OUR REFERENCE NUMBER: A394855

8 October 2018

The Hon. Vickie Chapman MP
Deputy Premier
Attorney-General
GPO Box 464
ADELAIDE SA 5001

Dear Attorney-General

***Independent Commissioner Against Corruption (Investigation Powers) Amendment Bill 2018* (SA)**

I write in relation to the *Independent Commissioner Against Corruption (Investigation Powers) Amendment Bill 2018* (SA)(**the Bill**).

In particular, I write to advise you of my views in relation to the:-

1. Recommendations contained in the report of the Crime and Public Integrity Policy Committee on the Bill (**CPIPC Report**); and

2. The proposed amendments to the Bill to be moved by the Treasurer (drafted dated 26.9.18)(**Proposed Amendments**).

I will deal with all of the Recommendations even though some have not found their way into the draft Bill that you have provided me.

As you will see, aside from two matters I largely agree with the Recommendations and the CPIPC Report and the Proposed Amendments.

The two matters with which I disagree are the proposals that the Bill contain an avenue of appeal from the Commissioner's determination to hold a public inquiry and a requirement that the Commissioner publish reasons for such a determination and the proposal that a decision by the Commissioner or person heading the investigation to refuse an application for an order suppressing evidence can be subject to an appeal to the Supreme Court.

For the reasons detailed below, I consider these matters will compromise the ICAC Act to such a degree that they will render the holding of public inquiries ineffective and simply unworkable. If implemented the proposals might cause such prejudice to any investigation conducted by way a public inquiry that it would be rarely, if ever, that a determination would be made to conduct such an investigation in public rather than in private.

Because the legislation amended in this way will be unworkable the Bill will not have the effect of improving the transparency of ICAC misconduct and maladministration investigations.

I will deal each Recommendation and Proposed Amendment in turn. Where a Proposed Amendment and Recommendation relate to the same subject matter I have dealt with them together.

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Recommendation 1 and Amendment No 3 - default private inquiries

It is my view that this proposed amendment and recommendation would have no substantive effect on the operation of the Bill.

Accordingly, I do not make any comment in relation to it.

Recommendation 2 and Amendments Nos 1 and 2 – matters relating to the determination to hold a public inquiry

Amendments Nos 1 and 2 and the amendments proposed by this Recommendation will create legislation that is in my opinion unworkable.

The proposed avenue of appeal and attendant requirement to disclose reasons (whether on the ICAC website or directly to persons reasonably expected to be affected by the inquiry) may cause significant prejudice to an investigation. This prejudice will compromise any ability to conduct an investigation by way of public inquiry.

My opposition to such a right of appeal is based on three key matters:-

1. The proposed amendments will create a real risk that investigations will be impeded, stifled and/or prejudiced. This will act as a significant disadvantage on conducting such investigations in public such that the majority of investigations would likely be conducted in private.

2. A determination by an administrative decision maker (which the Commissioner is) under a specific Act that a matter is "in the public interest" is not a decision that lends itself easily to a "merits review" by a judicial officer. Any such review may be time consuming; require the Court to consider a voluminous amount of material; and require the expenditure of significant public resources. It is difficult to see what if any public interest justifies the process. Existing administrative law mechanisms already exist by which aggrieved persons can seek relief.

3. There are significant practical problems with the terms of the Amendments.

I expand on these points below.

<u>(1) Prejudice and delay to investigations</u>

Any statutory right of appeal against a decision of the Commissioner to hold an inquiry in public presents an opportunity for persons who have an interest in delaying or impeding an investigation to take action to do so.

Under the present terms of the Proposed Amendments a person has up to one month after the Commissioner has made his or her decision to lodge an appeal. This time limit itself can be extended. It is reasonably foreseeable that a number of appeals against a Commissioner's decision could be made during a public inquiry. For example, it may only become apparent during an inquiry that a person is going to be affected by the inquiry (a witness in the inquiry might provide new information which implicates a person) who to that point of time has not been mentioned. That person may wish to then appeal the Commissioner's decision to hold a public inquiry. In these circumstances it is likely the Court would grant that person an extension of time to file an appeal.

The appeal itself is likely to be lengthy and time consuming. A further appeal of the primary judge's decision may be made to the Full Court and with leave to the High Court.

It could be months between the making of a determination to hold a public inquiry and the appeal process concluding. It is likely that, given the matters I have discussed above, once an inquiry commences it may also be interrupted by further appeals which will occasion further delay.

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Such a delay has an inevitable impact on the ability to deal with investigations efficiently and expeditiously which may impact all of those affected by the investigation, including those whose have made complaints or been affected by the conduct of persons the subject of investigation (including members of the community) or those whose reputations have been unfairly damaged. It also means that if a particular practice or procedure being examined by the investigation poses a risk to public administration or members of the community any risk will remain unidentified and be unable to be addressed.

Delay also has consequences for the efficacy of the investigations.

Recollections of witnesses can fade over time. Documentary evidence may be lost, destroyed or dealt with inappropriately.

Delay causes prejudice to the ability of the Commissioner to gather the best evidence to inform his or her determinations.

The proposed amendments will likely cause another aspect of prejudice to the investigation.

It is likely that a determination to conduct a public inquiry by the Commissioner will be made at least partly on the basis of information obtained during initial investigation of the matter but which the Commissioner wishes to retain for the forensic benefit of his or her investigation.

For example, it may be important that in order to obtain the most truthful account from a witness evidence is taken from them without them knowing all of the material in the investigator's possession. Rather, the investigator wishes to present the material to the person during an examination and obtain their evidence about it. Such an approach prevents the witness from falsifying or concocting evidence. It also prevents witnesses from colluding. It substantially assists the investigation in establishing the truth.

There are two aspects of the Proposed Amendments which create the risk that such evidence will be required to be disclosed prematurely and before the Commissioner has had the chance to use it in a manner which most increases his or her chances of getting to the truth.

Firstly, if such evidence is required to be disclosed in any statement required to be published on the ICAC website (or given to any person).

Secondly, by an appeal process which would require that information be disclosed to the Court and the appellant.

In such circumstances I am not sure how as Commissioner I could consider it was in the public interest to risk compromise to an investigation in this way by holding the hearing otherwise than in private (noting that in private no such risk of compromise will occur).

<u>(2) The appropriateness of a "merits review" of the Commissioner's determination</u>

The second reason I oppose the amendments is that the appeal process would impose a significant burden on public resources for little, if any, benefit to the public.

Under the present terms of the Bill the Commissioner may only conduct an inquiry when he or she is satisfied that it is "*in the public interest to do so*".

It is necessary to consider in some detail what that determination will involve.

The factors which the Commissioner must take into account are mentioned in cl 2(2) of Sch 3A which is a non-exhaustive list of matters which the Commissioner must consider.

Judicial consideration of similar statutory tests provide some guidance as to exactly what will be involved in the determination.

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In *A v Corruption and Crime Commissioner* [2013] WASCA 288 McClure P said at [245] to [246]:-

> 245...the expression 'in the public interest' imports a discretionary value judgment. As Hayne J said in *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423:
>
> > It may readily be accepted that most questions about what is in 'the public interest' will require consideration of a number of competing arguments about, or features or 'facets' of, the public interest. As was pointed out in *O'Sullivan v Farrer*:
> >
> > > '[T]he expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view"'.
>
> 246. A 'discretionary value judgment' simply means that, with a proper understanding of the nature and limits of the statutory power, reasonable minds may differ as to the outcome. That is, there is no single correct answer as to what is in the public interest or necessary in the public interest.[1]

The authorities indicate that:-

- The public interest is a "protean" concept;
- What is in the "public interest" is a discretionary value judgment about competing factors, considerations or aspects of the public interest;
- The factors to be considered are normally undefined and limited only by reference to the scope and purpose of the statutory enactment under which the determination is made;
- Because what is in the public interest is a discretionary value judgment reasonable minds are likely to differ about the outcome.

Accordingly, when a determination is made that it is *"in the public interest"* to conduct a particular inquiry in public consideration must have been given to the matters in cl 2(2) of Sch 3A but the decision maker (the Independent Commissioner Against Corruption) will also be informed by the purposes of the ICAC Act and whether those purposes will be advanced by the holding of the particular inquiry in public.

This is likely to mean that the following matters may be considered:

- Whether the misconduct or maladministration under investigation is consistent with trends that the decision maker has been observing in his oversight of public administration in South Australia and there is a need to hold the inquiry in public to educate public officers generally about the conduct and the need to take steps to prevent, minimise or deal with it.
- Whether the maladministration or misconduct being investigated is endemic to a particularly agency and part of a number of incidents of similar conduct within that agency that the Commissioner has observed. Accordingly, exposure of that conduct by way of public inquiry is necessary for the agency to amend its practices.
- Whether in the Commissioner's experience the misconduct or maladministration being investigated has otherwise led to corruption in public administration and there is a need to educate the public sector about such conduct to prevent such corruption occurring.

The Commissioner will have that knowledge because of his or her position (in particular it will be knowledge obtained as a result of administering the complaint, reporting and oversight regime in the ICAC Act).

A Supreme Court Judge will not have that knowledge.

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[1] Citations omitted.

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The difficulty a Supreme Court Judge will encounter in conducting a merits review of the Commissioner's decision is therefore apparent. The Judge will not have the specialised knowledge of the Commissioner. The Judge will only be able to obtain that knowledge by being provided and reading the substantial amount of information available to the Commissioner.

The collation of this material and its review by a Judge will take a considerable amount of time. It will consequently cause significant expense to the public by consuming the time of the Judge; the time and resources of the parties to proceedings (who may well be public authorities); and the time and resources of the ICAC. There will be a significant burden on public resources.

This process will of course cause further delay to any investigation. I have already commented on the deleterious effects of delay on the efficacy of the investigation and the public interest.

Such a significant burden on public resources would normally be justified by a consequent public benefit. However, no such benefit has been clearly articulated in the CPIPC Report or by any party who made submissions. I myself cannot see any such benefit.

There is of course a public benefit in ensuring that any decision by the Commissioner has been made reasonably (and not capriciously or for an improper purpose) and according to law. However, those matters are already capable of examination against under existing judicial review mechanisms.

It is not clear what benefit adding a "merits review" (with its attendant imposition on public resources and deleterious effect on ICAC investigations) to those existing mechanisms would have.

(3) Practical problems with the terms of the amendments

There are a number of practical problems with the terms of Amendment No 1 which I will note below:-

1. Proposed s 36B(2) of the Proposed Amendments confers standing on any public officer or public authority and does not limit the standing to lodge an appeal to those affected by it which is clearly too broad. It is likely to lead to delay. It would also lead to unmeritorious appeals by those who simply wish to delay the investigation. It would be very odd if the appellant does not have to establish that the appellant's interests or rights might be affected by the decision the subject of the appeal. Further, a person who might be affected by the inquiry but is not a public officer has no right to lodge an appeal.

2. The section does not specify on what grounds the appeal can be lodged.

3. The section does not deal with what information if any the person lodging the appeal is entitled to for the purposes of the appeal.

4. Can a public officer contradict the appellant? Can a media organisation contradict the appellant and argue for a hearing to be heard in public?

5. Who would act as a contradictor in the proceedings? Would the *Hardiman* principle apply?

6. The decision of the Supreme Court might be to substitute its decision for an administrative decision? What further appeals might lie?

Summary

For the reasons specified I oppose this Recommendation and Amendment No 1 and 2.

If the Bill is amended as proposed I think it is unlikely that an investigation will be conducted as a public inquiry because the holding of such an inquiry would require an acceptance of too great a risk of delay and prejudice to the investigation.

I am of the view that the existing right that anyone has whose interests, rights or legitimate expectations might be adversely affected to apply to the Supreme Court for judicial review is appropriate.

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For this reason and although I do not think it is necessary I would not object to the Bill being amended to make it clear that nothing in the ICAC Act affects any right a person has at common law to seek judicial review of any decision by the Commissioner.

Recommendation 3 and Amendment Nos 2 and 4 – matters relating to the determinations to make non-disclosure orders

Although I consider that it is probably catered for under the existing terms of the Bill I do not oppose Amendment No 4.

However, I do oppose the suggestion made in Recommendation No 3 and implemented by Amendment No 1 that a determination made by a person heading the investigation to refuse to make an order under proposed cl 3 of Sch 3A can be the subject of an appeal to the Supreme Court.

The right to appeal is only against the refusal to make an order under cl 3(1)(c).

The basis for my opposition is on similar grounds to those dealt with under Recommendation 2 above. Accordingly, the issues discussed in that part of my letter are also largely relevant to my opposition to this this Recommendation.

In particular, the following factors cause me to oppose the Recommendation.

First, such appeals are likely to take a substantial amount of time.

The appeal would need to be lodged and a time made by the Court to hear it. In order to fully determine the appeal the Judge may need to be appraised on the matters of which the person heading the investigation was aware and took into account. That could be a substantial amount of material. Time and resources would be required to collate that material and present it to the Court. The Judge would likely require substantial time to read the material and hear argument about it. Accordingly, the appeal may take a number of months to be heard.

It is inevitable therefore that the public inquiry would be interrupted and delayed for some time.

The inquiry may need to be adjourned for the appeal to be made and heard. Because of the time an appeal would take the inquiry may not be able to be resumed for some time.

The deleterious effect of delay on investigations has already been discussed.

Secondly, it may be that the decision to refuse an order under proposed cl 3(1)(c) is based on information the person heading the investigation has in his or her possession but which has been withheld for the forensic benefit of the investigation. An appeal process is likely to force the disclosure of such information (whether during the proceeding or as part of the written reasons the person heading the investigation is required to provide the appellant). This may prejudice the investigation for reasons I have already explained.

Thirdly, existing judicial review mechanisms exist by which relief can be obtained from the unreasonable refusal of an order by a person heading the investigation. It is unclear what public benefit is to be achieved by establishing a statutory merits review process at significant public expense and which could compromise ICAC investigations.

There are also a number of practical problems with Amendment No 2:-

1. The clause does not specify on what grounds the appeal can be lodged.

2. The clause does not deal with what information, if any, the person lodging the appeal is entitled to for the purposes of the proceeding.

3. Can a public officer contradict the appellant? Can a media organisation contradict the appellant and argue for the refusal to be upheld?

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4. Who would act as a contradictor in the proceedings? Would the *Hardiman* principle apply?

5. Would the decision of the Supreme Court be an administrative one? What further grounds of appeal might lie?

6. There is no provision in the clause to make an interim order forbidding publication pending the appeal.

Recommendation 4 and Amendment Nos 6 and 7 – legal representation

I support this Recommendation and the Amendments implementing it.

However, I would make one suggestion. In its terms the amendment to cl 5 of Sch 3A would not permit the person heading the investigation to grant leave for a person who could be affected by the inquiry to appear if he or she did not have legal representation. The Government may wish to consider amending this paragraph so that a person to whom the paragraph applies can obtain leave to appear at an inquiry whether or not he or she is represented by a legal practitioner.

This could perhaps be achieved by inserting the phrase "*appear at the inquiry and*" after the word "*may*" in paragraph (b) of Amendment No 7.

Recommendation 5 and Amendment No 5 – privilege against self-incrimination

In my view, this recommendation and proposed amendment will have no substantive effect on the operation of the Bill.

Accordingly, I do not seek to make any comment in relation to it.

I have previously raised two related matters in my CPIPC evidence and in correspondence with your Department. I have not been expressly advised that the Government has determined not to deal with these matters in the Bill so I raise them again so that Government can consider them.

Those matters are:-

- that a privilege against exposure to penalty may apply and impact on investigations;[2] and

- that the present terms of the Bill confer a wide protection on the use of evidence by those that are required to give it during an inquiry (such that it is not likely to be able to be used in any disciplinary proceedings that arise out of an ICAC inquiry).[3]

The first matter may have some impact on the efficacy of investigations. There is perhaps an argument that any such privilege is abrogated by the Bill. However, an express provision doing so would put the matter beyond doubt. I pause to note that were a person to claim such a privilege it would have a substantial impact on the investigation's ability to obtain evidence from them. It may well bring the investigation to a premature end.

The effect of the second dot point may cause controversy where a person is found in a public inquiry (on the basis or partly on the basis of evidence given by them) to have committed misconduct but the Crown is not able to take any disciplinary action in relation to that conduct and/or address any risks that that person poses.

It is difficult to see the rationale for limiting the capability of the Crown to take such action, particularly in circumstances where a witness might not have made any claim of privilege.

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[2] Transcript of Commissioner's evidence to the CPIPC, p.360; Letter to AG dated 23 March 2018, p.4; Topics for New Schedule document provided to AGD, [17]; Letter to AGD dated 18 April 2018, p.3

[3] Transcript of Commissioner's evidence to the CPIPC, pp.360-361

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As I mentioned in my CPIPC evidence provisions in a number of other jurisdictions provide exceptions for the use of such evidence in disciplinary proceedings. I can provide references to those provisions if that would assist you.

Recommendation 6 – amendment to cl 4 of Sch 3A regarding procedural fairness and natural justice

In my view, this recommendation would have no substantive effect on the operation of the Bill.

Accordingly, I do not seek to make any comment in relation to it.

"Natural justice" and "procedural fairness" are the same concepts. Natural justice is the term used when considering judicial proceedings. Procedural fairness is the term used to describe an administrative decision maker's obligations. Accordingly, there does not appear to be a need to refer to both in any amendment.

Further, there is some debate in the law about whether "procedural fairness" is a common law right or a principle of statutory interpretation. To this end, it may be better that any amendment omit any reference to a "common law right" to procedural fairness and instead indicate that the clause does not impact on the law relating to procedural fairness.

Recommendation 7 – amend to cl 6 dealing with legal professional privilege

I do not have any objection to replacing the present terms of proposed cl 6 of Sch 3A with a section in similar terms to ss 144(1) and 144(2) of the *Corruption, Crime and Misconduct Act 2003* (WA).

I note that s 144 of the *Corruption, Crime and Misconduct Act 2003* (WA) is in the following terms:-

> **144 - Legal professional privilege**
>
> (1A) ...
>
> (1) Subject to subsections (2) to (5), nothing in this Act prevents a person who is required under this Act to answer questions, give evidence, produce records, things or information or make facilities available from claiming legal professional privilege as a reason for not complying with that requirement.
>
> (2) Subsection (1) does not apply to any privilege of a public authority or public officer in that capacity.

I make two suggestions and one comment.

First, the text of sub-s (2) should be amended so that it refers to any privilege of "a public officer or a public authority in that capacity *or any privilege of the Crown*". The Crown is normally considered to be the entity which holds any privilege received by advice provided to its officers. This amendment will make the application of the section clear.

Secondly, proposed cl 6 of Sch 3A of the Bill has the effect of overriding any public interest immunity claim that could be made to prevent the production of information to the ICAC. I have outlined the rationale for including such a power in correspondence with your Department.[4] I reiterate my view that public interest immunity should not constitute a ground for refusing to produce documents to the ICAC when required for an investigation (subject to the exception relating to Cabinet Documents currently catered for in proposed cls 6(3) and (4) of Sch 3A).

Accordingly, if the clause is to be amended consideration should be given to including a further sub-section making it clear that public interest immunity does not constitute a ground for refusing production of material to the ICAC.

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[4] See Letter to AG dated 23 March 2018, p.3; Topics for New Schedule document provided to AGD, [18]; Letter to AGD dated 18 April 2018, pp.3 to 4

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The comment I make is in relation to the terms of proposed cl 6(2)(b) of Sch 3A. This paragraph preserves privilege a public authority might have obtained in relation to the relevant investigation the Commissioner is conducting. Such a matter is not dealt with in s 144 of the WA Act. It is a matter for the Parliament whether it wants to include the effect of this paragraph in any amended clause.

Recommendation 8

Aside from the matters I have already discussed in this letter I do not think that these amendments will have any substantive effect on the ICAC's operations.

Accordingly, I do not seek to make any comment in relation to them.

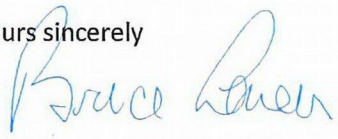
Amendments No 8, 9, 10 and 11 – including

These are necessary administrative amendments ensuring powers reposed in the Commissioner are also able to be exercised by the person heading the investigation.

I support these amendments.

Should you have any questions please do not hesitate to contact me.

Yours sincerely



The Hon. Bruce Lander QC
INDEPENDENT COMMISSIONER AGAINST CORRUPTION

(08) 8207 1777 • 1300 782 489
GPO BOX 11066, ADELAIDE, SA 5001
LEVEL 1, 55 CURRIE STREET
WWW.ICAC.SA.GOV.AU