

19 October 2015

Crime and Public Integrity Policy Committee
Parliament House
North Terrace
ADELAIDE SA 5000

Dear Committee Members

Public Inquiries into Potential Maladministration and Other Matters

On Wednesday 14 October 2015 I published a report entitled 'Sale of State Owned Land at Gillman'. I ***enclose** for your information a copy of page 247 of that report, in which I set out my thoughts in respect of public versus private inquiries into potential maladministration. I said on page 247 that I intended to write to the Committee recommending that consideration be given to amending the ICAC Act to permit the holding of public hearings in respect of inquiries into potential maladministration in public administration, when it is in the public interest to do so.

This letter serves that purpose.

My inquiry into the Gillman land sale was directed toward identifying whether or not there was maladministration in public administration, as defined in the ICAC Act. That inquiry was not, at any stage, a corruption investigation. Accordingly, the investigative powers given to me under the ICAC Act to investigate corruption were not available.

In order to investigate the matter, I exercised the powers of the Ombudsman. I was able to do so because the ICAC Act permits me to exercise the powers of an 'inquiry agency'. The Ombudsman is an inquiry agency for the purposes of the ICAC Act.

Section 19 of the *Ombudsman Act 1972* ('Ombudsman Act') provides that for the purposes of an investigation the Ombudsman has the powers of a commission as defined in the *Royal Commissions Act 1917*. Accordingly, when I exercise the powers of the Ombudsman I have the powers given to a Royal Commission.

On 30 June 2015 I published a review of the legislative schemes governing the oversight and management of complaints about police and the making of complaints and reports about public administration. I made 29 recommendations for reform. While most of those recommendations were geared toward the police complaints system, I also made recommendations about streamlining the process for the investigation, by me, of potential misconduct or maladministration in public administration.

I proposed that the ICAC Act be amended to permit me to investigate such matters utilising the powers under the Royal Commissions Act, rather than the rather clumsy process of first having to exercise a power in the ICAC Act to conduct an investigation utilising the powers under the

Ombudsman Act, which in turn enlivens the powers under the Royal Commissions Act. The more direct and streamlined mechanism would remove much of the confusion surrounding the source of my powers, the jurisdiction conferred and the inconsistency in language between the ICAC Act and the Ombudsman Act. I also proposed that section 42 of the ICAC Act be amended to remove the existing restriction on making reports to Parliament about matters connected with my core functions.

I have now had the benefit of conducting a detailed and extensive inquiry into a significant matter of maladministration. With the benefit of that experience I think consideration should now be given to permitting such inquiries to be conducted in the public eye. I offer the following reasons.

First, when I investigate corruption I do not make findings. Whether or not a prosecution ensues is a matter for the Director of Public Prosecutions. Whether or not a person is convicted of a criminal offence is a matter for a court.

In contrast, unlike a corruption investigation, an investigation into maladministration in public administration will require me to make findings in respect of the conduct of a public officer or the practices, policies or procedure of a public authority.

Secondly, there will be occasions where, as in the Gillman matter, there is a significant public interest in the subject matter of the inquiry. In those circumstances, there is a strong argument in support of permitting public scrutiny of the evidence given, the procedure undertaken and the submissions made. In a corruption matter, such scrutiny would routinely occur when the matter is prosecuted in a court.

Thirdly, some of the practical difficulties associated with conducting a large and complex inquiry in private, while at the same time affording all interested persons procedural fairness by providing a reasonable opportunity to be heard on the evidence and findings, can lead to difficulties and delay.

An inquiry held in public would permit all interested persons to hear, consider and make submissions in respect of the evidence as it occurs. Full public scrutiny of not just the findings, but of the process, might assist in understanding the reasons why an inquiry takes a particular course, and may also assist in more readily understanding the rationale for the findings and any recommendations that are made.

That is not to say that all inquiries, or all aspects of those inquiries, should routinely be held in public. There may be, in some cases, a competing public interest that operates against a public inquiry.

In my opinion, the Commissioner should be given the discretion to conduct such inquiries in public where, in the Commissioner's opinion, it is in the public interest to do so. At present, there is no such discretion.

I emphasise that this recommendation relates only to matters that relate to a potential issue of maladministration in public administration. I remain firmly of the view that the investigation of corruption in public administration should continue to be conducted in private. Because corruption investigations are, in every case, criminal investigations, such investigations as well as subsequent prosecutions might be compromised by the premature publicity of the existence of and particulars of a corruption investigation.

Amendments arising from Review of Legislative Schemes

I have already mentioned the review of legislative schemes that I published on 30 June 2015. My staff have had very preliminary conversations with the Legislative Services Section of the Attorney-

General's Department. I am hopeful that, if supported, those recommendations will be brought to fruition in the near future.

Other Amendments

There are some other amendments to the ICAC Act that I think would improve the operations of my office. These amendments are not intended to extend my jurisdiction or expand my powers. Rather, they are proposed with the benefit of 2 years of operational experience.

Search Warrants- Applications

At present, the ICAC Act creates a bifurcated system for the application and issue of a search warrant. I am empowered, on an application by an investigator, to issue a search warrant 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.

On the other hand, a judge of the Supreme Court may, on application by an investigator, issue a search warrant to enter and search:

- (a) a private place or private vehicle in which it 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.

A prescribed offence includes an offence captured by the definition of corruption in public administration.

My investigators have encountered difficulties where the nature of the 'place' is not clear. For example, some public officers work in environments that are shared by private companies with no connection to government. Other public officers fulfil both public and private roles. In some cases public officers work in areas where there are facilities that are shared with non-public officers.

This can make search warrant applications more difficult because it may not be clear whether the application should be made to a judge of the Supreme Court or to me.

I propose a simple solution. My powers to issue a search warrant should remain as they are, but the power of a judge of the Supreme Court should be extended to be able to issue a search warrant in respect of any place or vehicle. If the ICAC Act were to be amended in that way, any difficulty in identifying the precise nature of the 'place' or 'vehicle' could be guarded against by making an application for a search warrant to a judge of the Supreme Court.

Search Warrants – Legal Professional Privilege

Given the nature of the offences that we investigate, there have been occasions where claims of legal professional privilege has been claimed in respect of material held on a premises to which a search warrant is being executed. My investigators have attempted to work cooperatively with the

subject of the search to agree on a procedure to secure the documents the subject of a claim to enable the claim to be agitated before the items are inspected.

It would be preferable for the procedure to be legislated, so that there is no argument about the process to be followed. In Victoria, sections 97 and 101 of the *Independent Broad-based Anti-corruption Commission Act 2001* (Vic) prescribes the procedure to be followed in that jurisdiction.

Section 97 provides:

Privilege claims in relation to search warrants

- (1) This section applies if—
 - (a) a person executing a search warrant (the **searcher**) wishes to inspect, copy or seize a document or other thing under the search warrant; and
 - (b) a person who is entitled to claim the privilege (the **claimant**) claims that the document or other thing is the subject of privilege.
- (2) The searcher must consider the claim of privilege and either—
 - (a) cease exercising the power under the search warrant in relation to the document or other thing over which the claim of privilege is made; or
 - (b) require the claimant to immediately seal the document or other thing in an envelope, or otherwise secure it if it cannot be sealed in an envelope, and give it to the searcher.
- (3) The searcher must not inspect the document or other thing in considering the claim of privilege.
- (4) If the searcher requires the claimant to give the document or other thing to the searcher under subsection (2)(b), the searcher must—
 - (a) notify the Commissioner as soon as practicable; and
 - (b) immediately give the document or other thing to the proper officer of the Supreme Court to be held in safe custody.
- (5) Subject to section 101, a person must not open a sealed envelope or interfere with a document or thing secured otherwise than in an envelope before delivery to the proper officer of the Supreme Court.

Section 101 provides:

Determination of privilege claims

- (1) On an application under section 100, the Supreme Court must determine whether or not the document in the sealed envelope or the document or thing secured otherwise than in an envelope is the subject of privilege.
- (2) For the purpose of making a determination under subsection (1), the Judge constituting the Supreme Court and any other person authorised by the Court may—
 - (a) open the sealed envelope or access the document or thing secured otherwise than in an envelope; and
 - (b) inspect the document or thing.

- (3) *If the Supreme Court determines that the document or thing is the subject of privilege—*
- (a) *the Court must order that the document or thing be returned to the claimant; and*
 - (b) *the proper officer must return the document or thing to the claimant.*
- (4) *If the Court determines that the document or thing is not the subject of privilege—*
- (a) *the Court must order that the document or thing be given to the IBAC; and*
 - (b) *the proper officer must release the document or thing accordingly.*
- (5) *Subject to subsection (2), a person must not open a sealed envelope or otherwise have access to the document or thing contained in the sealed envelope before—*
- (a) *the Court determines the claim of privilege; or*
 - (b) *the document or thing is returned to the claimant.*
- Penalty: 120 penalty units or imprisonment for 12 months or both.*
- (6) *Subject to subsection (2), a person must not open or otherwise have access to a document or thing secured otherwise than in an envelope before—*
- (a) *the Court determines the claim of privilege; or*
 - (b) *the document or thing is returned to the claimant.*
- Penalty: 120 penalty units or imprisonment for 12 months or both.*

I think a similar procedure should be enshrined in legislation in this State.

Confidentiality – Section 54

Section 54 is an important confidentiality provision in the ICAC Act. However, it is a provision that still creates confusion in respect of the breadth of its application. I propose that section 54 be reworded in way that ensures adequate protections are in place but that the provision is easier to understand.

Accordingly, I propose the section 54 be amended as follows:

- (1) *Except as required or authorised by this Act or by the Commissioner, a person who is or has been engaged in the administration of this Act must not, directly or indirectly, disclose information in relation to or connected with a matter that forms or is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act.*

Maximum penalty: \$2 500 or imprisonment for 6 months.

- (2) *Despite subsection (1) a person engaged in the administration of this Act may disclose information:*
- a. *for the purposes of the administration or enforcement of this Act; or*
 - b. *for the purposes of referring a matter in accordance with this Act to a law enforcement agency, inquiry agency, public authority or public officer; or*
 - c. *for the purposes of a criminal proceeding or a proceeding for the imposition of a penalty; or*
 - d. *for the performance of the functions of the OPI or the Commissioner under another Act; or*

e. as otherwise required or authorised by this or another Act.

(3) A person who receives information knowing that that information is connected with a matter that forms or is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act must not disclose that information unless:

a. the person is authorised in writing by the Commissioner or by a person approved by the Commissioner under this section to give an authorisation;

or

b. the disclosure of that information is for the purpose of:

- i. dealing with a matter referred under this Act by the Commissioner or the OPI;
- ii. a criminal proceeding, a proceeding for the imposition of a penalty or disciplinary action;
- iii. a person obtaining legal advice or legal representation or for the purposes of determining whether a person is entitled to an indemnity for legal costs; or
- iv. a person obtaining medical or psychological assistance from a medical practitioner or psychologist.

Maximum penalty: \$2 500 or imprisonment for 6 months.

I am hopeful that section 54, if worded in this way, will resolve lingering uncertainty about its application and operation.

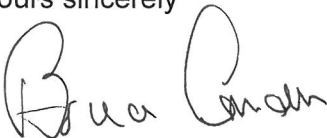
Of course, if the recommendations I made in the legislative reviews are accepted, the re-worded section 54, like many other provisions in the ICAC Act, will need to be amended to remove reference to 'inquiry agency'.

Action to follow

I intend to raise my views with the Attorney-General by providing him with a copy of this letter.

I look forward to discussing these matters further when I appear before the Committee on 30 October 2015.

Yours sincerely



The Hon. Bruce Lander QC
INDEPENDENT COMMISSIONER AGAINST CORRUPTION

PUBLIC VERSUS PRIVATE INQUIRY

Since my office commenced in September 2013, there has been much discussion and debate about the model under which I operate. It has been said that I should hold my inquiries in public.

I have publicly expressed the view that the investigation of corruption in public administration should take place in private. I remain of that view because when I am investigating corruption I am investigating a crime. If I were to conduct such investigations in public the investigation itself would likely be prejudiced.

However, this inquiry was not an investigation into corruption.

In this inquiry I was investigating a potential issue of maladministration in public administration. I conducted the inquiry by exercising the powers of the Ombudsman. As I have already said, my investigation was conducted in private because of the requirement to do so under the Ombudsman Act.

On 30 June 2015 I published a review of the legislative schemes governing the making of complaints and reports about public administration.²⁷⁹ In that review I recommended that the mechanism by which I may investigate misconduct or maladministration in public administration be streamlined. I recommended that the existing process of exercising the powers of an inquiry agency be abandoned in favour of providing the power directly under the ICAC Act to investigate misconduct or maladministration in public administration utilising the powers of a Royal Commission, and to amend the report making power under the ICAC Act accordingly.²⁸⁰

My experience in conducting this inquiry has caused me to consider whether I should recommend to Parliament an additional measure with respect to such investigations. That is, whether I should have the power to conduct an inquiry into potential maladministration in public administration in public if such a public inquiry was in the public interest.

In my opinion, the ICAC should be given that discretion. There are two reasons I think this should be considered.

First, when I investigate corruption I do not make findings. Whether or not a prosecution ensues is a matter for the Director of Public Prosecutions. Whether or not a person is convicted of a criminal offence is a matter for a court.

In contrast, unlike a corruption investigation, an investigation into maladministration in public administration will require me to make findings in respect of the conduct of a public officer or the practices, policies or procedures of a public authority.

Secondly, there will be occasion where, as in this case, there is a significant public interest in the subject matter of the inquiry. In those circumstances, there is a strong argument in support of permitting public scrutiny of the evidence given, the submissions made and the procedure undertaken. In a corruption matter, such scrutiny would routinely occur when the matter is prosecuted in a court.

For these reasons I intend to write to the South Australian Parliament Crime and Public Integrity Policy Committee recommending that consideration be given to amending the ICAC Act to permit the holding of public hearings in respect of inquiries into potential maladministration in public administration, when it is considered that it is in the public interest to do so.

²⁷⁹ Independent Commissioner Against Corruption, *Review of Legislative Schemes: The Oversight and Management of Complaints about Police; The Receipt and Assessment of Complaints and Reports about Public Administration*, 30 June 2015.

²⁸⁰ *Independent Commissioner Against Corruption Act 2012*, section 42.