

Public Integrity Reform – Independent Commissioner Against Corruption

Thursday 19 September 2013
Adelaide Convention Centre
The Hon. Bruce Lander Q.C.

The Offices Under The Act

When the *Independent Commission Against Corruption Act 2012* was proclaimed to commence on 1 September 2013 it created two offices, being the (OPI) Office for Public Integrity and the (ICAC) Independent Commission Against Corruption.

The offices are distinct but are designed to work harmoniously.

They do so by giving responsibility for the OPI to the Commissioner.

The two offices are subject to the direction of the same person.

I have appointed Patricia Christie as Chief Executive Officer of both the OPI and ICAC, which means that she will have the managerial responsibility for the two offices. She has been appointed as CEO of both offices in conformity with the design of the Act.

The ICAC has been appointed with the functions of;

- a) identifying and investigating corruption in public administration and referring that conduct for prosecution or referring that conduct to SA Police or the Police Ombudsman for investigation and prosecution;
- b) assisting inquiry agencies and public authorities to identify and deal with misconduct and maladministration in public administration, and
- c) including an education function of which this is an instance;
- d) with further functions designed to assist those with two principle functions.

The Commissioner does not have a Commission. The Act intends, that the Commissioner will operate personally for the purpose of fulfilling the primary functions, to which I have referred.

The OPI was created with the functions of;

- a) receiving and assessing complaints and reports about corruption, misconduct and maladministration in public administration from members of the public, inquiry agencies, public authorities and public officers;
- b) making recommendations as to whether, and by whom, complaints and reports should be investigated.

The OPI has such other functions that are assigned by the Commissioner.

As I have said, OPI is responsible to the Commissioner for the performance of its functions, but the Commissioner is not bound by the recommendations of OPI.

The personnel in the OPI may be either public servants assigned to OPI to assist the Commissioner, or employees of the Commissioner assigned to the OPI, by the Commissioner.

The ICAC Act has a curiosity that the Commissioner can personally engage employees on terms and conditions determined by the Commissioner. Those employees are not public servant employees but public sector employees.

Directions and Guidelines

The ICAC Act requires a system to be established for the receipt by OPI, of complaints about public administration.

In doing so, the Commissioner must, according to injunctions in the ICAC Act, prepare Directions and Guidelines governing reporting to 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 do not address the complaints made by members of the public who are not public officers.

I will interrupt myself now to explain what those various terms mean.

An inquiry agency is the Ombudsman, the Police Ombudsman and the Commissioner for Public Sector Employment.

A public authority is defined in Schedule 1 of the ICAC Act to include the Governor, the Ministers of the Crown, the Legislative Council, the House of Assembly, Statutory Authorities, Public Sector agencies, Local Government Bodies, the Commissioner of Police, and public authorities responsible for public officers.

A public officer is also defined in Schedule 1 and includes; the Governor, Ministers of the Crown, Judicial officers, Members of Statutory Authorities, all Public Sector employees, councillors and employees of local council, police officers and persons performing contract work for a public authority or the Crown.

I have prepared Directions and Guidelines in accordance with my statutory obligations that govern reporting by an inquiry agency, public authority or public officers who are aware of conduct, that they reasonably suspect constitutes corruption, misconduct or maladministration in public administration to the OPI.

I have attempted to explain in Section 6 of the Directions and Guidelines what is meant by the term 'reasonably suspects' or 'forming a reasonable suspicion'.

Suspicion is a state of mind, but short of belief.

Those Directions and Guidelines specify the matters required to be reported, and how they should be reported.

They also specify the reporting of matters, even if those matters have been referred to an inquiry agency or public authority.

Those Directions and Guidelines are available on the ICAC website and for inspection at the OPI at 55 Currie Street Adelaide.

The ICAC Act requires all inquiry agencies, public authorities, and public officers to make reports to OPI in accordance with the Directions.

Thus OPI has been created as the shop front for the purpose of reporting corruption, misconduct and maladministration in public administration.

The ICAC Act does not allow for complaints and reports to be made to the Commissioner, but only to OPI. There is one exception, in that the Act permits the Attorney-General to report such matters to the Commissioner for consideration, as the Attorney-General considers appropriate.

The Directions and Guidelines identify the matters which inquiry agencies, public authorities and public agencies must report to OPI and those that they may report. The Directions and Guidelines also provide for the manner in which those reports should be made.

The effect of the Direction and Guidelines is to make it mandatory for inquiry agencies, public authorities and public officers to report conduct, that those bodies or persons reasonably suspect involves corruption.

The Directions and Guidelines also oblige inquiry agencies to report serious or systemic misconduct or maladministration to OPI.

Public authorities and public officers must report serious or systemic maladministration to OPI unless the public authority or public officer knows that the matter has already been reported to an inquiry agency.

The intent of the Directions and Guidelines is to ensure that all conduct that anyone in public administration reasonably suspects involves corruption is reported to OPI. The further intent of the Directions and Guidelines is that all conduct, that anyone in public administration reasonably suspects involves misconduct or maladministration, is reported either directly to OPI or indirectly to OPI through an inquiry agency.

The end result is that if inquiry agencies, public authorities and public officers comply with the Direction and Guidelines, OPI should be made aware of all conduct that is reasonably suspected to be corruption or serious and systemic misconduct or maladministration in public administration in the State.

Because the Act applies at both State Government and Local Government level, if the Directions and Guidelines are observed, the OPI should be the repository of all reports of all conduct that is reasonably suspected to be corruption, and serious or systemic misconduct and maladministration.

The obligation to report includes the obligation to self-report. If a public authority reasonably suspects that it or someone has engaged in corruption or misconduct or maladministration within its own organisation which is serious or systemic, the public authority must report that conduct to the OPI.

Inquiry agencies, public authorities and public officers are obliged to make their reports online. The report must contain the information contained in the Directions and Guidelines.

The purpose of the Directions and Guidelines is to have the inquiry agency, public authority or public officer identify, precisely the issue that the inquiry agency, public authority or public officer reasonably suspects, involves corruption or serious or systemic misconduct or maladministration, and to provide the evidence which is known to the body or the person reporting that has given rise to the suspicion.

The inquiry agency, public authority or public officer can seek the OPI's or the Commissioner's permission to receive a report, other than online, but the intent of the Directions and Guidelines is those bodies and persons will report online.

There is no obligation on members of the public who are not public officers to report their suspicions of conduct that might constitute corruption or serious or systemic misconduct or maladministration. However, the ICAC Act supposes that members of the public will make complaints (s17(a)) and all members of the public who entertain such a suspicion are encouraged to report that conduct to OPI online, by correspondence, by telephone or in person.

There is no doubt there will be a section of the general public who will entertain those suspicions because in many cases, they will be, at least in their view, the victims of the conduct, or at least witnesses to the conduct.

There are separate Directions and Guidelines directed to public officers who are sworn police officers, including the Commissioner of Police, and those persons employed by SAPOL who are unsworn.

The Directions and Guidelines only require inquiry agencies, public authorities and public officers to report a matter that is reasonably suspected of involving corruption or misconduct or maladministration in public administration, that occurred on or after 1 September 2013, or has come to the attention of the reporting agency, authority or officer, after 1 September 2013.

The reason that the obligation is limited to conduct post 1 September 2013 is a practical one. If the Direction and Guidelines required an inquiry agency, public authority or public officer to report any impugned conduct that occurred before 1 September 2013, there would be no limit to their obligations. Those subject to mandatory reporting obligations would have to address conduct that would have occurred many years before the ICAC Act came into force and was conduct that was no longer relevant. The reporting obligations would be too onerous.

However, that does not mean that any of those bodies cannot report conduct of that kind to OPI. The Directions and Guidelines permit reports of conduct, that occur prior to 1 September 2013, be brought to the attention of the OPI. Indeed, all of the complaints and reports that have so far been received by OPI, relate to conduct before 1 September 2013. That is of course unsurprising. The ICAC Act only commenced just over 2 weeks ago.

The receipt of complaints and reports relating to conduct before 1 September 2013 is consistent with Section 5(5) which permits investigations into conduct that occurred prior to the commencement of the ICAC Act.

A closer reading of the Directions and Guidelines will reveal that the Directions and Guidelines do not apply to some public authorities and public officers, where those authorities or officers have learned of conduct only by reason of the discharge of their duties. For example, the Director Public Prosecution does not have to report conduct that he reasonably suspects involves corruption, misconduct or maladministration where he has learnt of that conduct, only because he is prosecuting a person in relation to the conduct.

If the Directions and Guidelines have been complied with by other public authorities and public officers, that conduct will have already come to the attention of the OPI.

Corruption, Misconduct and Maladministration in Public Administration

What does amount to corruption, misconduct or maladministration?

Corruption is conduct that amounts to a criminal offence of a kind described in section 5 of the ICAC Act and includes offences such as bribery or corruption of public officers, threats or reprisals against public officers, abuse of public office, demanding or requiring benefits on the basis of public office, offences relating to appointment to a public office, offences under the Public Sector (*Honest and Accountability*) Act 1995 and any other offence committed by a public officer while acting in the public officers capacity as a public officer.

It is important to note that the Act does not create any new offence of corruption but describes generically a number of offences that have existed for a number of years. The ICAC Act now calls those offences corruption.

It follows therefore that any conduct of a kind that amounted to an offence before the 1 September 2013, described in section 5(5) of the Act would now be called corruption under the ICAC Act. In so far as corruption is concerned, there is no reason for a public authority or public officer to change their conduct unless the conduct in which they previously engaged would constitute an offence.

The definition of corruption is very wide because it includes any offence committed by a public officer in the discharge of the public officers duties. That means whatever offence a public officer committed during the public officers' exercise of their duties, will amount to corruption. For example, if a public officer was driving a motor vehicle in the discharge of the public officer's duties and committed a speeding offence, that offence would come within the description of corruption.

I have taken the view, that OPI and ICAC were not established to inquire into offences against the Road Traffic Act, and the Direction and Guidelines specifically state that an inquiry agency, public authority or public officer need not report such conduct.

Misconduct means a contravention of a code of conduct by a public officer in the discharge of the public officers' duties that might constitute a ground for disciplinary action against the officer or other misconduct.

The reporting obligations only require the reporting of serious or systemic misconduct.

I have taken the view that less serious and single acts of misconduct by a public officer should be dealt with in accordance with the ordinary disciplinary procedures in the public authority, to which the public officer is attached or by the Ombudsman or Police Ombudsman.

Maladministration means conduct of the public officer or a practice policy or procedure of a public authority that results in an irregular use of public money or involves substantial mismanagement of public resources and includes conduct resulting from impropriety, incompetence or negligence.

Again, the reporting obligations only require inquiry agencies, public authorities and public officers to report serious or systemic maladministration.

The Act does not define what might amount to serious or systemic misconduct or maladministration. To assist public authorities and public officers, I have published on my website some factors which might go towards a determination that something is serious or systemic, and I have offered some examples of matters that I consider might amount to serious or systemic misconduct or maladministration.

Again however, an inquiry agency, public authority, public officer or indeed any member of the public is entitled to complain or report about misconduct or maladministration even if it does not involve serious or systemic conduct or maladministration. If they consider the conduct ought to come to OPI's attention.

The OPI Assessment

Once a complaint or report is made the ICAC Act requires OPI to assess the complaint or report to determine whether it raises potential issues of corruption in public administration that could be the subject of prosecution, or raises potential issues of misconduct or maladministration in public administration which is serious or systemic, or raises some other issues that should be referred to an inquiry agency, or on the other hand, is a complaint or report that is trivial, vexatious or frivolous, or has previously been dealt with by a public administration or authority and there is no reason to examine it, or there is other good reason as to why no action should be taken in respect of the complaint or report.

Having made that assessment, OPI must make a recommendation to the Commissioner as to whether, and by whom, the matter should be investigated.

Once the OPI has made an assessment of the complaint or report and made a recommendation to the Commissioner, the Commissioner's obligations in relation to the recommendations are engaged.

The Commissioner's Assessment

However, the Commissioner is not bound by the recommendation made by OPI but the Commissioner can assess the matter for himself and deal with it in accordance with his own assessment.

The Commissioner can assess for himself any matter identified by the Commissioner, acting on the Commissioner's own initiative or require OPI to make the assessment. Thus it is, the Commissioner can enquire into conduct that has not been directly complained of or reported to OPI.

If a matter is assessed as raising a potential issue of corruption, the matter must be investigated by the Commissioner or referred by the Commissioner to SAPOL, the Police Ombudsman (if it concerns a police officer), or some other law enforcement agency.

The ICAC Act does not specifically empower OPI to make any investigation in relation to any complaint or report before OPI makes its assessment and provides a recommendation to the Commissioner.

I think the ICAC Act does not envisage that OPI will carry out a full scale investigation in relation to a complaint or report. I think however the ICAC Act does allow OPI to obtain further information that OPI would need to make an assessment or recommendation.

There is nothing in the Act that would preclude OPI from seeking further information from an inquiry agency, public authority or public officer. Nor is there anything in the Act which would prevent OPI from obtaining information for OPI to make an assessment or recommendation.

But that does not, in my opinion, allow OPI to embark on a full scale investigation. The ICAC Act assumes that an investigation will occur after the recommendations have been made, and by the Commissioner, and if directed by the Commissioner, a law enforcement agency, an inquiry agency or a public authority.

If the OPI assesses a matter as being a matter that no action should be taken in respect of it, and I accept that recommendation, then that is the end of the complaint or report, and the complainant or the inquiry agency and public authority or public officer will be advised accordingly.

If the matter is assessed as raising a potential issue of corruption and I agree with that recommendation the ICAC Act obliges me to investigate the conduct complained of or refer the matter to SAPOL, the Police Ombudsman (if it concerns a police officer) or other law enforcement agencies.

A law enforcement agency includes the Australian Crime Commission, the Australian Federal Police, SAPOL, the Police Ombudsman, another Australian Police Force or the ICAC equivalents in the other states.

I intend as a matter of routine to investigate potential issues of corruption myself.

I shall mention in a minute how it is I will carry out the investigation.

If the matter is assessed as raising a potential issue of misconduct or maladministration the Act obliges me to deal with it either by referring it to an inquiry agency and give if I think appropriate, directions or guidance to the agency, for the manner in which the matter is dealt with or as part of this exercise, assume the powers of the inquiry agency myself.

Otherwise I must refer the matter to the public authority concerned and again if I think appropriate, give directions to the public authority as to how the matter should be dealt with.

In the Directions and Guidelines I have published, I have set out the usual directions and guidance that I will issue to inquiry agencies and public authorities if I refer a matter of misconduct or maladministration to either an inquiry agency or public authority.

Therefore if such a referral is made the inquiry agency or public authority should deal with the matter in accordance with the published Directions or Guidance which in both cases requires them to report to me in relation to the matter within 56 days of the referral identifying the issues that have been addressed and the action taken and the reasons for that action.

I am obliged before I refer a matter of misconduct or maladministration to obtain the views of the inquiry agency or the public authority as to the impending referral and a system has been put in place so as to comply with that obligation under the Act.

The main focus of my investigations will be into corruption.

You will be aware that I have been given extensive coercive powers to conduct examinations of witnesses and persons whose conduct is under investigation.

Investigation Process

The ICAC Act requires the Commissioner's Standard Operating Procedures (SOPs) to be published on the website. The SOPs must include provisions that will ensure that persons who might be subject to investigation are provided with appropriate information about their rights, obligations and liabilities under the ICAC Act. An investigator who contravenes the SOPs may be suspended, dismissed or disciplined: s 26(3).

If a decision is made to investigate a potential issue of corruption the Commissioner must oversee the investigation: s 27(1).

The Commissioner can head up the investigation or delegate that function to an examiner. However, even if the function is delegated, the Commissioner must oversee the investigation. That obligation is important. The Commissioner has the ultimate responsibility for an investigation. The Commissioner appoints the investigators: s 14.

Detective Superintendent Moyle has been seconded to ICAC as Director of Operations for a period of three years. The appointment of police officers is contemplated by the ICAC Act: s 14. Superintendent Moyle prepared the SOPS.

A Manager of Investigations has also been appointed.

Other investigators will be appointed between now and the end of October, not all at the same time but incrementally as is required. There will be, including Superintendent Moyle and the Manager, 8 investigators by that time.

The Commissioner must in conducting an investigation cooperate with other law enforcement agencies: s 15.

The Commissioner may for the purposes of an investigation, on the Commissioner's own initiative or an application by an investigator, issue a warrant authorising the investigator to enter and search a place occupied by a public authority or office or a vehicle owned by such an authority or officer: s 31. The warrant authorises the investigator to seize and retain evidence: s 31(7)(c).

However, the Commissioner cannot issue a warrant to enter and search private places or vehicles. The investigator in those circumstances must apply to the Supreme Court for such a warrant. Usually the

application will be in writing. Experience shows that an application to a Court for a warrant can take time. The procedure can be cumbersome when an investigation is urgent.

If a serving officer in SAPOL is appointed an investigator, that police officer may have a general search warrant: s 67 of the *Summary Offences Act 1953*. The Commissioner of Police can allow that officer to continue to hold the warrant and maintain other police powers, whilst that officer is on secondment: s 67(3) of the *Police Act 1998*. The Commissioner of Police has advised me that he will continue to allow seconded police officers to hold their general warrant.

Subject to the Commissioner of Police exercising the power under s 67(3) of the Police Act, serving police officers have powers that are not available to persons who are not police officers. The general search warrant is most important because it would enable an officer who is an investigator under the ICAC Act to go onto private property so long as the preconditions for the exercise of that warrant were in existence. An investigator may require a person who the investigator reasonably suspects has committed, or is committing, or is about to commit, an offence to state the person's personal details and produce evidence of those details: s 30.

The person heading the investigation who must be the Commissioner, or an examiner, can by notice to a public authority or public officer require the production of a written statement of information about a specified matter within a specified time and verified by statutory declaration: s 28.

It is an offence to obstruct an investigation in any of the ways mentioned in s 33. Refusing to provide a statement of information as required by the person heading the investigation will be obstruction: s 33(1). The provision of false information will be obstruction.

An investigator is empowered to arrest a person without a warrant if the investigator reasonably suspects that a person has committed, is committing, or is about to commit obstruction, if the person fails to state truthfully the person's personal details or for any of the other reasons in s 33(2)(B). The investigator, if not himself or herself a police officer, must deliver the arrested person to a police officer: s 33(3).

The Commissioner and an examiner and an investigator may continue investigations even if the person whose conduct is under examination has been charged with an offence but in doing so they must avoid, as far as practicable, prejudice to any person affected: s 43.

If the Commissioner is investigating a matter, the Commissioner may require by notice in writing a South Australian law enforcement agency, inquiry agency or public authority to refrain from taking any action. The Commissioner can apply to the South Australian Supreme Court to enforce that notice. Importantly, a South Australian law enforcement agency includes SAPOL. That means the Commissioner can require SAPOL to step aside from an investigation and allow the Commissioner to proceed.

The Commissioner can also require a South Australian law enforcement agency to conduct a joint investigation with the Commissioner.

How examinations will be conducted

The Commissioner, or a person appointed by the Commissioner, is empowered to conduct examinations: s 29. The only person so far appointed is Mrs Christie. An examination is an important investigative tool. The purpose of an examination is to obtain additional information relevant to the investigations being conducted by the ICAC. The examiner determines how the hearing will take place: cl 3. There are no rules of evidence. An examination is not a criminal trial. There is no finding of guilt or any finding of corrupt conduct.

Examinations must be conducted in accordance with Schedule 2 to the ICAC Act. The references to an examination that follow are references to the clauses of Schedule 2.

The Commissioner has power to summons witnesses and take evidence: cl 4. The Commissioner also has power to require a person to attend and produce documents: cl 5.

If the Commissioner, or for that matter an examiner, issues a summons under the Schedule, the summons may include a notation to the effect that disclosure of information about the summons or notice is prohibited except in the circumstances mentioned in the notation: cl 6.

If a person is served with a summons or notice containing a notation, that person must not disclose the existence of the summons or notice except insofar as the person discloses it to his or her legal practitioner or to any other person for the purpose of ensuring compliance with the summons: cl 7.

It is an offence for a person served with a summons to appear as a witness to fail to do so.

The examinee may be represented by a legal practitioner: cl 3(2)(a). The Commissioner or the examiner may direct that any evidence or the contents of a document not be published: cl 3(9). It is an offence for a witness at an examination, when required, to refuse to take an oath or an affirmation or to refuse to answer a question that the Commissioner or examiner requires that person to answer, or refuse to fail to produce a document that the person was required to produce: cl 8.

If a legal practitioner is summoned to appear to give evidence or produce a document, the legal practitioner is entitled to refuse to answer a question or produce a document if in doing so he or she would disclose a privileged communication between the legal practitioner and his or her client unless the client waives the privilege. However, if privilege is not waived, the legal practitioner must tell the Commissioner or the examiner the name and address of the person to whom or by whom the communication was made: cl 8(3).

Clause 8 further provides that if a witness is asked a question or is required to produce a document and before answering or producing the document claims that the answer or production might tend to incriminate the person, the answer or the document produced is not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty save under a proceeding under the *Criminal Assets Confiscation Act 2005* or a proceeding under the Act for falsely answering a question, or falsely making a statement in the document: cl 8(5).

Clause 8 means that the Commissioner or examiner can obtain evidence that might establish the guilt of a person but that evidence will not, if privilege is claimed, be admissible in Court.

The purpose of giving the Commissioner or the examiner the power to obtain the evidence or document, and the further purpose of the exception to the legal professional privilege rule mentioned above, is to provide the Commissioner or the examiner and the investigators with information to make further inquiries to obtain evidence that would be admissible in Court to prove the fact in the statement or document produced by the person, which is not for the reasons mentioned above admissible.

An examination can only take place for the purposes of an investigation into corruption in public administration, not misconduct or maladministration.

The Schedule to the ICAC Act requires that examinations must be conducted in private: s 3(3). Examinations in some other States are conducted in public.

The role of the Commissioner is to investigate and ascertain whether there is evidence that a person may be guilty of corruption as that term is defined and, if that is the opinion, to refer the matter to a prosecution agency (the DPP) for prosecution, or a law enforcement agency for further investigation and potential prosecution.

Investigators do not carry out their investigations of criminal conduct in public. The time for a public hearing in the ordinary course of an investigation is after a person is charged and at that person's trial. At that stage it will have been decided that there is a case to answer and that the person should be put on trial.

For that reason alone, it would be appropriate to hold the hearings in private because the hearings are merely for the purpose of obtaining evidence.

However, there are other reasons.

First, evidence obtained during an examination may provide new avenues of inquiry to the investigators. If that information is communicated more broadly, it may hinder the ability of investigators to follow up those lines and obtain that evidence.

Secondly, a private hearing means that evidence that will not be admissible in a trial will not become public. A hearing in private avoids the risk, if there is a later prosecution, of the accused arguing that, due to the

adverse publicity surrounding the examination, and the publication of evidence given, the accused cannot receive a fair trial, and for that reason the prosecution should be stayed.

Thirdly, it meets one of the primary objectives of the legislation, which is to achieve a balance between the public interest in exposing corruption while avoiding undue prejudice to a person's reputation. Irremediable reputational damage can be caused by allegations that are not capable of being established.

At the end of the hearing, there will either be evidence sufficient to put the person whose conduct is under examination on trial or not. But it will only be the evidence admissible at trial that will be considered before sending the matter to the DPP to prosecute. If there is such evidence, the evidence will be adduced in public at the person's trial and the public will have the opportunity of judging the conduct of the person accused for itself. If there is not sufficient evidence to put the person on trial, the person will not have suffered the reputational damage that would be occasioned by a public hearing.

Public examinations should not be used to shame a person where there is not sufficient evidence to charge that person with a criminal offence.

Schedule 2 to the ICAC Act identifies when a person is in contempt of the Commissioner: s 12.

If the Commissioner or an examiner is of the opinion that during an examination a person is in contempt of the Commissioner, the Commissioner or the examiner may apply to the Supreme Court for that person to be dealt with in relation to the contempt: cl 13(1). The Commissioner or the examiner may direct that the person be detained by a police officer: cl 15.

It is an offence for a person to hinder or obstruct an examiner in the performance of the examiner's functions or disrupt an examination: cl 19.

Privacy

The next thing I want to address in the time available to me today is the question of the privacy provisions in the ICAC Act.

The scheme of the Act is to keep all complaints, reports, assessments, investigations, referrals or evaluations under the ICAC Act confidential.

Indeed, the ICAC Act requires me and my staff not to disclose information obtained in the course of the administration of the Act except for the purposes of the administration or the enforcement of the Act or generally for the performance of the functions of the Act.

However, I can authorise, where appropriate, the provision of information to the persons mentioned in Section 54(2) of the ICAC Act.

Generally that authority is restricted to providing information to a complainant or a reporter or a person who is the subject of a complaint or report or those agencies that would have an interest including an inquiry agency, public authority, law enforcement agency, a Minister or the Auditor General. The authority should only be used for the purpose where the provision of information will assist in the prevention of the commission of an offence involving corruption. If I authorise the provision of such information to any person, that person, to whom the information is given, must keep the information confidential.

The Act therefore imposes a tight rein upon me and my officers in the provision in relation to information.

However I am given the power to make a public statement in connection with a particular matter if I think it to be in the public interest. In assessing public interest I must have regard to the benefits to any investigation; the risk of prejudicing a person by making the statement; whether the statement is necessary to allay public concern or prevent or minimise the risk or prejudice to the reputation of a person; whether such a statement would redress prejudice caused to a person's reputation as a result of an allegation made against that person being made public; or the risk of adversely affecting potential prosecution.

There will be occasions where for the reasons the Act addresses it will be necessary to make a public statement, and where I think it to be appropriate, I will have no hesitation in doing so.

It is not only me and my staff that must keep matters confidential.

It is an offence under the Act for a person to publish or caused to be published information that tends to suggest someone is or may have been the subject of a complaint or report; or information that might enable that person to be identified; or the fact a person has made or is about to make a complaint or report; or information that might identify a complainant or reporter; or the fact a person has given or is about to give information under the Act.

The penalty for breach of this provision in the case of a natural person is \$30,000.00.

'Publish' is defined in the ICAC Act to include 'publishing in printed or electronic form, or by public announcement (such as by radio, television, or the internet)'.

Because 'publish' refers to a public announcement, it seems to be at least arguable, that one can publish information other than by public announcement.

If that construction is correct the ICAC Act has a very wide import and may have unintended consequences.

For example, if a public officer were to disclose to a CEO of a public authority that he or she was aware of conduct that potentially raised the issue of corruption neither of the persons to the conversation, being the CEO or the public officer, could tell each other whether they intended to report the matter to the OPI. Neither could tell each other if they did report the matter that they had done so.

Moreover, an inquiry agency could not tell a complainant to the inquiry agency that the inquiry agency had referred the matter to the OPI.

This would leave complainants uninformed as to whether a complaint had been made to OPI or the result of the complaint.

That seems to me to be a most unfortunate result.

The ICAC Act does allow me to authorise a person to give information which is otherwise prescribed.

The Directions and Guidelines contains section 15 which is designed to inform persons how they can approach OPI to obtain my authority to provide information which is necessary to be provided to another party so as to keep the process within OPI and ICAC transparent.

It seems to me that I have an obligation to make sure the ICAC Act has a practical effect.

Independence

The Act provides for an Independent Commissioner.

It is impossible to make the OPI and the office of the Commissioner entirely independent of government. The budget does not allow that to be the case, nor need it do so. The offices will have to use government departments. The Attorney-General's Department will provide support for procurements, human resources and payroll. Relying upon government departments for administrative support does not, in my opinion, compromise independence.

The Commissioner cannot, on the budget, be entirely independent of SAPOL. The budget does not allow for the office to set up its own telephone interception regime, undercover squad or covert surveillance team. There is a suite of policing aids which will have to be provided by SAPOL.

That is presently unavoidable. It is again not a matter that will impact upon my independence.

However, there may be occasions where because of the nature of the investigation it would be inappropriate to use any SAPOL resources, for example, if SAPOL were the subject of the investigation.

The real issue for independence is the public's perception of whether the Commissioner is independent of government.

It seems to me that I have the responsibility of persuading the public that I am independent. I accept the responsibility for ensuring, in reality and in perception, that the Commissioner is independent.

I will accept no direction from government or any arm of government, although I must say I do not expect to receive any such direction.

One Matter of Concern

I have noticed in previous speaking engagements that some public authorities including local councils have become concerned about the powers I have been given and the exercise of those powers.

I cannot express too strongly that in so far as corruption is concerned the criminal offences that constitute that description have not changed as a result of the ICAC Act.

What was a criminal offence before this Act came into operation is still an offence. Conduct that did not constitute an offence before this Act came into effect will not be corruption as a consequence of the Act.

The same is true of misconduct and maladministration. Conduct that was not misconduct or maladministration before the Act commenced will not become misconduct or maladministration because of the Act.

I think some legal practitioners have perhaps taken too cautious a view and have given advice that is perhaps an overreaction to the purposes and functions of the Act.

The Act is concerned with conduct. It requires all of us to act ethically. If that is how we have been acting there is no reason to change.