

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

For the period 1 September 2013 to 30 June 2014



3 September 2014

The Honourable the Attorney-General,
45 Pirie Street,
Adelaide. SA

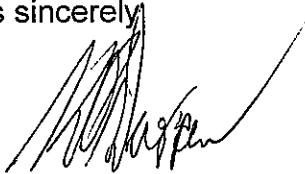
Dear Mr Attorney,

On 12 February 2014 I was appointed by you to conduct the first review of the operations of the Independent Commissioner Against Corruption (ICAC) and the Office for Public Integrity pursuant to section 46 of the Independent Commissioner Against Corruption Act 2012.

I now furnish you with my report of that review for the period from the commencement of the operations of ICAC to the 30th June, 2014.

The report is required to be laid before each House of Parliament within 12 sitting days of its receipt by you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kevin Duggan', with a long, sweeping flourish extending to the right.

The Honourable Kevin Duggan AM, QC

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REPORT TO THE ATTORNEY-GENERAL THE HONOURABLE JOHN RAU PURSUANT TO SECTION 46 OF THE INDEPENDENT COMMISSIONER AGAINST CORRUPTION ACT 2012

1. 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).

Section 3 of the Act states that the primary object of the Commissioner is to investigate serious or systemic corruption in public administration and to refer serious or systemic misconduct or maladministration in public administration to the relevant body, giving directions or guidance to the body or exercising the powers of the body as the Commissioner considers appropriate. It is essential to observe that the 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.

The Act also established the Office for Public Integrity (the OPI) to manage complaints about public administration. In broad terms, the OPI receives initial complaints and reports alleging conduct contrary to the Act, assesses the complaints and reports and makes recommendations to the Commissioner. The Commissioner then considers the matter and determines what action is to be taken in accordance with the requirements of the Act.

2. 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 s 5 of the Act.

Corruption in public administration is defined by reference to offences created by various Acts of Parliament. Section 5(1) of the Act identifies those offences as follows:

- (1) "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
- (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 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)(a) 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.

3. CONFIDENTIALITY

Section 54 of the Act imposes restrictions on disclosing information relevant to the operation of ICAC. Section 54(1) is as follows:

- (1) A person must not, directly or indirectly, disclose information obtained in the course of the administration of this Act in connection with a matter that forms or is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act except —
 - (a) for the purposes of the administration or enforcement of this Act; or
 - (b) for the purposes of a criminal proceeding or a proceeding for the imposition of a penalty; or

- (c) for the performance of the functions of the Commissioner under another Act; or
- (d) as otherwise required or authorised by this Act.

Maximum penalty: \$10 000 or imprisonment for 2 years.

Section 54(2) empowers the Commissioner to provide or authorise the provision of information in certain circumstances.

Section 56 of the Act restricts the publication of certain information relating to an ICAC matter. It provides:

A person must not, except as authorised by the Commissioner or a court hearing proceedings for an offence against this Act, publish, or cause to be published —

- (a) information tending to suggest that a particular person is, has been, may be, or may have been, the subject of a complaint, report, assessment, investigation or referral under this Act; or
- (b) information that might enable a person who has made a complaint or report under this Act to be identified or located; or
- (c) the fact that a person has made or may be about to make a complaint or report under this Act; or
- (d) information that might enable a person who has given or may be about to give information or other evidence under this Act to be identified or located; or
- (e) the fact that a person has given or may be about to give information or other evidence under this Act; or
- (f) any other information or evidence publication of which is prohibited by the Commissioner.

Maximum penalty:

- (a) in the case of a body corporate — \$150 000;
- (b) in the case of a natural person — \$30 000.

4. 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. It states:

24 — Action that may be taken

- (1) 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 —
 - (a) investigated by the Commissioner; or
 - (b) referred to South Australia Police, the Police Ombudsman (if the issue concerns a police officer or special constable) or other law enforcement agency.
- (2) If a matter is assessed as raising a **potential issue of misconduct or maladministration in public administration**, the matter must be dealt with in one of the following ways:
 - (a) the matter may be referred to an inquiry agency and, if the Commissioner considers it appropriate, the Commissioner may give directions or guidance to the agency, or exercise the powers of the agency, in respect of the matter; or
 - (b) the matter may be referred to the public authority concerned and, if the Commissioner considers it appropriate, the Commissioner may give directions or guidance to the authority in respect of the matter.
- (3) If a matter is assessed as raising other issues that should be dealt with by an inquiry agency, public authority or public officer, the matter must be referred, or the complainant or reporting agency advised to refer the matter, to the agency, authority or officer.
- (4) If a matter is assessed as trivial, vexatious or frivolous, the matter has previously been dealt with by an inquiry agency or

public authority and there is no reason to re-examine the matter or there is other good reason why no action should be taken in respect of the matter, no action need be taken in respect of the matter.

- (5) The same matter, or different aspects of the same matter, may be dealt with contemporaneously under more than one subsection.

Example—

A matter that is assessed as raising a potential issue of corruption in public administration that could be the subject of a prosecution and a potential issue of misconduct or maladministration in public administration may be dealt with under both subsection (1) and subsection (2).

- (6) A matter may be dealt with under this section even if it is a matter referred to an inquiry agency or public authority under another Act.
- (7) The making of an assessment, and whether action is taken, and what action is taken, in respect of a matter is at the absolute discretion of the Commissioner and, if an assessment is modified in the course of dealing with the matter, the Commissioner may deal with the matter according to the modified assessment.
- (8) Subject to any directions of the Commissioner, reasonable steps must be taken to ensure that a complainant or reporting agency receives an acknowledgement of the complaint or report and is informed as to the action, if any, taken in respect of the matter.

5. ANNUAL REVIEW OF EXERCISE OF POWERS OF ICAC

Section 46 of the Act requires the Attorney-General to appoint a person to conduct a review of the operations of the Commissioner and the Office during each financial year. The person conducting the review must consider the following matters:

- 1 Whether the powers under the Act were exercised in an appropriate manner and, in particular, whether undue prejudice to the reputation of any person was caused.
- 2 Whether the practices and procedures of the Commissioner and the OPI were effective and efficient.

- 3 Whether the operations made an appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration in public administration.

The reviewer may also make recommendations as to changes that should be made to the Act or to the practices and procedures of the Commissioner or the OPI.

The report must not include information if publication of the information would constitute an offence against s 56 of the Act.

The Attorney-General must, within 12 sitting days after receipt of the report, cause copies of the report to be laid before each House of Parliament.

6. APPOINTMENT PURSUANT TO SECTION 46

On 12 February 2014, the Attorney-General appointed me to conduct the review for the period from the commencement of the operations of the ICAC on 2 September 2013 to 30 June, 2014.

7. THE OPI

The functions and objectives of the OPI are set out in section 17 of the Act. The OPI is responsible for receiving complaints concerning alleged corruption and the various types of misconduct and maladministration with which the ICAC is charged with investigating and to make a preliminary assessment of each complaint or report received by it. This assessment involves a consideration of whether and by whom complaints and reports should be investigated.

In the course of this preliminary assessment, the OPI officers may have to obtain further information voluntarily from complainants or other persons reporting corruption, misconduct or maladministration. However, such enquiries do not extend beyond the acquisition of information necessary to the OPI to perform its task.

The OPI consists of a Manager, a Senior Assessment Officer, assessment officers and complaints officers. Complaints and reports are received by telephone, written correspondence, online or by e-mail.

The circumstances of the matter as then known are summarised in an entry in a Microsoft Windows based case management system known as Resolve.

In the event that a matter is eventually referred by the Commissioner to an inquiry agency or public authority, the OPI is responsible for actioning that directive and communicating with the authority and the complainant or reporting party.

Detailed procedural steps for the exercise of the functions of the OPI are set out in the OPI Operations Policy document.

I have visited the OPI and discussed its functions and operations with the Manager and members of the staff comprising Complaints Officers and Assessment Officers. I am satisfied that they provide a helpful and professional interface with public officers and members of the public and that they assess reports and complaints in an effective and timely manner.

8. ASSESSMENT BY ICAC

Following upon the communication of a recommendation by the OPI to the Commissioner, each matter is considered by an Assessment Panel consisting of the Commissioner and/or the Chief Executive Officer and at least one lawyer employed by ICAC.

The assessment and recommendations of the panel may be accepted by the Commissioner or, if the Commissioner is not present, the CEO. However, the Commissioner may exercise the powers under section 24 of the Act independently of the Assessment Panel. Detailed procedures for the method of assessment by the Assessment Panel are set out in a policy document approved by the Commissioner.

Directions and Guidelines governing the reporting of matters and the duties of public authorities in this respect have been prepared and are available on the Commission website.

9. COMPLAINTS, REPORTS AND OWN INITIATIVE MATTERS

The following table indicates the source of matters brought to the attention of ICAC for the period 2 September 2013 to 30 June 2014:

Complaints from members of the public	462
Reports from inquiry agencies, public authorities and public officers	461
TOTAL	923

10. PROCESSING OF COMPLAINTS

462 complaints were received of which 389 were assessed as follows:

Complaints raising a potential issue of corruption in public administration	15
13 were investigated by the Commissioner and 2 were referred to the Police Ombudsman for investigation	

<p>Complaints raising a potential issue of misconduct and/or maladministration in public administration</p> <p>22 were referred to an inquiry agency for action – 14 to the Police Ombudsman and 8 to the Ombudsman</p> <p>The Commissioner exercised the powers of an inquiry agency in relation to 8 complaints (Ombudsman powers were exercised in 5 matters and Police Ombudsman powers in 3 matters)</p>	45
<p>Complaints raising some other issue</p> <p>Both complaints were referred to public officers in accordance with Section 24(3) of the ICAC Act</p>	2
<p>The Commissioner determined to take no further action.</p> <p>This decision was made for one or more of the following reasons:</p> <ul style="list-style-type: none"> • the matter fell outside the jurisdiction of the ICAC; • 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; <p>or</p> <ul style="list-style-type: none"> • there was other good reason why no action should have been taken in respect of the matter. 	327

11. PROCESSING OF REPORTS MADE BY INQUIRY AGENCIES, PUBLIC AUTHORITIES AND PUBLIC OFFICERS

461 reports were received of which 388 were assessed as follows:

<p>Assessed as raising a potential issue of corruption in public administration</p> <p>77 reports were investigated by the Commissioner, 19 were referred to the Police Ombudsman for investigation and 61 were referred to the SA Police for investigation (<i>includes 5 matters that were assessed as</i></p>	157
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<p><i>raising a potential issue of corruption in public administration and a potential issue of misconduct and/or maladministration in public administration (1 investigated by the Commissioner and exercised the powers of the Commissioner for Public Sector Employment (the CPSE); 4 investigated by the Commissioner and exercised the powers of the Ombudsman)</i></p>	
<p>Assessed as raising a potential issue of misconduct and/or maladministration in public administration</p> <p>43 reports were referred to an inquiry agency (31 to the Police Ombudsman, 11 to the Ombudsman and 1 to the CPSE)</p> <p>36 reports were referred to a public authority</p> <p><i>(includes one report that was referred to both an inquiry agency and a public authority)</i></p> <p>The Commissioner exercised the powers of an inquiry agency in relation to 13 reports (powers of the Police Ombudsman were exercised in relation to 2 reports, those of the Ombudsman in relation to 9 reports and those of the CPSE in relation to two reports)</p>	92
<p>The Commissioner determined to take no further action in relation to 145 reports</p> <p>This decision was made for one or more of the following reasons:</p> <ul style="list-style-type: none"> • the matter fell outside the jurisdiction of the ICAC; • 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; <p>or</p> <ul style="list-style-type: none"> • there was other good reason why no action should have been taken in respect of the matter. 	145

12. OWN INITIATIVE MATTERS

The Commissioner assessed, or caused to be assessed, five matters on his own initiative.

Three matters were assessed as raising a potential issue of corruption in public administration and were subject to investigation by the Commissioner.

Two matters were assessed as raising a potential issue of misconduct and/or maladministration in public administration. One matter was referred to a public authority. The Commissioner investigated the other matter by exercising the powers of the Ombudsman.

13. STANDARD OPERATING PROCEDURES

Section 26 of the Act requires the Commissioner to prepare standard operating procedures governing the exercise of powers by the investigators appointed under the Act for the purposes 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. These procedures must be made available on the Internet and at the premises of the OPI.

Standard operating procedures have been prepared in accordance with this provision and they are available on the ICAC website. They relate to the exercise by investigators of the following powers:

- the power under section 28 of the Act in an investigation into corruption in public administration, to require by way of written notice, a public authority or public officer to produce a written statement of information about a specified matter, within a specified period, and in a specified form, verified if the person so requires by statutory declaration;
- the power under section 30 of the Act 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 powers conferred under an enter and search warrant issued pursuant to section 31 of the Act;

- the powers of seizure and retention when executing warrants issued pursuant to section 31 of the Act;
- the power of arrest for an offence against the Act.

I have perused each of these documents and, subject to some comments which I make below in relation to the powers of arrest and search, I am satisfied that they are accurate and serve the purpose for which they were intended.

14. DIRECTIONS AND GUIDELINES GOVERNING REPORTING TO THE OPI

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 accordance with this section, the relevant Directions and Guidelines have been published in booklet form and are available on the Internet.

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

15. THE COMMISSIONER'S WEBSITE

Section 48 of the Act requires the Commissioner to maintain a website and include on it information prescribed by the Act. Reference has already been made to the website which has been established in accordance with this provision.

The nature and function of the Commissioner and the OPI are set out on the website. This explanation includes an organisational chart.

The concepts of corruption in public administration, misconduct in public administration and maladministration in public administration are explained along with the procedure for making a complaint or a report. Facilities are provided for making a complaint or report online. The process of investigation and examinations following complaints and reports is explained and the Commissioner's Standard Operating procedures are set out. The statutory and regulatory provisions under which the Commissioner and the OPI operates can be accessed on the website.

Information is provided about educational programs conducted by the Commissioner and material such as speeches explaining the nature of the Commissioner is available for perusal. Media releases by the Commissioner and fact sheets are accessible.

The website fulfills the requirements set out in section 48 of the Act and goes further in providing a detailed explanation of the working of the Commissioner and the OPI.

16. EFFICIENCY OF OPERATIONS

Following upon numerous visits to ICAC, discussions with the Commissioner, CEO and various officers of ICAC, along with extensive perusal of matters recorded in Response and an examination of the operations of the OPI, I am satisfied that, in a relatively short period of time, an organisational structure has been created which achieves the purpose of enabling ICAC to carry out its statutory responsibilities in an effective and efficient manner. Apart from these observations, no concern has been expressed to me by any member of the staff that there are any significant deficiencies in the manner in which complaints and reports are being processed by ICAC and the OPI.

I also undertook an examination of all matters which had been the subject of reports or complaints to ICAC since the commencement of operations to the end of 2013 and which have not yet been closed. I did not detect any undue delay in processing these matters. There was one matter in which there was a delay which I discussed with the Commissioner. I am satisfied that the matter is now being satisfactorily progressed.

I add that I was provided with complete co-operation and assistance by the Commissioner and members of his staff and the staff of the OPI in all aspects relating to my report.

17. THE EXERCISE OF POWERS UNDER THE ACT

As stated above, the annual review of the operations of ICAC requires consideration as to whether the powers under the Act were exercised in an appropriate manner. To this end, I have attempted to identify and comment upon the powers to conduct examinations and other coercive powers which I am required to audit. They are confined to investigations into corruption in public administration.

18. 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 cl 4(1)). The evidence may be taken on oath or 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.

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.

As at 30 June 2014, persons were summoned to give evidence in two matters under investigation by the Commissioner. The Commissioner was the examiner in relation to these matters. Two witnesses were called to give evidence in the first matter and three in the second matter. Each witness was represented by counsel and counsel was appointed to assist the Commissioner.

I have read the transcript of proceedings in these matters. The hearings were conducted in accordance with the procedure laid down in the Act. Nothing occurred which would make the proceedings unfair to any person. The proceedings were explained to the persons called to give evidence and they were advised of their rights. Counsel representing them were given the opportunity to safeguard their interests.

19. NOTICE 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, require 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 subclause (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.

Four such notices have been prepared and served. The procedure prescribed by the Act was followed on each occasion.

20. 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 a public authority or public officer to produce a written statement of information about a specified matter within a

specified period and in a specified form. If required by the person heading the investigation, the statement must be verified by statutory declaration.

So far, a total of nine section 28 notices have been issued in three matters.

After perusing these files, I am satisfied that the Standard Operating Procedure for section 28 notices was followed in each case.

21. SECTION 32 RETENTION NOTICES

Section 31(7)(c)(v) of the Act provides that in the course of a search authorized by a warrant issued pursuant to the Act, an investigator may issue a retention order in respect of anything that the investigator 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. Section 31(7)(c)(vi) 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. Standard Operating Procedure 4 sets out the procedure to be followed by investigators issuing such notices.

Four Retention Notices have been issued, all in relation to the same inquiry. The prescribed procedure was followed with respect to each notice.

22. SECTION 34 NOTICE LIMITING ACTION BY OTHER AGENCIES AND AUTHORITIES

Section 34 of the Act provides as follows:

34 — 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.

Section 34 notices have been issued in four matters. An appropriate procedure was followed in each case.

23. ENTER AND SEARCH POWERS UNDER WARRANT

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

Section 31 empowers the Commissioner to issue a warrant authorising an investigator 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.

Section 31(2) empowers a judge of the Supreme Court to issue a warrant authorising an investigator to enter and search –

- (a) a private place or private vehicle that is reasonably suspected of being, or having been, used for or in connection with a prescribed offence; or
- (b) a private place or private vehicle in which it is reasonably suspected there may be records relating to a prescribed offence or anything that has been used in, or may constitute evidence of, a prescribed offence.

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 a 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 authorized at any time of the day or night or during specified hours of the day or night (section 31(7)).

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

Rules entitled "The Supreme Court Independent Commissioner Against Corruption Act Rules 2013" ("the Rules") came into operation on 1st September 2013. A section of the Rules prescribes 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.

Apart from the provisions relating to search warrants, the Rules deal with other matters such as applications to the court for the issue of warrants for arrest under clause 9, Schedule 2 of the Act, applications for a person to be dealt with for contempt under clause 13 Schedule 2 of the Act and applications under clause 18 of Schedule 2 of the Act for surrender of passports.

I suggest that a link to these Rules on the ICAC website would be useful.

Standard Operating Procedure 3 sets out the investigator's responsibilities when executing a search warrant. It refers to Appendix A which is an information sheet detailing the rights, obligations and liabilities of the person in respect of whom the warrant has been issued and which is to be provided to the person.

I recommend that the Standard Operating Procedure provide that a copy of the search warrant be given to the person upon whom it is being executed. This appears to be the present practice of the ICAC investigators.

24. SEARCH WARRANTS ISSUED

A total of 18 search warrants have been issued in four separate matters for the period from the commencement of the Commissioner's operations to 30 June 2014.

I have perused the applications to the Court and the Commissioner in each of these matters. I am satisfied that the stated grounds in each case disclosed that the warrant was reasonably required for the purpose of the investigation and that, insofar as I was able to determine, the information supplied to the Court or the Commissioner was true and correct. Furthermore, the procedure prescribed in the Act and the Supreme Court Rules for applications for a warrant was followed in each case.

Each of the four searches was recorded on videotape. I viewed the videotapes, concentrating in particular on the first part of the search when the nature of the search was explained to the person whose property was the subject of the search.

I am satisfied that the warrant was produced and shown to the occupier on each occasion and that the person was made sufficiently aware of his or her rights.

I inspected the records of documents and objects seized during the searches and the facilities for storing exhibits. On each occasion an investigator was appointed to supervise the processing of the exhibits. On my observation all of these arrangements were satisfactory.

I deal with some further matters relating to searches in the following section on police powers.

I note that a protocol for managing claims of legal professional privilege in the course of search and seizure operations has been approved by the Commissioner.

It would be of assistance in the future, if the investigator in charge of a search and seizure operation, entered a report on Resolve which contained a summary of events which took place in the course of the search. This summary could include the date and time of the search, the investigators who took part, a short description of objects which were seized or, in respect of which a retention order was made and any other significant events. A summary of this nature would facilitate any subsequent audit of the operation.

25. EXERCISE OF POLICE POWERS

All but two of the ICAC investigators are SA Police officers who have been seconded to ICAC.

Section 67(3) of the Police Act 1998 provides as follows:

Unless the Commissioner [of Police] otherwise authorises by instrument in writing, if a person who is a member of SA Police or a special constable is seconded to a position outside SA Police, all powers and authorities vested in the person by or under this or another Act or any law as a member of SA Police or constable are suspended for the period of secondment.

The Commissioner of Police has authorised in writing all police officers seconded to ICAC to retain the powers and authorities vested in them under the Police Act 1988 and pursuant to any other Act or law.

Prior to the passing of the Act, the Attorney-General's Department sought an opinion from the Crown Solicitor, as to whether police officers seconded to ICAC, could exercise the statutory powers of a member of SA Police when performing ICAC duties, in the event that the Commissioner of Police authorised the continued use of such powers.

The Crown Solicitor advised that the police powers could be used by the officers when conducting ICAC investigations.

I do not dispute this opinion and indeed such an arrangement was contemplated in the second reading speech when the ICAC Bill was introduced into Parliament. However, the question arises as to the circumstances in which, as a matter of policy, police powers might be used in ICAC investigations.

This question has particular relevance in relation to the power of arrest and the power to search.

I have referred to the requirements of the Act in relation to applications for search warrants. They are quite detailed and provide significant safeguards for the protection of members of the community. The distinction is made between applications which must be made to the Supreme Court and those which may be made to the ICAC Commissioner. The application must be supported by affidavit if made to the Supreme Court or by statutory declaration if made to the Commissioner. The issuing authority is charged with determining whether the search is justified and a warrant may only be issued if the Commissioner or Judge, is satisfied that it is reasonably required in the circumstances for the purposes of an investigation into a potential issue of corruption in public administration. The conditions under which the search is to take place are to be determined by the issuing authority.

By way of contrast, section 67 of the *Summary Offences Act 1953*, empowers the Commissioner of Police to issue general search warrants to such police officers as the Commissioner thinks fit. The warrant remains in force for six months or for a shorter period specified in the warrant. The warrant vests the police officer with wide powers of search in the event that he or she, has reasonable cause to suspect that there are goods which might have been obtained by an offence or anything which may afford evidence of an offence or anything which might be intended for the purpose of committing an offence. The power to issue warrants in such circumstances is somewhat unique in Australian jurisdictions. The Police Commissioner has issued general search warrants to all of the police officers seconded to ICAC.

The question arises, whether a police officer seconded to ICAC should be entitled to rely on a general search warrant issued by the Commissioner of Police when investigating an ICAC matter, instead of making application for a warrant under the Act.

Such a situation has occurred on only one occasion since the ICAC commenced operations. Search warrants had been obtained in accordance with the procedure required by the Act, but while the investigators were searching the premises and vehicles on those premises, it was discovered that one of the vehicles was not covered by the warrants which had been issued. One of the investigators then searched that vehicle, in reliance upon the general search warrant which had been issued to him as a police officer.

I do not suggest that there was any illegality involved by reason of these circumstances. However, it is my view that a policy should be formulated in order to define the circumstances in which such a course of action might be adopted. I do not think that the matter should be left to the discretion of an individual officer without such guidelines. Bearing in mind the strict requirements for obtaining a search warrant under the Act, which do not apply to a general search warrant, it is my view that a general search warrant should only be used in exceptional circumstances which prevent a warrant being applied for in the usual way or by telephone.

Another police power which it is appropriate to refer to in this context is the power of arrest. Under section 75 of the *Summary Offences Act 1953*, police officers may arrest without a warrant where they have reasonable cause to suspect the commission of an offence.

The ICAC Act empowers an investigator to arrest without warrant in the event that a person obstructs in various ways investigations under the Act or fails to state their personal details truthfully or the investigator has reasonable grounds to believe a person would fail to attend court, continue an offence or interfere with the evidence or witnesses (section 33(2)). There were no arrests by ICAC officers during the reporting period.

The powers of arrest under the *Summary Offences Act* are much wider and, again, it would seem desirable for some guidance be given to police officers seconded to ICAC as to the circumstances in which those powers might be used during the course of the secondment.

In relation to these and other matters, it is important to bear in mind that SA Police officers seconded to ICAC are not acting in their capacity as police officers when investigating ICAC matters. They act independently of SA Police in this role despite the fact that they may be invested with certain police powers.

26. RETENTION ORDERS

In the course of a search pursuant to a warrant issued under section 31 of the Act, the investigator may seize and retain anything that the investigator reasonably suspects has been used in, or may constitute evidence of, a prescribed offence or issue a retention order in respect of such a thing requiring that it not be removed or interfered

with without the approval of an investigator (section 31(7)(c)(v)). There is a similar provision in relation to anything which the investigator reasonably suspects has been used in, or may constitute evidence of, an offence other than a prescribed offence (section 31(7)(c)(vi)).

Section 32(1) of the Act requires the retention order to 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.

Standard Operating Procedure 4 sets out the investigator's responsibilities relating to the issue of a retention order and is available on the ICAC website.

Four Retention Orders have been issued, all in relation to the same matter.

It is clear that an appropriate procedure was followed in the case of each of these orders.

27. COMPLAINTS

The Act does not provide any procedure for the making of complaints of abuse of the exercise of the powers of the Commissioner or other forms of misconduct on the part of officers of the ICAC. Furthermore, the requirements of confidentiality imposed by the Act, would prevent a person from reporting such conduct in the course of an investigation to any person or body other than the Commissioner.

This is contrary to the position in other jurisdictions. The legislation which in the Commonwealth and each State creates a crime or corruption body, also provides for a person or body to exercise the type of audit function referred to in section 46 of the South Australian Act. Furthermore, in each case the legislation addresses the issue of complaints made against the ICAC or its officers in the exercise of the powers bestowed upon them.

Section 57B of the *Independent Commission Against Corruption Act 1988* (NSW), lists as one of the principal functions of the Inspector of the Independent Commission, that of dealing with complaints against the Commission or its officers.

The *Victorian Inspectorate Act 2011* (Vic), established the Victorian Inspectorate which exercises audit functions in relation to the Independent Broad-based Commission (IBAC), and is given the power to deal with complaints concerning the conduct of the IBAC or its personnel. (section 43)

The *Crime And Misconduct Act 2001* (Qld), empowers the Parliamentary Commissioner to audit the functions of the Crime and Misconduct Commission and section 314 provides that this officer has power to investigate complaints made against the

Commission or its officers. In the report of a review of the *Crime and Misconduct Act* by the Honourable Ian Callinan¹ this procedure was described as an important function which should be continued.

The *Corruption and Crime Commission Act 2003 (WA)*, section 195 provides that the Parliamentary Inspector has power to deal with matters of misconduct on the part of the Corruption and Crime Commission and its officers. Section 17 of the *Parliamentary Commissioner Act 1971*, provides for complaints in relation to such conduct to be made to the Parliamentary Commissioner.

Under the *Ombudsman Act 1976 (Cth)*, the Commonwealth Ombudsman is empowered to conduct audits on various prescribed authorities, including the Australian Crime Commission. Section 7 sets out the procedure for making complaints against prescribed authorities or their officers.

It is important to note, that none of the above jurisdictions empower the independent inspector to question the decision of the Commission or Commissioner to investigate or decline to investigate an allegation of corruption, misconduct or maladministration or other investigational decisions. Rather the responsibility and power is confined to conduct in the exercise of the coercive powers of the Commission, such as search and seizure and matters such as undue delay in the investigation of matters.

I recommend that consideration be given to amending the legislation, in order to provide for a mechanism for the making of complaints similar to that which exists in the above jurisdictions.

28. RESTRICTIONS ON DISCLOSURE AND PUBLICATION

I have referred to sections 54 and 56 of the Act which impose restrictions on the disclosure and/or publication of information relating to the investigation of complaints and reports under the Act.

I understand that the Commissioner intends to comment on the far-reaching effect of these provisions and some of the difficulties which have been encountered in relation to them. I confine my remarks to one aspect of these restrictions. Construed in one way, they would prevent a person against whom an allegation of corruption or misconduct had been made from seeking adequate legal advice. Obviously, this would be an undesirable result. I suggest that consideration be given to an amendment which would permit communications of this nature.

¹ Review Of The *Crime And Misconduct Act 2001 (Qld)* by the Hon. Ian Callinan
28 March 2013

29. RECONTACTS

I examined 75 cases in which complainants contacted ICAC after being advised of the result in matters which had been the subject of complaints or reports. These are classified by ICAC as "Recontacts". In almost all of these instances, the complainants expressed dissatisfaction with the outcome of the matter following upon the decision of ICAC not to investigate or pursue the report or complaint. In a number of these cases, the Commissioner had decided that he had no jurisdiction to investigate. Examples of the circumstances in which it has been decided not to proceed in a matter are set out in the tables above. In other matters, the correspondence was simply a reiteration of the complaint or report.

I reached the conclusion that in each case there was either no justification for the complaint or the issue was satisfactorily answered by the Commissioner in correspondence with the complainant. None of the recontacts raised an issue of significance such as to require reference in this report.

30. THE EFFECT OF THE OPERATIONS OF ICAC

I am required by section 46 (2)(a)(iii) of the Act to consider –

"whether the operations [of ICAC] made an appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration in public administration".

This is no easy assessment, particularly as the reporting period is less than a year. As I stated above, within that short period of time, an effective organisational structure has been established and appropriate consideration is being given to the large number of complaints and reports which have been received. The inception of ICAC has been given considerable publicity in the media and the Commissioner regularly addresses community groups on its operation. The website provides appropriate advice in the making of reports and complaints as well as informing the public on its role.

A survey of various authorities and agencies undertaken within the State, provides insight into some effects of the operation of ICAC thus far.² 102 authorities including Local Councils, State Departments, Statutory Authorities, Judicial Officers and Inquiry Agencies were consulted. There were 70 responses and of those, 35% observed an increased awareness of ethical obligations, 46% indicated that training in relation to the role and functions of ICAC had taken place and 53% reported that the introduction of ICAC had led to changes in policies and procedures.

² Reported in Regulatory Impact Statement: Post Implementation Review prepared by ICAC 21 August 2014.

When these observations are taken into account, along with the statistics which indicate a significant number of reports and complaints and the actions taken in respect of them, there is good reason to conclude that ICAC has contributed appreciably to one of its stated statutory objects, namely,

“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”.³

31. TELECOMMUNICATIONS INTERCEPTIONS

The *Telecommunications (Interception and Access) Act 1979* (Cth) (the Commonwealth Act), regulates the circumstances in which certain Commonwealth, State and Territory government agencies can be authorized 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 in investigations, but imposes conditions on those agencies in recognition of the right to privacy.

In addition to providing for authorized 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, authorizes 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, to be 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 now provides that the South Australian 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* (the South Australian Act).

The South Australian Act provides for the appointment by the Governor of a “review agency”, which is independent of the Independent Commissioner Against Corruption. The principal function of the review agency is to check on compliance by ICAC with record-keeping requirements which are prescribed by the Commonwealth Act.

³ *Independent Commissioner Against Corruption Act 2012* section 3(1)(a)(ii).

I was appointed as the review agency for a three year term commencing on 24 July 2014 and expiring on 23 July 2017.

The South Australian Act provides that the review agency must, at least once in each period of 6 months, inspect the records of ICAC for the purpose of ascertaining the extent of compliance with the requirements for record-keeping set out in s 3. The agency must then report in writing to the Attorney-General within two months of the completion of the inspection. Any instance of non-compliance with the Commonwealth or South Australian Acts, must be set out in the report.

The Attorney-General is required to give a copy of the report, to the Minister responsible for the administration of the Commonwealth Act, as soon as practicable after the receipt of the report.

I have prepared a separate report for this purpose. I record in that report that the ICAC has complied with the record-keeping requirements of the Commonwealth and State legislation.

The Hon. K P Duggan AM, QC