by an inquiry agency or public authority and there was no reason to re-examine the matter;

or

- there was other good reason why no action should have been taken in respect of the matter.

PROTECTIVE SECURITY OFFICERS

During the reporting period the OPI oversaw 13 matters concerning alleged breaches of the Code of Conduct for Protective Security Officers. Those matters were dealt with by SAPOL. The OPI did not issue any directions in respect of those matters.

THE OFFICE FOR PUBLIC INTEGRITY (OPI)

The functions and objectives of the OPI under the Act are set out in section 17. Additional functions are prescribed by section 8 of the PCDA.

Section 17 provides:

There is to be an Office for Public Integrity with the following functions:

- (a) to receive and assess complaints about public administration from members of the public;
- (b) to receive and assess reports about corruption, misconduct and maladministration in public administration from inquiry agencies, public authorities and public officers;
- (c) to refer complaints and reports to inquiry agencies, public authorities and public officers in circumstances approved by the Commissioner or make recommendations to the Commissioner in relation to complaints and reports;
- (ca) to give directions or guidance to public authorities in circumstances approved by the Commissioner;
- (d) to perform other functions assigned to the Office by the Commissioner or another Act.

The OPI is operated by 19 staff comprising a Director, an Acting Manager Assessments, a Team Leader, Investigation Specialists, Principal Assessment Officers, Assessment Officers and Operations Support Officers.

The OPI is responsible for receiving complaints concerning alleged corruption and the various types of misconduct and maladministration which ICAC is charged with investigating or referring. Complaints and reports are received by telephone, written correspondence, online, by email or through personal interview. Section 23 of the Act requires the OPI to make an assessment of each complaint or report received by it.

The assessment is made in order to determine whether the complaint or report –

- (a) raises a potential issue of corruption that could be the subject of a prosecution;

- (b) raises a potential issue of misconduct or maladministration in public administration;
- (c) raises some other issue that should be referred to an inquiry agency, a public authority or public officer;
- (d) is trivial, vexatious or frivolous or has previously been dealt with by an inquiry agency or public authority and there is no reason to re-examine it or there is another good reason why no action should be taken in respect of it.

Since December 2016, the OPI has had authority to refer matters raising a potential issue of misconduct or maladministration in public administration to a public authority and give directions and guidance to the authority.

The Act provides that the power to make such referrals is to apply in circumstances approved by the Commissioner. Those circumstances, as prescribed by the Commissioner, restrict the function of direct referral by the OPI to –

- complaints and reports which are assessed as raising potential misconduct or maladministration which is not of a serious or systemic nature, or
- complaints or reports which are assessed as raising some other issue which renders it appropriate to refer the complaint or report to an inquiry agency, public authority or public officer.

The process of assessment enables the Commissioner to concentrate on allegations of corruption and serious or systemic misconduct or maladministration.

Section 4(2) of the Act provides that misconduct or maladministration in public administration will be taken to be serious or systemic if the misconduct or maladministration –

- (a) is of such a significant nature that it would undermine public confidence in the relevant public authority, or in public administration generally; and
- (b) has significant implications for the relevant public authority or for the public administration generally (rather than just for the individual public officer concerned).

The OPI received 1059 general enquiries and 186 contacts in relation to matters outside the Commissioner's jurisdiction.

There were 1238 new complaints and reports made under the Act to the OPI during the reporting period. This is a decrease of 1.5% from the previous reporting period. Complaints and reports are received through the website, by telephone, by email, by letter and in person. There were 112 complaints and reports relating to Local Government, two complaints relating to the Ombudsman, 35 complaints and reports about members of Parliament, 112 complaints and reports about statutory authorities, 334 complaints and reports relating to the State Government and one private complaint.

In addition, the OPI is responsible for receiving and processing complaints from persons dissatisfied with the handling of a particular matter. One hundred and eighty such complaints (referred to as "recontacts") were received by OPI in the reporting period.

The Commissioner refers to this process in her Draft Annual Report:

Where a person recontacts the OPI because that person is dissatisfied with the decision made in relation to his or her complaint or report, the matter is reviewed by the OPI and referred to the Commissioner or Deputy Commissioner for determination as to whether the complaint or report ought to be reassessed.

During the reporting period the OPI received 180 recontacts in relation to 154 complaints and reports. The OPI reviewed a further ten recontacts which were received in the previous reporting period.

During the reporting period, 92 matters were substantively reviewed following a recontact (including five matters carried over from the previous reporting period). As a result, nine complaints and reports were reassessed. A decision was made to take no further action in relation to the remaining recontacts.

There were 77 occasions where the OPI determined to take no action on a recontact in the absence of a formal review. Such a review was not required because the recontact did not include any substantive information.

As at 30 June 2021 there were 16 outstanding recontacts.

I have visited the OPI. I have perused the records of a number of matters dealt with by ICAC and the OPI. I consider that the OPI is well administered.

PUBLIC INTEREST DISCLOSURE ACT 2018 (SA) (PID ACT)

The PID Act commenced on 1 July 2019. The ICAC issued guidelines pursuant to section 14 of the PID Act.

The OPI has a function to receive and assess disclosures of public interest information. The OPI treats all reports made under the Act consistently with the PID Act. During the reporting period the OPI received 642 reports under the Act which were dealt with in accordance with the PID Act.

A recipient of an appropriate disclosure under the PID Act must notify the OPI and provide relevant information regarding the disclosure. There were 71 notifications in the reporting period. If a person to whom a notification has been made takes action in respect of the notification, the person must notify the OPI and provide information about which action was taken. During the reporting period, there were 20 notifications.

I am satisfied that the OPI undertook its role in relation to the PID Act in an appropriate manner.

THE POLICE COMPLAINTS AND DISCIPLINE ACT 2016 (SA) (PCD ACT)

As previously stated, the PCD Act resulted in various functions associated with complaints against officers of SAPOL being transferred to the OPI. The initial function of the OPI in this respect is to receive and process such complaints.

The majority of complaints received by the OPI relating to police misconduct are dealt with by the Internal Investigation Section (IIS) of SAPOL. Although the OPI has oversight over the police in respect of these complaints, they are mainly dealt with by IIS. Section 28 of the PCD Act provides that, within three days after IIS informs the OPI about an assessment of a complaint or report, the OPI may, after consultation with the officer-in-charge of IIS, reassess

the complaint or report and may substitute its assessment of the complaint or report and that reassessment will be taken to be an assessment of the IIS. The substituted assessment must be recorded on the complaint management system.

The Draft Annual Report of the Commissioner sets out the number of complaints and reports received:

Between 1 July 2020 and 30 June 2021 the OPI received or registered 2,413 complaints and reports under the PCDA: 1,616 matters received directly by the OPI and 797 matters received by the IIS. Three of those matters were later marked as duplicates.

The OPI received 79.9% of all complaints under the PCD Act while SA Police received 94.5% of all reports made under the PCD Act.

The OPI reviewed 2326 complaints and reports assessed by the IIS under section 14 of the PCD Act. There were 43 occasions in which the OPI consulted with IIS. On five occasions IIS amended its assessments. The OPI referred eight complaints and reports to the Commissioner. The OPI oversaw 202 conduct investigations commenced by SAPOL. On one occasion the OPI gave a direction pursuant to section 27 of the PCD Act.¹ The direction was given to IIS.

In reviewing the conduct of the OPI, there have been instances when I have considered that the IIS review of a complaint has been less than satisfactory. However, in each of those instances, I have concluded that the OPI's oversight was satisfactory. I have no power to review investigations made by SAPOL.

THE INVESTIGATIONS SECTION

The Investigations Team is comprised of 25 staff members including a Director, Team Leaders, Investigators, Digital Forensic Analysts, Intelligence Analysts and other staff members.

COMPLAINTS, REPORTS AND OWN INITIATIVE MATTERS

The Commissioner in her Draft Annual Report states:

During 2020-21 the ICAC commenced 30 new corruption investigations. Two of those investigations were commenced as a result of a complaint or report received in the previous financial year. One investigation was conducted as a joint investigation.

The Commissioner and the OPI determined to take no further action in respect of 833 matters. This includes nine matters commenced by the former Commissioner upon his own initiative. A further 14 matters were reassessed in response to comments from a public authority or inquiry agency and no further action was taken.

¹ SA Police Internal Investigation Section.

DIRECTIONS AND GUIDELINES GOVERNING REPORTING UNDER THE ACT

Section 20 of the Act requires the Commissioner to prepare directions and guidelines governing reporting to the OPI of matters that an inquiry agency, public authority or public officer reasonably suspects involves corruption, misconduct or maladministration in public administration. The directions and guidelines must include provisions specifying the matters required to be reported and guidance as to how they should be reported. The guidelines must be made available free of charge on the Internet and at premises established for the receipt of complaints or reports, for inspection by members of the public.

In conformity with this section, the relevant Directions and Guidelines have been published in a booklet form and are available on the ICAC website.

In my view, the material which has been prepared in this respect satisfies the statutory requirements.

THE EXERCISE OF POWERS UNDER THE ACT

The annual review of operations of ICAC requires consideration as to whether the powers under the Act were exercised in an appropriate manner.

The audit of the exercise of the powers involves consideration of the manner in which examinations and other coercive powers were conducted and exercised during the reporting period. The coercive powers are confined to investigations into corruption in public administration.

It is also convenient in this section of the Report to comment on Standard Operating Procedures which have been prepared in accordance with section 26 of the Act which requires the Commissioner to prepare Standard Operating Procedures governing the exercise of powers by investigators for the purpose of an investigation into corruption in public administration. The Standard Operating Procedures must include provisions designed to ensure that persons in relation to whom powers are to be exercised under the Act are provided with appropriate information about their rights, obligations and liabilities under the Act. To this end, the procedures must be made available for inspection by the public on the Internet and at premises established for the receipt by the OPI of complaints or reports.

I have read and considered the Standard Operating Procedures Guidelines. I am satisfied that they comply with the Act.

SECTION 28 NOTICES REQUIRING PRODUCTION OF A STATEMENT OF INFORMATION

Section 28 of the Act provides that the person heading an investigation into corruption in public administration may, by written notice, require an inquiry agency, public authority or public officer to produce a written statement of information about a specific matter, or to answer specified questions within a specified period and in a specified form. The statement must be verified by statutory declaration if the person heading the investigation so requires.

The Standard Operating Procedure sets out the responsibilities of the person heading the investigation in preparing the written notice and the manner in which the notice is to be served.

A copy of the notice is to be kept in ICAC's case management system. An entry is to be made in the case management system recording the application for the notice and the outcome of that application. A *pro forma* of a document explaining the nature of the notice for the information of the person served with the notice is provided for in an Appendix to the Standard Operating Procedure.

No section 28 notices were issued during the report period.

SECTION 29 NOTICES TO PRODUCE DOCUMENTS AND OTHER THINGS

Section 29 of the Act states that a person may be required to produce a document or thing for the purposes of an investigation into corruption in public administration as set out in Schedule 2.

Clause 5 of Schedule 2 of the Act provides, in part, as follows:

5 – Power to obtain documents

- (1) An examiner may, by notice in writing served on a person, required the person –
 - (a) to attend, at a time and place specified in the notice, before a person specified in the notice, being the examiner or a member of the staff of the Commissioner; and
 - (b) to produce at that time and place to the person so specified a document or other thing specified in the notice, being a document or other thing that is relevant to an investigation into corruption in public administration.
- (2) Before issuing a notice under sub clause (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so.
- (3) The examiner must also record in writing the reasons for the issue of the notice.
- (4) A notice may be issued under this clause in relation to an investigation into corruption in public administration, whether or not an examination before an examiner is being held for the purposes of the investigation.

During the reporting period 14 section 29 notices were issued. Of those, it was determined not to serve two notices.

SECTION 29A NOTICES AUTHORISING INSPECTION OF FINANCIAL RECORDS

Section 29A of the Act empowers the Commissioner to authorise, by written notice, an investigator to inspect and take copies of financial records in the course of an investigation into corruption in public administration. The section also empowers an investigator authorised

pursuant to the section to give directions to, or impose requirements on, the deposit holder for the purpose of inspecting and taking copies of the records.

The notice is served on a deposit holder such as a bank which holds money in accounts on behalf of other persons.

The Standing Operating Procedure requires the investigator seeking an authorisation in a matter to present a written application to the Commissioner together with a draft notice in the approved format. The authorisation and direction notice in the form provided in the Appendix to the Standard Operating Procedure must be accompanied by an information sheet outlining the manner in which service is to be effected.

During the reporting period 113 section 29A notices were authorised and served.

SECTION 30 – POWER TO REQUIRE A PERSON TO DISCLOSE IDENTITY

Section 30 of the Act authorises an investigator in an investigation into corruption in public administration, to require a person who the investigator reasonably suspects has committed, is committing, or is about to commit, an offence prescribed by the Act or who may be able to assist an investigation of a prescribed offence to state all or any of the person's details and to produce evidence of those details.

The Standard Operating Procedure sets out the preconditions for the exercise of this power and the investigator's responsibilities in respect of it. A pro forma setting out the terms of a written notice requiring relevant personal details is contained in an Appendix to the Standard Operating Procedure.

I am informed that there were no section 30 notices issued during the reporting period.

RETENTION ORDERS – SECTIONS 31 AND 32

Section 31(7)(c)(v) of the Act provides that, in the course of a search authorised by a warrant issued pursuant to the Act, an investigator or a police officer may issue a retention order in respect of anything that the investigator or police officer reasonably suspects has been used in, or may constitute evidence of, a prescribed offence requiring that it not be removed or interfered with without the approval of the investigator or police officer. Section 31(7)(c)(v) provides for a similar procedure where reasonable suspicion exists in relation to an offence other than a prescribed offence.

Section 32(1) states that a retention order must be in the form of a written notice given to the owner or person apparently in control of the thing to which the order relates.

The responsibilities of an investigator or police officer exercising powers of seizure and retention under section 31 and the procedure to be followed in each case are set out in the Standard Operating Procedure. The Retention Order must be given to the owner or person apparently in possession of or having control of the thing to which the order relates and, in the event that the order is to be varied or discharged, written notice is to be given to the person who was served with the original Retention Order. The rights and obligations of the person served are to be set out in the Retention Order as well as in an information sheet provided for in the Appendix to the Standard Operating Procedure.

There were no retention orders issued during the reporting period.

SECTION 34 NOTICES LIMITING ACTION BY OTHER AGENCIES AND AUTHORITIES OR REQUIRING THAT A JOINT INVESTIGATION TAKE PLACE

Section 34 of the Act provides as follows:

Limiting action by other agencies and authorities

- (1) The Commissioner may, by written notice, require a South Australian law enforcement agency, inquiry agency or public authority to refrain from taking action, in respect of a particular matter being investigated by the Commissioner under this Act or to conduct a joint investigation with the Commissioner in respect of a particular matter (and the agency or authority must comply with the requirement even if the agency or authority is otherwise required or authorised to take action under another Act).
- (2) The notice must specify the period for which it is to apply and set out details of the action that is not to be taken or the requirements governing any joint investigation.
- (3) The Commissioner must consider any comments of the agency or authority with respect to the terms of the notice.

In the reporting period, three notices were issued requiring an agency to refrain from taking action. One of those notices was an extension of a previous notice. One notice to conduct a joint investigation was issued.

COMPLIANCE

I have undertaken a review of the matters in which the coercive powers discussed above have been employed. I am satisfied that the use of the powers in individual matters was justified and that the statutory and procedural requirements relevant to them were followed and applied in each case.

ENTER AND SEARCH POWERS UNDER WARRANT – SECTION 31

The Act provides for the issue of search warrants in investigations into corruption in public administration.

Section 31(1) empowers the Commissioner to issue a warrant authorising an investigator or a police officer to enter and search –

- (a) a place occupied or used by an inquiry agency, public authority or public officer; or
- (b) a vehicle owned or used by an inquiry agency, public authority or public officer, being, or having been, used for or in connection with a prescribed offence; or

Section 31(2) provides that a judge of the Supreme Court may, on application by an investigator, issue a warrant authorising an investigator or a police officer to enter and search any place or vehicle.

Section 31(3) states that a warrant may only be issued if the Commissioner or the judge is satisfied that the warrant is reasonably required in the circumstances for the purpose of an investigation into the potential issue of corruption in public administration.

The grounds of an application for a warrant must be verified by a statutory declaration if the application is made to the Commissioner, or by affidavit if the application is made to a judge of the Supreme Court (section 31(5)).

The warrant must specify the place or vehicle to which it relates and whether entry is authorised at any time of the day or night or during specified hours of the day or night (section 31(6)).

Section 31(7) specifies the powers which may be exercised by the investigator or police officer during searches pursuant to a warrant, including the power to seize and retain objects and documents found in the course of the search.

The *Supreme Court Independent Commissioner Against Corruption Act Rules 2013* ("the Rules") prescribe the procedure for an application to the Court under section 31 of the Act for the issue of a search warrant.

Form 1 to the Rules prescribes the information to be included in the application. This includes the requirement to set out in detail the grounds upon which it is said that the warrant is reasonably required for the purposes of the investigation. Procedures for applications by e-mail and telephone are also set out in the Rules.

The Standard Operating Procedure on enter and search warrants provides direction to investigators and police officers when exercising powers pursuant to warrants issued under this section of the Act which regulates the procedure for applications for and the execution of, warrants issued by the Commissioner (section 31(1)) and warrants issued by the Supreme Court (section 31(2)).

The Standard Operating Procedure directs that the investigator or police officer must produce the original warrant for sighting by the person upon whom it is executed without relinquishing physical possession of the original warrant. It also provides that, unless it is not reasonably practicable to do so, a copy of the warrant is to be provided to the occupier of the place, or the owner or driver of the vehicle to be searched. In addition, there is a requirement that the investigator or police officer provide the person who is the subject of the warrant with an information sheet detailing that person's rights, obligations and liabilities in regard to the warrant. A pro forma for the information sheet is set out in Appendix A to the Standard Operating Procedure.

During the reporting period, 14 search warrants were applied for and issued by the Supreme Court. No warrants were issued by the Commissioner.

The procedure prescribed for applying for warrants was followed in each case.

I am satisfied on the information before me that the searches were in accordance with the procedures which the investigators were required to follow.

EXAMINATIONS

Section 29 of the Act provides for an examination, including the taking of evidence, for the purposes of an investigation into corruption in public administration.

The procedure for an examination is set out in Schedule 2 of the Act.

An examination may be conducted by the Commissioner, Deputy Commissioner, or an examiner appointed by the Commissioner.

An examiner may summon a person to appear before an examination to give evidence and produce such documents or other things as are referred to in the summons (Schedule 2 clause 4(1)). The evidence may be taken on oath or by affirmation. The person giving evidence before the examiner may be represented by a legal practitioner. The examination must be held in private and the examiner may give directions as to the persons who may be present during the examination or a part of the examination.

Counsel may be appointed to assist the examiner. The examiner may order that proceedings before the examiner not be published. Such a direction must be given if the failure to do so might prejudice the safety or reputation of a person or prejudice the trial of a person who has been, or may be, charged with an offence.

Audio and video recordings are made of the proceedings.

Before issuing a summons for a person to appear before the examiner, the examiner must be satisfied that it is reasonable in all the circumstances to do so.

It is an offence for a person to fail to attend an examination as required by a summons. It is also an offence for a person to give evidence before the examiner that the person knows is false or misleading in a material particular.

During the reporting period six examinations took place under the Act. No new hearings were conducted exercising the powers of the Ombudsman under the *Ombudsman Act 1972* (SA). Six ongoing investigations from the previous reporting period were finalized in the reporting period.

The hearings were conducted in accordance with the prescribed procedures.

COMPLAINTS CONCERNING THE EXERCISE OF ICAC POWERS

Clause 2(1)(b) of the Fourth Schedule of the Act provides that one of the functions of the Reviewer is "to conduct reviews relating to relevant complaints received by the Reviewer". Clause 1 defines a "relevant complaint" as a complaint relating to an abuse of power, impropriety or other misconduct on the part of the Commissioner or employees of the Commissioner or of the Office.

A website for the Office of the Reviewer is now in operation and it contains instructions for the making of such complaints. It is emphasised on the website that complaints can only relate to an alleged abuse of power, impropriety or misconduct and that the Reviewer cannot review decisions made by ICAC or OPI to investigate or not investigate complaints made to them.

Over the period from 1 July 2020 to 30 June 2021, 38 complaints against ICAC and the OPI have been made to the Reviewer.

A number of complaints related to matters which the OPI had referred to the Internal Investigation Section (IIS) of SAPOL. The Reviewer concluded that the matters had been properly referred to the IIS and that the IIS had made determinations which were not subject to a review by the Reviewer.

After Schedule 4 of the Act came into operation, the Commissioner and The Honourable Mr Duggan AM RFD QC, my predecessor, decided that it would be within the spirit of the amendment if ICAC brought to the Reviewer's attention matters in which there had been complaints to ICAC or the OPI of conduct answering the description of a "relevant complaint", but where the alleged conduct had not been made the subject of a complaint to the Reviewer. Such matters would not be within my jurisdiction to review because of the absence of the complaint. However, it was thought that there may be some cases in which the Reviewer might contact the complainant asking whether he or she wished to lodge a complaint to the Reviewer pursuant to Schedule 4. I have adopted a similar approach to that as has been previously followed.

As part of my role I review the use of surveillance devices by ICAC. No inappropriate use of surveillance devices occurred during the reporting period.

Four matters were brought to the attention of the Reviewer by the ICAC. One matter did not amount to a relevant complaint. Two matters relating to one complaint were considered.

The OPI self-reported to me one unauthorised disclosure of a complainant's identity. The complainant was advised of the error. He then made a complaint to me. I communicated with the OPI and the Deputy Commissioner of ICAC who communicated with the complainant. I am satisfied that the OPI has undertaken a review of its processes and has put in place systems designed to avoid unauthorised disclosures of complainants' identities.

One matter required the authority of the complainant to reveal her identity in order to progress an investigation into her complaint. The complainant did not give her authority. The investigation was terminated.

A further matter related to the unauthorised disclosure of a complainant's identity. The complainant was advised of the error which was inadvertent.

The OPI advised a complainant that her complaint had been wrongly disclosed to the IIS of SAPOL. The complainant was informed of the error and she advised that she was satisfied with the action taken by the OPI. No complaint was made to me.

Two matters did not require further action by me. One was reconsidered by ICAC. The other was not a complaint about ICAC or the OPI.

One complaint related to the failure of the Judicial Conduct Commissioner to consider a complaint. Due to an administrative oversight there had been a failure to communicate the results of the investigation to the complainant. The Judicial Conduct Commissioner communicated with the complainant. I also communicated with the complainant who was dissatisfied with the decision of the Judicial Conduct Commissioner.

In the circumstances, as the judicial officer had retired, there was no further action required.

THE COMMISSIONER'S WEBSITE

Section 48 of the Act requires the Commissioner to maintain a website and include on it the following information:

- (a) information about the educational programs conducted or facilitated by the Commissioner; and
- (b) information about the evaluations of practices, policies and procedures of inquiry agencies and public authorities conducted by the Commissioner; and
- (c) information about the other functions of the Commissioner and the Office; and
- (d) the Commissioner's standard operating procedures; and
- (e) the reports prepared under section 41; and
- (f) the reports prepared under section 42; and
- (g) the Commissioner's annual reports; and
- (h) the reports on annual reviews laid before Parliament in accordance with Schedule 4 of the Act; and
- (i) information designed to assist in preventing or minimising corruption, misconduct and maladministration in public administration or other material, as considered appropriate by the Commissioner.

The website is also an essential component of the operation of ICAC and the OPI. In particular, it incorporates the secure online complaint and report facility.

Apart from complying with the statutory requirements referred to above, the website continues to provide considerable information concerning the operation of the organisation.

There were 87,089 visitors to the website during the reporting period and over 197,979 webpages accessed.

PERFORMANCE ASSESSMENT

In the light of the expenditure devoted to maintaining an anti-corruption body such as ICAC and bearing in mind the extensive powers invested in such a body, it is essential that its performance should be monitored on a regular basis.

It is for this reason that an annual review under the Act must have regard to some assessment of performance throughout the year.

To this end, clause 3 of Schedule 4 directs attention to two matters which must be addressed by the Reviewer, namely:

- whether the practices and procedures of the Commissioner and the Office were effective and efficient (clause 3(1)(a)(ii));

and

- whether the operations made an appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration in public administration (cl 3(1)(a)(iii).

The research required for a comprehensive study of the kind referred to therein is well beyond the resources available to me as Reviewer. It might well be appropriate for a separate inquiry.

My comments on efficiency and effectiveness are based on matters referred to in the Commissioner's Annual Report and my own limited observations in auditing the activities of the organisation and the manner in which it exercises its powers.

THE EFFICIENCY OF OPERATIONS UNDER THE ACT

ICAC has developed a Strategic Plan for 2017/2020 which focuses on key priorities directed towards achieving efficiency in the area of its operation. The plan sets out the organisation's vision and its purpose. It acknowledges the importance of setting an example in efficiency in its operations and stresses the aim of engagement with the community in various ways including education sessions. It emphasises the aim of creating an ethical and accountable workforce.

The Strategic Plan incorporates Key Performance measures specifying the desired number of education and prevention initiatives to be undertaken, the number of public officers to participate in education and prevention initiatives, the desired time limits within which to reply to complaints or reports, the period within which the complaints and reports are to be assessed, the time within which recommendations are to be made by the OPI, the desired time within which investigations are to be closed or referred for prosecution and the period within which all investigations are to be reviewed after completion.

The Commissioner's Strategic Plan was reviewed in May 2021. A new Strategic Plan 2021-2024 has been published, to be effective from 1 July 2021.

It is apparent from the Commissioner's Annual Report that there has been substantial success in meeting the various Key Performance Indicators across the range of ICAC's activities.

Training programs for staff have been implemented and the staff must take part in a Performance and Potential Review Policy which requires line managers and employees to undertake a formal performance and potential review discussion in November each year with a follow-up review in the following May.

The computerised case management system which records all actions and documentation relevant to each matter has been developed as an effective tool for the various activities for which it was set up. Apart from other uses, it is an essential source of information for the annual audit of the powers of ICAC by the Reviewer.

THE IMPACT ON PREVENTION OR MINIMISATION OF CORRUPTION, MISCONDUCT AND MALADMINISTRATION IN PUBLIC ADMINISTRATION

In order to determine the extent to which ICAC has achieved success in preventing or minimising corruption, misconduct and maladministration in public administration, it is necessary to refer to the primary objects of the Act. The objects as expressed in the legislation summarise the steps by which Parliament envisaged its purpose would be carried out.

Section 3 provides for the establishment of ICAC to further the identification and investigation of corruption in public administration and the prevention or minimisation of corruption, misconduct and maladministration in public administration.

To this end, ICAC has established the apparatus for identifying such conduct and ensuring that reports and complaints about public administration are dealt with by the most appropriate person or body.

There is specific mention in the objects to the educative role which ICAC is expected to undertake and the further role of the Commissioner in evaluating practices, policies and procedures.

Reference has been made to the apparatus which has been created to identify corruption, misconduct and maladministration, beginning with the role of the OPI to process complaints and reports. It is clear that an efficient process has been developed for this purpose and that its effectiveness is constantly reviewed by management, including the implementation of extensive changes to accommodate the considerable increase in workload brought about by the responsibilities associated with the independent oversight of police.

An important activity towards prevention takes place through education and communication. The Annual Report records that in 2020-21, due to social distancing requirements required as a result of the ongoing coronavirus pandemic, the number of education sessions was reduced. There were three ICAC Public Interest Disclosure Responsible Officer training sessions during the reporting period. ICAC provides video resources and other resources for education purposes.

The following enrolments were received:

2657 persons enrolled for the 'Induction for Public Officers' course.

1600 persons enrolled for the 'ICAC Conflicts of Interest' course.

197 persons enrolled for the 'Internal Investigation Concepts and Principles' course.

The level of reports and complaints received each year is an indicator of the awareness in the public service section and the public at large of the existence and purpose of ICAC.

THE SURVEILLANCE DEVICES ACT 2016 (SDA)

The *Surveillance Devices Act 2016* (SDA) came into operation on 18 December 2017.

Section 6 of the SDA empowers a judge of the Supreme Court to issue a warrant authorising the use of one or more listening devices and entry to or interference with any premises, vehicle or thing for the purposes of installing, using, maintaining or retrieving one or more listening or surveillance devices. This section sets out the procedure for making an application for a warrant to the Court.

Section 6 provides that applications for a warrant under the Act may be made by an officer of an investigating agency with the approval of the chief officer of the investigating agency. ICAC is an investigating agency for the purposes of the SDA and the Commissioner is the chief officer (section 3).

The SDA authorises the appointment of a “review agency” for an investigating agency and, in the case of the ICAC, the review agency must be independent of the Commissioner and be appointed by the Governor.

Section 6D of the Act requires the review agency to undertake inspections of the investigating agency every six months in order to ascertain the extent of compliance by the agency with the record-keeping requirements of the Act.

I have conducted inspections of the records of ICAC as they have fallen due throughout the audit periods and I am satisfied that there has been compliance with the requirements of the SDA.

THE TELECOMMUNICATIONS (INTERCEPTION AND ACCESS) ACT 1979 (CTH)

The *Telecommunications (Interception and Access) Act 1979* (Cth) (the Commonwealth Act) regulates the circumstances in which certain Commonwealth, and Territory government agencies can be authorised to intercept telecommunications and deal with the material derived through this means.

The Commonwealth Act enables law enforcement and other agencies to apply to an eligible judge for a warrant to intercept telecommunications as part of an investigation, but imposes conditions on those agencies in recognition of the right to privacy.

In addition to providing for authorised interceptions by Commonwealth agencies, the Commonwealth Act enables State and Territory agencies to apply for warrants to intercept telecommunications subject to conditions imposed by the Commonwealth Act and State and Territory legislation. Section 34 of the Commonwealth Act authorises the relevant Commonwealth Minister, by legislative instrument and at the request of the Premier of a State, to declare an eligible authority of that State, as an agency for the purposes of the Act.

Before making a declaration pursuant to section 34, the Minister must be satisfied that the law of the State makes satisfactory provision for imposing on the eligible authority various obligations referred to in the Commonwealth Act.

Pursuant to these arrangements, the Commonwealth Act provides that ICAC is an enforcement agency for the purposes of the Commonwealth legislation. As a prerequisite to this arrangement and in order to satisfy the requirements of the Commonwealth Act, the South Australian Parliament has enacted the *Telecommunications (Interception) Act 2012* (SA) (the State Act).

The chief officer of the agency is required to keep records of each warrant issued to the agency and various other documents associated with the issue and execution of the warrant.

In order to equate the State procedures with those set out in the Commonwealth Act, section 3 of the State Act required ICAC as chief officer of an eligible authority, to keep records of the application for warrants authorising telecommunication interceptions and the use thereof as prescribed in the Commonwealth Act.

The State Act provides for the appointment of a “review agency”, to determine whether there has been compliance by ICAC with record-keeping requirements. Section 2 states that the review agency for ICAC is a person who is independent of ICAC and is appointed by the Governor as the review agency.

I have been appointed as the review agency for ICAC to conduct the review required by section 5 of the State Act for the purpose of ascertaining compliance with the record-keeping requirements of that Act.

I have conducted inspections of the records of ICAC as they have fallen due throughout the audit period and I am satisfied that there has been compliance with the requirements of the State Act.

CRIME AND PUBLIC INTEGRITY POLICY COMMITTEE (CPIPC)

During the reporting period, I attended a hearing of the CPIPC and provided evidence to the Committee.

I reported to the Committee that, in my role of reviewing ICAC, I have received complete cooperation from ICAC and the OPI. I advised the Committee about the extent of my role as Reviewer. There was discussion with the Committee as to whether the Reviewer should have a more extensive role in overseeing ICAC and in dealing with complaints. I indicated that it was a matter for Parliament to determine the extent of the Reviewer's role. There was discussion about the resources provided to the Reviewer. I advised that I have one part-time Personal Assistant. The role I carry out requires my attention for approximately one day each week.

CO-OPERATION

I have been given full cooperation by both the former Commissioner and the current Commissioner and ICAC staff in carrying out my role. I appreciate the assistance given to me by the Commissioners and the staff.



The Honourable J R Sulan QC

28/10/2021

