

**HOUSE OF ASSEMBLY
LAID ON THE TABLE**

31 Oct 2017

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

For the period 1 July 2016 to 30 June 2017

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REPORT TO THE ATTORNEY-GENERAL THE HONOURABLE JOHN RAU PURSUANT TO SCHEDULE 4 OF THE INDEPENDENT COMMISSIONER AGAINST CORRUPTION ACT 2012 FOR THE PERIOD 1 JULY 2016 to 30 JUNE 2017

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).

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

Schedule 4 clause 2(1) of the Act states:

2—Appointment of reviewer

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

Schedule 4 clause 3(1) provides:

3—Reviews

- (1) Without limiting the matters that may be the subject of a review, the reviewer—
 - (a) must, in the case of an annual review, consider the following in relation to the financial year to which the review relates:
 - (i) whether the powers under this Act were exercised in an appropriate manner, including—
 - (A) whether there was any evidence of—
 - maladministration in public administration on the part of the Commissioner or employees of the Commissioner or of the Office; or
 - unreasonable delay in the conduct of investigations under this Act; or
 - unreasonable invasions of privacy by the Commissioner or employees of the Commissioner or of the Office; and
 - (B) whether undue prejudice to the reputation of any person was caused;
 - (ii) whether the practices and procedures of the Commissioner and the Office were effective and efficient;
 - (iii) whether the operations made an appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration in public administration; and
 - (b) may examine any particular exercises of power by the Commissioner or the Office; and
 - (c) may make any recommendations to the Commissioner or to the Attorney-General that the reviewer thinks fit.

On 4 March 2017 I was appointed as the reviewer of ICAC pursuant to Schedule 4 of the Act and section 14C of the Acts Interpretation Act 1915.

This report is based on the annual review which I have conducted with respect to the operations of ICAC and the OPI for the period 1 July 2016 to 30 June 2017.

The Act requires the preparation of a further report which must be prepared before the end of 2017. Section 61 requires the Attorney-General, within five years after the commencement of the Act, to cause a report (the Five Year Report) to be prepared on the operation of the Act. A copy of the Five Year Report must be laid before each House of Parliament. The Attorney-General has appointed me to prepare that report.

In view of the requirement to prepare a Five Year Report, the present annual report is concerned principally with my audit of the exercise of the coercive powers of ICAC. I will comment more fully on the general operation of the Act in the Five Year Report.

REVIEW OF THE EXERCISE OF POWERS

This is the fourth annual report on the operations of ICAC which I have prepared. The previous three reports were prepared pursuant to s46 of the Act which was amended by the 2016 amendments and now provides that Reviews must be conducted in accordance with Schedule 4.

As in previous years, I propose to set out some of the provisions of the Act in order to provide a background for my comments on the exercise of the powers by ICAC during the reporting period.

THE PRIMARY OBJECTS OF THE ACT

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

- (1) The primary objects of this Act are—
 - (a) to establish the Independent Commissioner Against Corruption with functions designed to further—
 - (i) the identification and investigation of corruption in public administration; and
 - (ii) the prevention or minimisation of corruption, misconduct and maladministration in public administration, including through referral of potential issues, education and evaluation of practices, policies and procedures; and
 - (b) to establish the Office for Public Integrity to manage complaints about public administration with a view to—

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

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 and undertakes an initial assessment of the issues which they raise.

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 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

(ba) an offence against the *Lobbyists Act 2015*, or an attempt to commit such an offence; or

(c) any other offence (including an offence against Part 5 (Offences of dishonesty) of the *Criminal Law Consolidation Act 1935*) committed by a public officer while acting in his or her capacity as a public officer or by a former public officer and related to his or her former capacity as a public officer, or by a person before becoming a public officer and related to his or her capacity as a public officer, or an attempt to commit such an offence;

(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.

ACTION WHICH MAY BE TAKEN BY THE COMMISSIONER OR THE OPI

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

Matters assessed as raising a potential issue of corruption

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

Prior to the 2016 amendments, the matter could also be referred to the Police Ombudsman if the issue concerned a police officer or special constable. However, the office of Police Ombudsman has now been abolished.

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

Prior to the 2016 amendments to the Act, section 24(2) provided that if the matter was assessed as raising a potential issue of misconduct or maladministration in public administration, the Commissioner was required to either –

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

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

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

3. in the case of a matter raising potential issues of serious or systemic misconduct in public administration, exercise the powers of an inquiry agency in dealing with the matter.

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

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

ACTION TAKEN BY THE COMMISSIONER DURING THE REPORTING PERIOD

Corruption Investigations

During the reporting period, 31 corruption investigations were commenced by the Commissioner in relation to matters received during that period. A further two corruption investigations were commenced as a result of being carried over from the previous reporting period. A further corruption investigation was commenced on the Commissioner's own initiative.

A total of 107 matters assessed as raising a potential issue of corruption were referred to South Australia Police and a further seven such matters were referred to the Police Ombudsman.

In the Commissioner's Annual Report for the reporting period, he refers to the prosecutions resulting from investigations into corruption:

"In the reporting period five matters were referred to the Director of Public Prosecutions (DPP) for consideration and a total of 10 persons were charged with 158 offences. Seven persons were found guilty of engaging in corruption while corruption investigations referred to South Australia Police (SA Police) have resulted in 32 persons being prosecuted."

Misconduct and Maladministration Referrals

During the reporting period there were 90 non-corruption referrals to an inquiry agency, 60 of which were referred to the Ombudsman and 30 to the Police Ombudsman.

A further 347 referrals were made to a public authority.

The Commissioner exercised the powers of an inquiry agency in three matters.

Matters in which no action or further action was taken

The Commissioner determined to take no action in 661 matters. 350 of these matters were complaints, 310 were reports and one was an inquiry on the Commissioner's own initiative.

A decision not to take any further action is usually made for one or more of the following reasons:

- the matter falls outside the jurisdiction of ICAC;
- the matter does not raise a potential issue of corruption, misconduct or maladministration in public administration;
- the matter is trivial, vexatious or frivolous;
- the matter has been previously dealt with by an inquiry agency or public authority and there is no reason to re-examine the matter;

or

- there is some other good reason why no action should be taken in respect of the matter.

THE OPI

The functions and objectives of the OPI are set out in section 17 of the Act. The OPI consists of a Manager, a senior assessment officer, a senior assessment officer reviews, other assessment officers, complaints officers and an administrative officer. The senior assessment officers, assessment officers and complaints officers are legally qualified.

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

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

- (a) raises a potential issue of corruption that could be the subject of a prosecution;
- (b) raises a potential issue of misconduct or maladministration in

public administration;

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

If a matter is assessed as raising a potential issue of corruption in public administration that could be the subject of a prosecution, the matter must be investigated by the Commissioner or referred to South Australia Police or other law enforcement agency.

Prior to the 2016 amendments, the OPI was required to make all recommendations consequent upon the assessment to the Commissioner. The making of the decision whether to refer a matter and what, if any, directions were to be given upon referral vested in the Commissioner. This procedure was applicable throughout most of the period of the present review.

During the reporting period, the Commissioner accepted 91 per cent of the recommendations of the OPI.

As the result of the passing of the 2016 amendments and their coming into operation in December 2016, the OPI now has authority to refer matters raising a potential issue of misconduct or maladministration in public administration to a public authority and give directions and guidance to the authority

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

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

The intention in introducing this change in procedure was to streamline the process of assessment and enable the Commissioner to concentrate on allegations of corruption and serious or systemic misconduct or maladministration. In line with this aim, the 2016 amendments confine the Commissioner's power to the investigation of misconduct or maladministration in public office, to conduct of which is serious or systemic.

For the purposes of the Act, misconduct or maladministration in public

administration will be taken to be serious or systemic if the misconduct or maladministration—

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

During the reporting period, the OPI assessed 1210 matters. 1797 separate issues were identified. Previously an assessment performance indicator for the average time to assess a complaint or report was set at 30 working days. The indicator has now been set at 25 working days. The average assessment time for matters received and assessed during the reporting period was 18.3 working days. This compares with an average of 25.6 for the previous period.

The OPI also receives and responds to general enquiries relevant to its function and that of ICAC. 374 enquiries were made in the reporting period.

The OPI is also responsible for receiving and processing complaints from persons dissatisfied with the Commissioner's handling of a particular matter. 197 recontacts were processed in relation to 170 complaints and reports during the reporting period.

During the reporting period, the procedures of OPI were analysed by independent business consultants. The consultants concluded that the processes and procedures in place were structured, detailed and well documented. They found it difficult to identify procedural improvements which would make any significant difference to the way in which the work was being performed. It was apparent that staff members possessed excellent skills in various key areas. It was noted that the desire of a large portion of the team to develop themselves personally and professionally had contributed to turnover of staff. Certain recommendations for improvement were made and some of these recommendations have been acted upon.

As in previous years, I visited the OPI while conducting this review. The audit which I conduct necessitates perusing the records of a large number of matters being dealt with by ICAC and the OPI. It is apparent to me that the OPI is well administered and that it is efficient in the sometimes difficult work which it carries out. In my view, it amply fulfils its role as the public face of ICAC.

COMPLAINTS, REPORTS AND OWN INITIATIVE MATTERS

1200 complaints and reports were made to ICAC during the reporting period. This is an increase of 13 per cent over the previous reporting period. 428 of these matters were complaints from members of the public and 772 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 1797 separate issues were identified and assessed.

DIRECTIONS AND GUIDELINES GOVERNING REPORTING UNDER THE ACT

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

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

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

THE EXERCISE OF POWERS UNDER THE ACT

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

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

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

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 (the Commissioner or an examiner) may, by written notice, require a 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 Standard Operating Procedure sets out the responsibilities of the person heading the investigation in preparing the written notice and the manner in which the notice is to be served. A copy of the notice is to be kept in ICAC's case management system and used to record the application for the notice and the outcome of that application. A pro forma of a document explaining the nature of the notice for the information of the person served with the notice is provided for in Appendix A to the Standard Operating Procedure.

No s 28 notices were issued during the reporting period.

SECTION 29 NOTICES TO PRODUCE DOCUMENTS AND OTHER THINGS

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

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

5 - Power to obtain documents

- (1) An examiner may, by notice in writing served on a person, 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 sub clause (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so.
- (3) The examiner must also record in writing the reasons for the issue of the notice.
- (4) A notice may be issued under this clause in relation to an investigation into corruption in public administration, whether or not an examination before an examiner is being held for the purposes of the investigation.

During the reporting period, section 29 notices were issued in five matters and there were multiple notices in some of those matters. I have perused the records relating to all of these notices. The procedure prescribed by the Act was followed on each occasion.

SECTION 29A NOTICES AUTHORISING INSPECTION OF FINANCIAL RECORDS

Section 29A of the Act empowers the Commissioner to authorise, by written notice, an investigator to inspect and take copies of financial records in the course of an investigation into corruption in public administration. The section also empowers an investigator authorised pursuant to the section to give directions to, or impose requirements on, the deposit holder for the purpose of inspecting and taking copies of the records.

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

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

During the reporting period, section 29A notices were authorised and served in eight matters. Multiple notices were served in some matters. I perused the records relating to these notices. The correct procedure was followed in each case.

SECTION 30 – POWER TO REQUIRE A PERSON TO DISCLOSE IDENTITY

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

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

No notices were issued pursuant to this section during the reporting period.

RETENTION ORDERS -- SECTIONS 31 and 32

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

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

There were no retention orders issued during the reporting period

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

Section 34 of the Act provides as follows:

Limiting action by other agencies and authorities

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

In the reporting period, notices were issued in five matters. Multiple notices were served in some matters following the expiry of previous notices. I have examined the records of the occasions on which the notices were prepared and served and I am satisfied that the prescribed procedure was followed in each case.

COMPLIANCE

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

ENTER AND SEARCH POWERS UNDER WARRANT — SECTION 31

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

Section 31 empowers the Commissioner to issue a warrant authorising an investigator or a police officer to enter and search-

- (a) a place occupied or used by an inquiry agency, public authority or public officer; or
- (b) a vehicle owned or used by an inquiry agency, public authority or public officer.

Prior to the 2016 amendments, section 31(2) empowered a judge of the Supreme Court to issue a warrant authorising an investigator or a police officer 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(2) has now been amended by rewording the original subsection so as to empower a Supreme Court judge to issue a warrant authorising an investigator or police officer to enter and search **any** place or vehicle.

Section 31(3) states that a warrant may only be issued if the Commissioner or the judge is satisfied that the warrant is reasonably required in the circumstances for the purpose of an investigation into 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 authorised 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 or police officer during searches pursuant to a warrant, including the power to seize and retain objects and documents found in the course of the search.

The Supreme Court Independent Commissioner Against Corruption Act Rules 2013 ("the Rules") prescribe the procedure for an application to the Court under 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.

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

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

During the reporting period, search warrants were applied for and issued in seven matters. Seven search warrants were issued by the Commissioner and 22 by the Supreme Court.

The procedure prescribed for applying for 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.

GENERAL SEARCH WARRANTS

In previous reports I have drawn attention to the fact that police officers seconded to ICAC as investigators retain certain police powers, including the powers under a general search warrant if they are currently in possession of such a warrant issued by the Commissioner of Police.

In view of the strict requirements in s31 of the Act, governing applications for search warrants to the Commissioner and the Supreme Court, I expressed the view that it was desirable for guidance to be given to ICAC investigators in possession of general search warrants as to the circumstances in which the powers conferred by the warrants might be used in ICAC investigations.

There is now an internal ICAC Operational Policy on the use of general search warrants. Its stated aim is to provide general search warrant holders with clear terms and conditions applicable to the use of such warrants while performing the

duties of an investigator with ICAC.

Under the Operational Policy, a warrant holder must obtain the authorisation of the Director Operations or, if the Director Operations is unavailable, the Manager Investigations before acting pursuant to the warrant. This policy is under review so as to ensure that it aligns with the new investigations team structure. The warrant holder must also submit a report on the use of the warrant which is modelled on the South Australia Police form PD23A. This form must be completed prior to the execution of the General Search Warrant except in circumstances where the search is urgent or it is impractical to prepare the form.

It is important to note that the Operational Policy states that the General Search Warrant should only be used where it is not practicable, due to a need for immediate action to preserve evidence, to apply for and use a warrant issued pursuant to s 31 of the Act.

The policy rightly stresses the rarity of the circumstances in which the General Search Warrant is to be used in an ICAC investigation.

There was only one occasion during the reporting period when a general search warrant was used as the authority for a search.

The Commissioner refers to this occasion in his Annual Report. He explains that a warrant was issued to conduct a search in a regional location and when the officers were on-site it was discovered that a process error had been made in the course of seeking an urgent warrant from the Commissioner and that this may have affected the validity of the warrant. He thereupon approved the use of a general search warrant so as to prevent any further delay.

I am satisfied that the granting of permission to use the general search warrant was appropriate bearing in mind the exceptional circumstances which arose.

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.

Audio and video recordings are made of the proceedings.

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

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

During the reporting period, examinations took place in five matters. There were multiple examinations in four of the matters. The total number of examinations was 20.

I have read the transcripts of the examinations. The hearings were conducted in accordance with the prescribed procedures and nothing occurred which would make the proceedings unfair.

RECONTACTS

I examined various instances in which complainants contacted ICAC after being advised of the results in matters which were the subject of complaints or reports. These are classified by ICAC as "recontacts". There were 197 recontacts in the reporting period.

Almost all of the recontacts I perused involved a request to re-open a matter after a decision not to proceed further.

I could find no reason to criticise the approach of ICAC in any of the matters I perused

COMPLAINTS CONCERNING THE EXERCISE OF ICAC POWERS

In previous reports, I recommended that consideration be given to amending the Act, so as to provide for a procedure for the making of complaints to the reviewer of alleged abuse of the exercise of the powers of the Commissioner or other forms of misconduct on the part of officers of ICAC.

This issue was addressed in the 2016 Amendments. As previously stated, provisions for the appointment and functions of the reviewer of ICAC are set out in the Fourth Schedule of the Act. Clause 2(1)(b) of the Schedule states that one of the functions of the person appointed as reviewer is "to conduct reviews relating to relevant complaints received by the reviewer." Clause 1 defines a "relevant complaint" as "a complaint made in accordance with any requirements prescribed by the regulations relating to an abuse of power, impropriety or other misconduct on the part of the Commissioner or employees of the Commissioner or of the Office."

The necessary steps have been taken to give practical effect to this amendment. A website for the Office of the Reviewer of ICAC is now in operation and it contains instructions for the making of complaints.

THE COMMISSIONER'S WEBSITE

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

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

Instructional videos which can be accessed through the website were streamed 31,000 times.

The website is also an essential component of the operation of ICAC and the OPI. In particular, it incorporates the secure online complaint and report facility which provided the means of making 56 per cent of the complaints and reports during the reporting period.

The website is user friendly and, apart from complying with the statutory requirements, it continues to provide considerable information concerning the operation of the organisation.

There were over 27,000 visitors to the website during the reporting period.

COMPUTERISED CASE AND DOCUMENT MANAGEMENT SYSTEMS

Resolve is ICAC's computerised case management system. The documents and actions relevant to my inspection are, for the most part, to be found in Resolve. However, while Resolve has served its purpose, document management is not its core function.

In June 2016, ICAC implemented Objective, a document managing system which has been integrated with Resolve to manage documents and records. This program uses a records management system which has delivered administrative efficiencies and provides a platform for knowledge management. The system can capture and manage a wide range of electronic formats including images and video recordings. It is also a system which facilitates word or phrase searches within a document and enables more effective security classification of material within the system.

Objective is an effective means of identifying and perusing documents relevant to my inspection.

I have brought to the attention of the Commissioner a suggested refinement which would assist me considerably in finding and examining documents for the purposes of my audit. I have suggested that the descriptions of certain classes of documents could be made more uniform so as to enable me to search for and open relevant documents more speedily. I understand consideration is being given to a naming convention which would assist in swift retrieval.

THE EFFICIENCY OF OPERATIONS UNDER THE ACT

Schedule 4 Clause 3(1)(a)(ii) of the Act requires the reviewer to report on whether the practices and procedures of the Commissioner and the Office were effective and efficient during the reporting period.

A primary object for the establishment of ICAC as stated in the Act is the prevention or minimisation of corruption, misconduct and maladministration in public administration including through referral of potential issues, education and evaluation of practices, policies and procedures.

It follows that ICAC's administration of its own organisation should be of a high order.

Throughout my various inspections I have detected a consciousness of the importance of that aim in the conduct of the organisation.

The annual report of the Commissioner reflects that concern and refers to systems which have been put in place to further overall efficiency.

I mention some of these measures.

I have referred to the commissioning of the review of OPI operations by independent consultants.

Staff performance assessment has been conducted. This has included a performance and potential review of all employers during the reporting period.

Reference has been made to efficiency in the implementation and use of appropriate information technology which is central to the organisation's day-to-day business. All relevant details of complaints and reports and the various steps in investigations are recorded on the case management system. Documentary material relevant to investigations is uploaded to the document management system "Objective". The use of both of these systems is essential to the preparation of this report.

"Objective" was installed in June 2016 and it has done much to overcome some of the limitations of "Resolve" in facilitating the work of investigators.

Investigational record-keeping will also be assisted by the implementation of intelligence analysis and exhibit management systems which have now been procured.

As a result of the experience gained since the commencement of ICAC, various changes have been made so as to enable the Commissioner to concentrate on the core function of investigating corruption in public administration along with the investigation of serious or systemic misconduct or maladministration. I have mentioned some of these measures including the streamlining of the organisation achieved through changes to the role of OPI.

Reference has also been made to the fixing of performance indicators for the activities of OPI and the conduct of investigations. It appears that these indicators are under periodic review in order to ensure their relevance to the realities of the functions to which they are directed.

Preparations are in place for the development of a more detailed strategic plan for the operation of the organisation which will rely on experience gained over the previous few years of operation.

There is an extensive program in place to educate the community generally, and public officers in particular, on issues relevant to the aims of the Act.

I am able to say that, on my observations, ICAC and OPI are conscious of their responsibilities under the Act and have achieved an acceptable level of efficiency.

I found no evidence in the course of my audit of maladministration in public administration on the part of the Commissioner or employees of the Commissioner or of the OPI; nor did I find evidence of unreasonable delay in the conduct of investigations or unreasonable invasions of privacy.

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

Schedule 4 Clause 3 (1)(a)(iii) requires the reviewer to consider-

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

In order to address this issue, it is appropriate to return to the primary objects of the Act as set out in section 3(1), namely,

"the identification and investigation of corruption in public administration and the prevention or minimisation of corruption, misconduct and maladministration in public administration, including through referral of potential issues, education and evaluation of practices, policies and procedures".

These stated aims highlight the fact that ICAC it is not a prosecuting authority but rather performs an investigative role in relation to corruption in order to expose it with the effect of preventing or minimising such activity. There is the further role of preventing or minimising misconduct and maladministration in public administration. This latter function is to be achieved through referral, education and evaluation of practices, policies and procedures.

It follows that the effectiveness of ICAC is not to be measured in terms of convictions in relation to charges which might later be brought by the DPP or other prosecuting authority.

This was the point made by the Hon Murray Gleeson AC and Bruce McClintock SC in their report on ICAC (NSW) ¹ when they quoted with approval an earlier report ² which stated:

The number of criminal prosecutions is, however, an imperfect indicator of the performance of ICAC. The principal function of ICAC is to investigate and expose corrupt conduct, not to obtain criminal convictions. ICAC was established because of the difficulties with obtaining criminal convictions for corruption offences. Its focus generally will, and should be, on those matters where it is more important to ascertain what happened than to obtain a criminal conviction.

The Select Committee on the Establishment of a National Integrity Commission make the following comments in their Interim Report (May 2016):

3.91 The expenditure of public money always requires justification. Any expansion of public services should be accompanied by expectations and measures of success. In a polity with no corruption, there would be no need to take any anti-corruption measures. In the absence of anti-corruption measures it is doubtful that any corruption would be uncovered, creating the impression of there being no corruption; even if this is only because there is no-one looking.

3.92 Careful thought needs to be given to measuring success in the case of an anticorruption agency. An anti-corruption agency that uncovers no corruption may be any of; extremely successful, incompetent, severely under resourced, or operating in a corruption free environment. The response to this problem in Australia has typically been to rely on qualitative measures of trust in government and perceptions of corruption. As the former NSW Premier Nick Greiner argued:

...it would also be crass and naïve to measure the success of the independent commission by how many convictions it gets or how much corruption it uncovers. The simple fact is that the measure of its success will be the enhancement of

¹ *Independent Panel-Review of the Jurisdiction of the Independent Commission against Corruption*, 30 July 2015 12.2.5

² Bruce McClintock, *Independent Review of the Independent Commission Against Corruption Act 1988, Final Report* (2005) 3.4.22

integrity and, most importantly, of community confidence in public administration in this State.

The difficulties inherent in determining the impact of ICAC on the type of conduct with which anti-corruption bodies is concerned have been discussed in Annual Reviews and in evidence before the Crime and Public Integrity Policy Committee of the Parliament of South Australia.

I have expressed the view that this assessment cannot be made on a strictly quantitative basis. As is stated in the passage quoted above, the tendency is to resort to qualitative material. It is possible to draw inferences from the activities of ICAC. As a result of educative measures and general publicity, ICAC has become reasonably well-known in the community. In particular, its activities would be familiar to most public officers whose conduct it examines. It is open to infer that this education and publicity has resulted in a level of deterrence. To this must be added the number of matters which have been drawn to the attention of ICAC and in respect of which it has taken action of one kind or another.

There is ample evidence from which to infer that the organisation has made a significant impact in preventing corruption, maladministration and misconduct in public administration.

TELECOMMUNICATION 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 authorised to intercept telecommunications and deal with the material derived through this means.

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

In addition to providing for authorised interceptions by Commonwealth agencies, the Commonwealth Act enables State and Territory agencies to apply for warrants to intercept telecommunications subject to conditions imposed by the Commonwealth Act and State and Territory legislation.

Section 34 of the Commonwealth Act authorises the relevant Commonwealth Minister, by legislative instrument and at the request of the Premier of a State, to declare an eligible authority of that State, 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 inspected and reported on the keeping of the relevant records by ICAC for the periods 1 March 2016 to 31 August 2016 and 1 September 2016 to 28 February 2017. In my reports to the Attorney-General, I stated that ICAC had complied with the record-keeping requirements of the Commonwealth and State legislation.

LISTENING AND SURVEILLANCE DEVICES

The *Listening and Surveillance Devices Act 1972 (SA)* (the LSD Act) regulates the use of listening devices, visual surveillance devices and tracking devices in South Australia.

A listening device is defined as an electronic or mechanical device capable of being used to listen to or record a private conversation or words spoken to or by

any person in private conversation (s3). Section 4 of the LSD Act provides as follows:

Except as provided by this Act, a person must not intentionally use any listening device to overhear, record, monitor or listen to any private conversation, whether or not the person is a party to the conversation, without the consent, express or implied, of the parties to that conversation.

A surveillance device is defined as a visual surveillance device or a tracking device (s3).

A visual surveillance device is defined as an electronic or mechanical device capable of being used to observe or record visually (whether for still or moving pictures) a person, place or activity and associated equipment (if any).

A tracking device is defined as an electronic device capable of being used to determine the geographical location of a person or thing and associated equipment (if any).

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

Section 6 AB provides that a person must not knowingly communicate or publish information or material derived from the use of a listening device under a warrant, or a surveillance device installed through the exercise of powers under a warrant except in the circumstances outlined in the section.

Sections 6AC, 6B and 6C direct that an agency to which a warrant under the Act is granted to make reports and keep records specified in those sections relating to the granting and use of the warrant. The relevant sections are set out in Annexure A to this Report.

Further details of the requirements in relation to applications for warrants, the keeping of records and the making of reports are set out in Part 3 of the Listening and Surveillance Devices Regulations 2003.

Section 6 provides that applications for a warrant under the Act may be made by an officer of an investigating agency with the approval of the chief officer of the investigating agency.

The Independent Commissioner Against Corruption is an investigating agency for the purposes of the LSD Act (s3).

The LSD Act authorises the appointment of a "review agency" for an investigating agency, and in the case of the Independent Commissioner against

Corruption, the review agency must be independent of the Commissioner and be appointed by the Governor.

Section 6D of the LSD Act provides as follows:

Inspection of records by review agency

- (1) The review agency for an investigating agency—
 - (a) must, at least once in each period of six months, inspect the records of the investigating agency for the purpose of ascertaining the extent of compliance with sections 6AC, 6B and 6C; and
 - (b) must, not later than two months after completion of such an inspection, report in writing to the Minister on the results of the inspection.
- (2) If, as a result of an inspection under subsection (1), the review agency is of the opinion that the investigating agency has contravened section 6B(1)(a) or (b), the review agency must include a report on the contravention in the report under subsection (1).
- (3) Before making a report on a contravention under subsection (2), the review agency must give the investigating agency an opportunity to make comments in writing on the report and must include in or attach to the report any comments made.

I have been appointed by His Excellency the Governor as the review agency to conduct reviews under the Act.

The review agency must, at least once in each period of six months, inspect the records of the investigating agency for the purpose of ascertaining the extent of compliance with sections 6AC, 6B and 6C and must, not later than two months after completion of such an inspection, report to the Minister on the results of the inspection.

I have now conducted a review of the records which the Independent Commissioner against Corruption is required to keep under the LSD Act for the periods 20 June 2016 to 19 December 2016 and 20 December 2016 to 19 June 2017.

In accordance with s6D of the LSD Act, I have perused all records and documents which are required to be made and kept pursuant to the Act and Regulations set out above in relation to the warrants issued during these periods.

In my reports to the Attorney-General on these inspections, I stated that I was satisfied that there has been compliance with sections 6AC, 6B and 6C and with the Regulations to which reference has been made.

I also stated that I was satisfied that there had been no contravention by the Independent Commissioner against Corruption of the requirements to provide to the Minister information and documentary material relevant to issued warrants pursuant to s6B(1)(a) and (b) of the LSD Act.

CO-OPERATION

I record my appreciation for the ready assistance I have been given by the Commissioner and his staff in carrying out my role.



The Hon. K P Duggan AM, QC

26 / 09 / 2017