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ICAC
Independent Commissioner
Against Corruption
SOUTH AUSTRALIA

31 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) No 2 Amendment Bill 2018* (SA)**

I write in relation to the *Independent Commissioner Against Corruption (Investigation Powers) No 2 Amendment Bill 2018* (SA)(**the Bill**).

I support the majority of the amendments the Bill makes to the *Independent Commissioner Against Corruption Act 2012* (SA)(**the Act**). However, there remain a number of clauses that will create operational difficulties which may persuade a Commissioner against a decision to hold a public inquiry.

The purpose of this letter is to point out those difficulties so that you may give them consideration before the Bill is introduced into Parliament.

There are three clauses which present difficulties:-

(1) Proposed s 36B of the Act which creates an avenue of appeal to the Supreme Court from the decision of the Commissioner to hold a public inquiry.

(2) Proposed s 36C of the Act which creates an avenue of appeal to the Supreme Court from the decision of the person heading the investigation refusing an application for an order forbidding the publication or disclosure of specified matter or matter of a specified kind.

(3) Proposed cl 2(3) of Sch 3A of the Act which requires the Commissioner before holding a public inquiry to publish a written notice on a website and in a newspaper circulating within South Australia a written notice including, *inter alia*, the basis on which he or she is satisfied that it is in the public interest to conduct the public inquiry.

These proposed amendments give rise to a number of practical difficulties such that if the Commissioner were to order a public inquiry there would be a real risk that both the effectiveness of the investigation will be compromised and that the investigation would be beset by substantial delays.

In circumstances where such difficulties would not arise if the investigation were held in private it would be expected that the Commissioner would rarely commit to holding a public inquiry.

If the Bill was to pass in its present form the proposed power to conduct an investigation by way of a public inquiry (with the resultant power to conduct public hearings) will, in practical terms, be largely devoid of utility and largely if not completely symbolic. There is therefore a real risk that the Bill will not have the effect of achieving the purposes I discussed in my Oakden and Gillman reports and will not improve the transparency of ICAC investigations.

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

On 8 October 2018 I wrote to you and advised that I opposed those recommendations of the Crime and Public Integrity Policy Committee (**CPIPC**) which recommended amendments of the type referred to above.

In that letter I also set out in detail the reasons why I held that view. Although they continue to form the basis of my opposition to the three clauses I will not repeat those detailed reasons here.

I **attach** a copy of my 8 October 2018 letter.

Nevertheless, I offer the following additional observations.

Under the terms of the proposed amendments the Commissioner can only decide to hold a public inquiry for the purposes of a particular investigation if he or she is satisfied that "it is in the public interest to do so". Two matters which will necessarily be considered by the Commissioner in making that determination are what effect, if any, holding a public inquiry will have on:-

- the effectiveness of the relevant investigation (or, to put it another way, what effect a public inquiry might have on the ability of that investigation to get to the truth); and

- the ability of that investigation to achieve the ICAC's functions of identifying misconduct or maladministration in public administration, preventing and minimising such conduct, and assisting public sector agencies to identify and deal with it.

It is only by obtaining evidence of what occurred (including whether or not maladministration or misconduct in public administration has occurred and if it has occurred the circumstances in which it has occurred) that remedial steps can be taken to prevent such conduct recurring and to ensure that the public's interest in good, proper and efficient public administration is preserved.

Also it is only by identifying such things in a timely and efficient manner (and in a manner not beset by delay) that such steps can be taken in a way which minimises any harm to the public interest.

It follows that the Commissioner is not likely to choose to hold an investigation by way of a public inquiry (as opposed to in private) where doing so creates the real risk of prejudice to the effectiveness of the investigation and a real risk that the investigation will experience unnecessary delay.

I have referred in detail in my letter of 8 October 2018 how prejudice and delay is likely to occur (in particular pp.2 to 6).

By way of summary prejudice or delay could be caused by:-

- Requirements that the Commissioner prematurely disclose information which he or she might wish to retain for the forensic benefit of the investigation.

- The likely substantial delay caused by the making of (possibly multiple) applications to the Supreme Court and the time required to hear and determine those applications. Such a delay could well be measured in months. The consequences of delay for investigations, public officers and for the integrity of public administration is discussed in my letter of 8 October 2018.

- The real risk that the avenues of appeal will be used tactically by persons (including corporate persons) at risk of being criticised in any investigation to stifle, impede and/or frustrate the investigation, including by using those avenues to delay the investigation for tactical reasons.

- The substantial diversion of public resources required to facilitate an appeal before the Supreme Court (being the resources of the ICAC, the Court and public agencies).

In circumstances where conducting the investigation in private carries no such risks it is difficult to foresee circumstances in which a Commissioner would determine that it was in the public interest to hold a public inquiry. It may well be that such circumstances never arise. I myself cannot presently think of circumstances

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in which I would consider it in the public interest to hold a public inquiry knowing that by doing so the investigation could encounter the risks mentioned above.

The proposed provisions relating to public inquiries are practically unworkable. They are unlikely to be used and will be largely if not completely symbolic.

There are also a number of parts of the Bill which are inherently contradictory. These parts indicate that the proposed statutory scheme is not grounded in a logical and consistent framework and further indicate it may be devoid of any real practical utility.

These parts are as follows:-

1. The Bill would require the Commissioner to publish (on a website and in a newspaper) reasons for his or her decision to hold a public hearing. Such information may include the identity of persons the subject of the investigation at risk of reputational damage during the hearing. There is no right of appeal from the decision of the Commissioner to publish that information. There is no statutory requirement to give such persons the right to be heard before the information is published. This information is not subject to s 56 of the Act. Persons referred to in that information may have wished to make an application for a direction prohibiting the disclosure or publication of information relating to their identities. However, at the point that they are able to make the application information about them will already have been published in accordance with this requirement.

   This does not seem logical.

2. The Bill would empower the Commissioner to make a determination to investigate a matter by way of public inquiry. Such a determination of the Commissioner must necessarily contemplate and take into account the fact that during that public inquiry evidence will be given that will identify persons and may cause them reputational damage. However, once the Commissioner has made that decision (and, if an appeal has been made, the Court has confirmed it) a person could still make an application for that person's identity or information that might reveal that person's identity to be suppressed.

   A refusal to make such a direction could be appealed to the Supreme Court. This appeal process could take months. As I said in my letter of 8 October 2018 it is likely that the person heading the investigation would either have to adjourn the investigation or continue the investigation acknowledging and applying the terms of the direction sought until such time as the Supreme Court proceedings were resolved.

   A direction with the breadth described in some circumstances could cover the majority of evidence given in a public hearing. It would, in effect, be an order making the Commissioner's decision to hold an inquiry in public nugatory or at least have the effect of substantially reversing it. In practice it would contradict the regime in Sch 3A cl 2(1) and s 36B.

   This avenue of appeal represents a tactical opportunity for persons who are affected by investigations to delay or stifle them. Further, because multiple applications could be made the delay could be repeated. There is also nothing to prevent a person who had been unsuccessful in making an application under s 36B using the provisions of s 36C as a second attempt to effectively stifle the public inquiry.

There is one other matter I wish to raise.

In Recommendation 7 of the CPIPC's report the committee recommended that the present terms of cl 6 of Sch 3A be replaced with a section in similar terms as s 144 of the *Corruption, Crime and Misconduct Act 2003* (WA)(**CCM Act**).

In my letter of 8 October 2018 I advised that I did not oppose this recommendation subject to minor amendments.

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One of these amendments was that if the section was amended to adopt wording similar to s 144 of the CCM Act that some of the wording be changed so as to preserve the ability of ICAC investigations to obtain information that could otherwise be the subject of a public interest immunity claim. This was the effect of the previous terms of cl 6.

I note that in the Bill the terms of s 144 appear to have been adopted but the terms have not been amended as per my suggestion.

It is unclear whether this was an omission or deliberate choice. I note that the new cl 7 is headed "Legal Professional Privilege ***and public interest immunity***"(emphasis added) and that cl 7(3) creates an exception to a general requirement that no longer exists in the Bill.

In previous correspondence with your Department I have set out why I think the ability of ICAC investigations to compel the production of information that could otherwise be the subject of public interest immunity claim (other than information relating to cabinet proceedings) is important. I maintain that view. I re-iterate my suggestion that cl 6 be amended so that it has this effect.

As you know I will be on annual leave from tomorrow until 16 November 2018. The Deputy Commissioner is available during that period to address any questions you might have.

Yours sincerely

The Hon. Bruce Lander QC
INDEPENDENT COMMISSIONER AGAINST CORRUPTION

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