

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

For the period 1 July 2014 to 30 June 2015

28 September 2015

The Honourable The Attorney-General
Attorney-General's Department
45 Pirie Street
Adelaide SA 5000

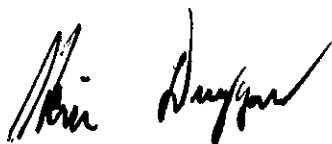
Dear Mr Attorney,

I was appointed by you to conduct a 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 which relates to the period 1 July 2014 to 30 June 2015.

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', written in a cursive style.

The Honourable Kevin Duggan AM, QC

Table of Contents

1. BACKGROUND	1
2. THE CATEGORIES OF CONDUCT WHICH MAY BE INVESTIGATED.....	2
3. ACTION WHICH MAY BE TAKEN BY THE COMMISSIONER.....	5
4. THE OPI.....	6
5. ASSESSMENT BY ICAC	8
6. COMPLAINTS, REPORTS AND OWN INITIATIVE MATTERS	8
7. STANDARD OPERATING PROCEDURES.....	10
8. DIRECTIONS AND GUIDELINES GOVERNING REPORTING TO THE OPI	13
9. THE COMMISSIONER'S WEBSITE	13
10. THE EFFICIENCY OF OPERATIONS UNDER THE ACT	13
11. THE EXERCISE OF POWERS UNDER THE ACT.....	14
12. SECTION 28 NOTICES REQUIRING PRODUCTION OF A STATEMENT OF INFORMATION.....	14
13. NOTICE TO PRODUCE DOCUMENTS AND OTHER THINGS.....	15
14. POWER TO AUTHORISE INSPECTION OF FINANCIAL RECORDS	15
15. SECTION 32 RETENTION ORDERS.....	16
16. SECTION 34 NOTICE LIMITING ACTION BY OTHER AGENCIES AND AUTHORITIES.....	16
17. ENTER AND SEARCH POWERS UNDER WARRANT.....	17
18. EXAMINATIONS.....	18
19. RECONTACTS	19
20. COMPLAINTS CONCERNING THE EXERCISE OF ICAC POWERS.....	19
21. THE EFFECT OF THE OPERATIONS OF ICAC.....	20
22. TELECOMMUNICATIONS INTERCEPTIONS.....	21
APPENDIX A	23

**REPORT TO THE ATTORNEY-GENERAL THE HONOURABLE JOHN RAU
PURSUANT TO SECTION 46 OF THE INDEPENDENT COMMISSIONER
AGAINST CORRUPTION ACT 2012 FOR THE PERIOD 1 JULY 2014 to
30 JUNE 2015**

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) and the Office for Public Integrity (the OPI).

Section 46 of the Act requires the Attorney-General to appoint a person to conduct a review of the operations of ICAC and the OPI during each financial year. It provides as follows:

46—Annual review of exercise of powers

- (1) The Attorney-General must, before the end of each financial year, appoint a person who would be eligible for appointment as the Commissioner to conduct a review of the operations of the Commissioner and the Office [OPI] during the financial year.
- (2) Without limiting the matters that may be the subject of a review, the person conducting a review—
 - (a) must consider—
 - (i) whether the powers under this Act were exercised in an appropriate manner and, in particular, whether undue prejudice to the reputation of any person was caused; and
 - (ii) whether the practices and procedures of the Commissioner and the Office were effective and efficient; and
 - (iii) whether the operations made an appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration in public administration; and
 - (b) may make recommendations as to changes that should be made to the Act or to the practices and procedures of the Commissioner or the Office.

- (3) The Commissioner must ensure that a person appointed to conduct a review is provided with such information as he or she may require for the purpose of conducting the review.
- (4) A report on a review must be presented to the Attorney-General on or before 30 September in each year.
- (5) The report must not include information if publication of the information would constitute an offence against section 56.
- (6) 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.

I was appointed to conduct the review of the exercise of the powers of ICAC in relation to the period 1 July 2013 to 30 June 2014. The report on that review (the First Report) was presented to the Attorney-General on 3 September 2014 and he laid copies of the report before each House of Parliament.

Subsequently I was appointed to conduct the review for the period 1 July 2014 to 30 June 2015.

In order to provide the necessary context for the present report, it is appropriate to refer to relevant provisions of the Act along with summaries of the operation of ICAC and the OPI which I set out in the First Report.

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 that body as the Commissioner considers appropriate. It is essential to observe that 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 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. 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 or more 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 in respect of the matter;
 - (ab) the Commissioner may exercise the powers of an inquiry agency in respect of the matter;
 - (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.

4. 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 ICAC is charged with investigating. A preliminary assessment is then made of each complaint or report received by it. This assessment involves 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, an administrative officer and assessment and complaints officers. Complaints and reports are received by telephone, written correspondence, online, by email or through personal interview. All the assessment and complaints officers have legal qualifications.

The circumstances of the matter as then known, are summarised in an entry in a Microsoft Windows based case management system known as Resolve and the matter is referred to the Commissioner for consideration.

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.

Where the Commissioner refers a matter to an inquiry agency or public authority, the Commissioner will give a direction to the agency or authority requiring a report to be provided to the Commissioner dealing with:

1. the issues addressed;
2. the findings made and the reasons for those findings; and
3. the action taken and the reasons for that action, or, if no action was taken, the reason why no action was taken.

The OPI receives a report ("report back") from inquiry agencies and public authorities on behalf of the Commissioner.

These reports are initially processed by a Complaints Officer within the OPI and added to Resolve.

During the 2014-2015 financial year, the reports were considered by a member of the ICAC legal team and advice would be provided to the Commissioner in respect of the matter, including a recommendation as to whether or not the Commissioner ought to be satisfied that action had duly and properly been taken in respect of the referral.

A new process was adopted as from 1 July 2015. Now, when a report back is received, the report is allocated to a Senior Assessment Officer ("SAO"). The SAO reviews the report back and prepares a memorandum which includes a recommendation as to whether action has duly and properly been taken in respect of the issues referred. The SAO may recommend that further information be sought from the agency or authority before an assessment is made.

In all cases, the SAO makes a recommendation to the ICAC Senior Legal Officer, who has delegated authority to consider the action taken in respect of a matter pursuant to sections 37(7) and 38(7) of the Act. If the Senior Legal Officer considers that the matter ought to be considered personally by the Commissioner, it will be referred to the Commissioner accordingly.

Neither the Commissioner nor the Senior Legal Officer are bound by the recommendations of the SAO.

Once the Commissioner or the delegate is satisfied that action has duly and properly been taken, or that further information is required, the SAO is responsible for preparing draft correspondence to give effect to that decision.

Occasionally the Commissioner or delegate will raise issues of a general nature associated with the action that has been taken by the inquiry agency or public authority in respect of the referral. The purpose of raising such issues is to assist that agency or authority to improve the manner in which it deals with alleged misconduct or maladministration.

In all cases, both the inquiry agency or public authority concerned and the complainant or reporter, are advised of the outcome of the matter before the file is closed on Resolve.

In the course of this review, I visited the OPI and discussed its functions and operations with the Manager and members of the staff comprising Complaints Officers and Assessment Officers. I have also perused the assessments and correspondence from the OPI officers in Resolve when reviewing each of the many files I have examined.

Officers of the OPI continue to develop considerable expertise in the important task of assessing and administering complaints and reports received by them. I am satisfied that they provide a professional interface between ICAC and members of the public and that they act as an effective conduit between ICAC and inquiry agencies and public authorities. On my observation, they assess reports and complaints in an effective and timely manner.

5. ASSESSMENT BY ICAC

Following upon the communication of a recommendation by the OPI to the Commissioner, each matter is considered by either the Commissioner or the Chief Executive Officer. The Commissioner is not bound by the recommendations of the OPI (s 18(2)).

6. COMPLAINTS, REPORTS AND OWN INITIATIVE MATTERS

927 complaints and reports were made to ICAC during the reporting period. 453 of those matters were complaints from members of the public and 474 were reports from inquiry agencies, public authorities and public officers.

A number of the complaints and reports gave rise to more than one issue for consideration by the Commissioner. A total of 1525 issues were identified and assessed.

Matters assessed as raising a potential issue of corruption

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

During the reporting period 69 corruption investigations by the Commissioner were commenced in relation to matters received during that period. These included one matter which the Commissioner assessed on his own initiative as raising a potential issue of corruption. In addition 13 investigations were commenced as a result of complaints or reports received in the previous financial year. Some of the investigations were directed to be conducted by the Commissioner jointly with South Australia Police. A further 67 investigations were carried over from the previous financial year.

Referrals for investigation were made to South Australia Police, The Police Ombudsman or other law enforcement agency in 74 matters assessed as raising a potential issue of corruption. Seventy of these matters were referred to South Australia Police.

Matters assessed as raising a potential issue of misconduct or maladministration in public administration

As previously stated, 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 either –

1. refer the matter to an inquiry agency
2. exercise the powers of an inquiry agency in respect of the matter or
3. refer the matter to a public authority

During the reporting period 89 matters assessed as giving rise to a potential issue of misconduct or maladministration in public administration were referred to an inquiry agency. Of these, 56 matters (inclusive of three duplicate matters) were reported or complained of during the reporting period and 36 matters were received in the previous financial year.

A further 120 matters assessed as raising a potential issue of misconduct or maladministration in public administration were referred to a public authority. 97 of these were received in the reporting period and 23 were received in the previous reporting period.

During the reporting period the Commissioner exercised the powers of an inquiry agency on 12 occasions. Five of these occasions related to complaints and reports received during the reporting period and seven occasions related to complaints and reports received in the previous financial year.

No further action on complaints or reports

During the reporting period the Commissioner determined to take no further action in respect of 342 complaints and 186 reports

This decision was made for one or more of the following reasons:

- the matter fell outside the jurisdiction of 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;

or

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

Prosecutions and disciplinary action

During the reporting period 12 prosecutions and 19 disciplinary actions have been commenced as a result of investigations by ICAC.

7. 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.
- the power under s 29A of the Act exercisable by the Commissioner to authorise an investigator to inspect and take copies of financial records held by a deposit holder and give directions to, or impose requirements on, the deposit holder to facilitate these purposes.

I have perused the Standard Operating Procedures and, subject to the following comments which I make in relation to the powers exercisable under enter and search warrants, I am satisfied that they are accurate and serve the purpose for which they were intended.

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

The Standard Operating Procedure directs that the investigator 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 a copy of the warrant be provided to the occupier of the place, or the owner or driver of the vehicle, upon request. In addition, there is a requirement that the investigator 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.

The last-mentioned direction summarises the effect of Rule 9 of the *Supreme Court Independent Commissioner Against Corruption Act Rules 2013* which provides that:

"A person executing a warrant issued under these Rules must, unless it is not practical to do so, show the warrant to the occupier of a place, or the owner or driver of a vehicle, to which the warrant applies and, on request, provide a copy of the warrant to that occupier, owner or driver as the case may be."

Appendix A does not refer to the right of a person to request a copy of the warrant. As this is a right of which most people would be unaware, I think there should be a specific reference to it in the information sheet Appendix A.

There is a further comment to be made in relation to Appendix A.

In setting out the obligations imposed upon the person whose property or vehicle is being searched the information sheet states:

"TAKE NOTICE that Section 33 of the Act provides:

(1) A person must not—

- (a) refuse or fail to provide a statement of information as required by the person heading an investigation; or
- (b) include information in a statement of information knowing that it is false or misleading in a material particular; or
- (c) without lawful excuse, refuse or fail to comply with a requirement or direction of an investigator under this Act; or
- (d) alter, destroy, conceal or fabricate a document or other thing knowing that it is or is likely to be required by an investigator performing functions under this Act; or
- (e) alter, destroy, conceal or fabricate a document or other thing knowing that it is or is likely to be required by an investigator performing functions under this Act; or
- (f) otherwise hinder or obstruct an investigator, or a person assisting an investigator, in the performance of his or her functions.

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

Section 33 of the Act deals with a number of investigational issues under the heading of "Obstruction". Not all of the matters dealt with in s 33 (1) are relevant to the execution of search warrants. Only sub-sections (1) (c), (d), (e) and (f) are applicable to search operations.

The description in s 33(1)(a) "the person heading an investigation" is in reference to the Commissioner or a person appointed to head an investigation into corruption pursuant to s 27 of the Act. It has no application to investigators carrying out a search operation. There is a clear risk that the inclusion of this sub-section in the information sheet would create the impression in the mind of the person whose property is being searched that he or she is under an obligation to provide a statement of information about the matter under investigation to the officer in charge of the search. There is no such obligation.

The inclusion of a reference to s 33(1)(b) in the information sheet is also inappropriate. Again this sub-section does not deal with statements which might be made in the course of searches, but rather to situations in which a person can be required to provide information such as under s 28 when the person heading an investigation may, by written notice, require a public authority or public officer to produce a statement of written information about a specified matter relevant to the investigation.

I recommend that the information sheet be amended to reflect these comments.

8. 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.

9. 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.

A revamped website was launched in October 2014 with the aim of making it more user friendly.

The website is an essential component of the operation of ICAC and the OPI. In particular it incorporates the secure online complaint and report facility which provided the means of making over 40% of the complaints and reports during the reporting period.

In addition, the website provides considerable information concerning the operation of the organisation. The extent of this information is apparent from the sitemap which is reproduced in Appendix A to this report.

It is readily apparent from a perusal of the sitemap and the content of the items listed in it that the website fulfills the requirements set out in s 48 of the Act and goes further in providing a detailed explanation of the working of ICAC and the OPI.

10. THE EFFICIENCY OF OPERATIONS UNDER THE ACT

Section 46 of the Act requires that this report consider whether the practices and procedures of the Commissioner and the OPI were effective and efficient.

I have commented above on the operation of the OPI in these respects. According to the Commissioner's Annual Report there has been a 20% improvement in the average time a matter remains in the assessment stage compared with the previous reporting period.

It is apparent that considerable thought has been given to the efficient conduct of the operations of ICAC. Key Performance Indicators have been promulgated to assist in the assessment of certain aspects of the organisation's performance. They address the periods of time within which it is expected that various stages of investigations should be completed.

The Commissioner's Report notes that 57% of all investigations were completed within nine months which was far in excess of the benchmark. However, 65% of investigations were completed within 12 months of assessment as compared with the benchmark of 70%. Furthermore, 90% of matters were completed within 18 months of assessment as against the benchmark of 95%. The Commissioner makes the point that only five investigations have not been completed in the desired timeframe and that all five are particularly complex and protracted. In the light of the nature of ICAC's jurisdiction it is perhaps not surprising that, from time to time, there will be exceptionally protracted investigations.

The progress of all matters which are under investigation by the Commissioner or inquiry agencies are monitored in accordance with reporting requirements which have been put in place.

11. 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.

12. 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 specified 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 requirement to answer specified questions and the extension of the section to include inquiry agencies were introduced into the Act by the Independent Commissioner Against Corruption (Miscellaneous) Act 2014.

No notices were issued pursuant to s 28 during the reporting period.

13. 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.

During the reporting period eight such notices were prepared and served. The procedure prescribed by the Act was followed on each occasion.

14. POWER TO AUTHORISE INSPECTION OF FINANCIAL RECORDS

Section 29A was inserted into the Act by the *Independent Commissioner Against Corruption (Miscellaneous) Amendment Act 2014*. It enables the Commissioner to authorize, 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 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.

During the reporting period 29 such notices were authorised and served. The correct procedure was observed in each case.

15. SECTION 32 RETENTION ORDERS

Section 31(7)(c)(v) and (vi) of the Act provide 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.

A total of six retention orders were issued during the reporting period in relation to two matters. The prescribed procedure was followed with respect to each notice.

16. 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.

No s 34 notices were issued in the reporting period.

17. 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 (s 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 (s 31(6)).

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.

The Supreme Court Independent Commissioner Against Corruption Act Rules 2013 ("the Rules") came into operation on 1st September 2013. Inter alia the Rules prescribe the procedure for an application to the Court under s 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.

As stated above, Standard Operating Procedure 3 sets out the investigator's responsibilities when executing a search warrant.

During the reporting period 19 search warrants were issued in a total of five matters. 15 warrants were issued by the Commissioner and four by the Supreme Court. The procedure prescribed for applying for such warrants was followed in each case.

I have viewed the video recordings of each search pursuant to the warrants. I am satisfied on the information before me that the searches were in accordance with the procedures which the investigators were required to follow.

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 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.

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 five persons were examined in relation to one investigation. The Commissioner was the examiner for each witness. Each witness was represented by counsel and counsel was appointed to assist the Commissioner.

I have read the transcript of proceedings of these examinations. The hearings were conducted in accordance with the procedure prescribed by the Act. Nothing occurred which would make the proceedings unfair. The proceedings were properly explained and counsel representing the witnesses were given the opportunity to safeguard the interests of their clients.

19. RECONTACTS

I examined the majority of instances in which complainants contacted ICAC after being advised of the results in matters which had been the subject of complaints or reports. These are classified by ICAC as "Recontacts". As was the case in my examinations of these matters in the First Report, almost all of them involved a complaint that ICAC had decided not to proceed with an investigation, either because there was no jurisdiction to do so or for some other reason. In a few cases, complaints were made about the investigation. However I could find no reason to criticize the approach of ICAC in any of these matters.

20. COMPLAINTS CONCERNING THE EXERCISE OF ICAC POWERS

In the First Report I pointed out that 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 the officers of ICAC.

I recommended that consideration be given to amending the Act so as to provide for a mechanism for the making of complaints similar to that which exists in the Commonwealth and State models which I listed in the First Report. The legislation governing all anti-corruption bodies, with the exception of Tasmania, provides an avenue for a person to make a complaint of this nature. In these jurisdictions complaints can be made to the independent inspector. The Tasmanian legislation does not include provision for an independent reviewer or inspector in relation to the exercise of the powers of the anti-corruption body in that State.

As I pointed out in the First Report, if the facility to make a complaint were introduced, the subject matter of any complaint should be restricted to the exercise of the coercive powers of ICAC. It is the exercise of these powers which constitutes the principal focus of my role as inspector. I refer in particular to the powers of search and seizure under s 31 of the Act and the powers to require information under ss 28, 29 and 29A. As I am presently required to consider whether practices and procedures of the Commissioner are effective and efficient, any complaint of alleged excessive and unwarranted delay in investigation should also be included.

I should add that my recommendation that a person should be able to complain to an independent entity has not emanated from evidence of any misconduct which I have uncovered in the course of my inspections.

It is important to stress that any power to consider complaints should not extend to a review of decisions of the Commissioner to investigate or decline to investigate an allegation of corruption, misconduct or maladministration or other investigational decisions. Nor should it apply to any finding of the Commissioner as to the appropriate disposal of a matter.

Since the making of the First Report, these recommendations have been considered by The Crime and Public Integrity Committee of Parliament ("the Committee"). In the First Report of that Committee into Public Integrity and The Independent Commissioner Against Corruption¹ it was recommended in general terms that the person conducting the Review under s 46 of the Act should have power to deal with complaints of the nature referred to above.

The Attorney-General has discussed this matter with the Commissioner and me prior to the writing of this report and the Commissioner has also written to the Committee setting out his views on any proposed legislation. The Commissioner supports the proposal in principle. I agree with his submission to the Committee in a letter dated 9 September 2015 that any jurisdiction conferred on the reviewer should be restricted to alleged abuses in the exercise of the powers conferred by the Act in relation to investigations into corruption in public administration as well as allegations of unreasonable delay in investigations. The jurisdiction should not extend, for example, to decisions by the Commissioner whether or not to take action in a matter. In his letter to the Committee the Commissioner made some practical suggestions as to the procedure for dealing with such complaints and I agree that these are appropriate matters for consideration.

21. THE EFFECT OF THE OPERATIONS OF ICAC

Section 46 (2)(a)(iii) of the Act requires me to consider –

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

¹ Laid on the Table of the Legislative Council and ordered to be printed on 30 June 2015.

It is not possible to make this assessment on a strictly quantitative basis. However it is possible to draw inferences from the nature of the organisation which has been created and the activities in which it has been involved. The ICAC website provides an insight into the educational activities which have been undertaken. There would seem to be no doubt that the purpose and function of ICAC is reasonably well-known in the community and that public officers, in particular, would be aware of its role. It is likely that information and advice given to public authorities by ICAC has led to a heightened awareness of the importance of institutional probity. Publicity has also been given to the matters in which there has been a referral to prosecuting and disciplinary authorities.

In the light of these educative activities and the action which has been taken by the Commissioner in particular matters, I am of the view that the operations of ICAC have contributed in an effective manner to the prevention of conduct of the type which the Commissioner is required to investigate.

22. 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 s 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.

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 six months, inspect the records of ICAC for the purpose of ascertaining the extent of compliance with the requirements for record-keeping set out in section 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 reported on two occasions during the last financial year in accordance with these requirements. In each of those reports I stated that ICAC has complied with the record-keeping requirements of the Commonwealth and State legislation.

The Hon. K P Duggan AM, QC

APPENDIX A

MAIN MENU

- About us
 - The Commissioner
 - The Chief Executive Officer
 - The Office for Public Integrity
 - Organisational chart
 - What we do
 - Accountability
- Regulatory framework
 - Other key legislation
 - Codes and regulations
 - Standard operating procedures
 - Careers and vacancies
- Contact us
 - Contact us form
- Complaints and reports
- What to make a complaint or report about
 - Reporting rights and obligations
 - What is corruption?
 - What is misconduct?
 - What is maladministration?
 - What is a 'reasonable suspicion'?
 - What is 'serious or systemic'?
- How to make a complaint or report
 - Confidentiality
 - Offences and penalties
 - Make an online complaint or report
- What happens to complaints or reports
 - Investigations
 - Examinations
 - Other places to lodge a complaint
- Prevention and education
 - Directions and Guidelines
- Education events
 - Past events - 2015
 - Past events - 2014

- [Past events - 2013](#)
- [Request an ICAC speaker](#)
- [Education resources](#)
- [Brochures and posters](#)
- [Frequently asked questions \(FAQs\)](#)
- [E-Learning](#)
- [Fact sheets](#)
- [Case studies](#)
- [Videos](#)
- [Communications and Media](#)
- [News](#)
- [News - 2014](#)
- [News - 2013](#)
- [Newsletters](#)
- [Media releases](#)
- [Public statements](#)
- [Information for the media](#)
- [Join mailing list](#)
- [Publications and Reviews](#)
- [Annual reports](#)
- [Reports and recommendations by the Commissioner](#)
- [Annual review of exercise of powers](#)
- [Evaluations](#)
- [Legislative reviews](#)

NEWS

- [ICAC awareness session for public officers — 11 November 2015](#)
- [Executive arrested after ICAC investigation](#)
- [Review of Legislative Schemes Report published](#)
- [Public statement — pending prosecution](#)
- [Public inquiries — submissions and transcripts published](#)
- [Public statement — investigation outcome](#)

QUICK LINKS

- [Legislative reviews](#)
- [Directions and Guidelines](#)
- [Careers and vacancies](#)
- [Independent Commissioner Against Corruption Act 2012](#)

- [Education events](#)
- [Stay informed — join our mailing list](#)
- [Transcript for home page video \(PDF 62KB\)](#)