OUR REFERENCE NUMBER: A429208

ICAC
Independent Commissioner Against Corruption
SOUTH AUSTRALIA

19 February 2019

The Hon. Kyam Maher MLC
Shadow Attorney-General
Leader of the Opposition in the Legislative Council
Parliament House
North Terrace
ADELAIDE SA 5000

Dear Mr Maher

I have been provided with proposed amendments dated 5 February 2019 (the Maher Amendments) which contain amendments that you intend to move in the Legislative Council to amend the *Independent Commissioner Against Corruption (Investigation Powers) No. 2 Amendment Bill 2018* (the ICAC Bill).

The contents of this letter contain my views as to the appropriateness or suitability of those amendments insofar as they would impact upon the Independent Commissioner Against Corruption (the ICAC) in the discharge of the ICAC's duties under the *Independent Commissioner Against Corruption Act 2012* (the ICAC Act).

I assume that you are familiar with the contents of the letters of 8 October 2018 and 31 October 2018 that I wrote to the Hon. Vickie Chapman MP, Deputy Premier and Attorney-General (the Deputy Premier), in relation to the recommendations made by the Crime and Public Integrity Committee in relation to the ICAC Bill and the ICAC Bill as it was introduced into the Legislative Council on 15 November 2018. In case you are not I enclose copies of those letters.

You will be aware that I have expressed the view that the ICAC Bill in its current form without the Maher Amendments will have the following effect:

> "If the Bill was to pass in its present form the proposed power to conduct an investigation by way of public inquiry (with the result in part 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 purpose as I discussed in my Oakden and Gillman reports and will improve the transparency of ICAC investigations".

As you will know I expressed the view in the reports that I wrote in relation to Gillman and Oakden that the ICAC should be able to conduct investigations into serious or systemic misconduct or maladministration in public and by way of public hearings when it is in the public interest to do so.

Shortly stated the reasons underpinning that view are that the public are entitled to be aware of the manner in which an investigation of that kind is conducted so as to be satisfied that the discharge of functions and powers by the ICAC is in accordance with the powers given to the ICAC by the ICAC Act and be aware of the conduct of witnesses and their counsel during the course of that investigation.

In other words I hold the view that some investigations which are not investigations into corruption need to be heard in public.

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The former Premier made it clear before the last election that he disagreed with that view.

The present Government on the other hand, whilst in Opposition, adopted a policy that such investigations should be able to be conducted in public in certain circumstances.

An understanding of the ICAC Act is important for understanding the comments that follow.

The ICAC has two primary objects, the first being the identification and investigation of corruption in public administration, and the second being the prevention or minimisation of corruption, misconduct or maladministration in public administration.[1]

I need not address the first primary function but the second primary function is to be addressed by the ICAC in the following ways:

> To identify serious or systemic misconduct maladministration in public administration and to exercise the powers of an inquiry agency in dealing with serious or systemic maladministration in public administration if satisfied that it is in the public interest to do so.[2]

The ICAC Act as presently constituted requires the Office for Public Integrity (the OPI) on receipt of a complaint or report to assess that complaint or report to determine whether it raises a potential issue of corruption in public administration that could be the subject of prosecution or raises a potential issue of misconduct or maladministration in public administration.[3]

If a potential issue of misconduct or maladministration in public administration is identified by the OPI the ICAC Act envisages that the matter be dealt with in one of three ways. It may be referred to a public authority for investigation; it may be referred to an inquiry agency for investigation;[4] and if it is serious or systemic and if it otherwise satisfies the public interest test referred to in s.24 it may be investigated by the ICAC using the powers of an inquiry agency i.e. the Ombudsman.

If a matter is referred to a public authority the public authority investigates the matter without the aid of any statutory powers. The public authority must rely upon the cooperation of witnesses and to the extent necessary the person under investigation.

If the matter is referred to the Ombudsman for investigation the Ombudsman has all the powers given to a Commissioner under the *Royal Commissions Act 1917* (RCA).[5]

If a matter is referred to the Ombudsman for investigation the Ombudsman:

(a) is not bound by the rules of practice of any court or tribunal as to procedure or evidence but may conduct the proceedings and inform his mind on any matter in such manner as he thinks proper;[6]
(b) may enter upon and inspect any land, building, place or vessel and inspect any goods or other things;[7]
(c) may summons the attendance of all such persons as the Ombudsman thinks fit to call before him and may require answers or returns to such inquiries as the Ombudsman thinks fit;[8]
(d) may summons a person to produce books, papers, documents or records;[9]
(e) may examine witnesses on oath, affirmation or declaration.[10]

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[1] Section 3(1) of the ICAC Act
[2] Section 7(1)(ca) and (cb)
[3] Section 23 of the ICAC Act
[4] The Ombudsman is the only inquiry agency for the ICAC Act
[5] Section 19 of the *Ombudsman Act 1972*
[6] Section 7 of the RCA
[7] Section 10(a) of the RCA
[8] Section 10(b) of the RCA
[9] Section 10(c) of the RCA
[10] Section 10(e) of the RCA

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The RCA imposes a duty on a witness to attend before the Commission (i.e. the Ombudsman).[11] A witness may be represented by counsel or a solicitor unless the Ombudsman otherwise directs.[12]

A statement made by a witness in response to a question put by the Ombudsman pursuant to the Ombudsman's exercise of powers under the RCA is not admissible in evidence against that person in any civil or criminal proceedings in any court.[13]

The Ombudsman has the powers given to a Royal Commissioner under s.11 including a power to commit a person to gaol if that person engages in any conduct mentioned in s.11(1).

It can be seen that the Ombudsman enjoys extensive powers if a matter is referred to him by the ICAC under the ICAC Act.

An investigation conducted by the Ombudsman must be conducted in private.[14]

The ICAC can only investigate maladministration if the maladministration is serious or systemic and if it is in the public interest to do so.[15] The ICAC can only investigate misconduct if the misconduct is serious or systemic and the matter is connected with an investigation into corruption or maladministration.[16]

Serious or systemic is defined in s.4 ss(2) of the ICAC Act to mean

> *(2) For the purposes of this 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).*

Prior to the Gillman report being published the ICAC could investigate any kind of misconduct or maladministration but following the publication of that report the ICAC's powers in relation to investigations into misconduct and maladministration were confined to serious or systemic conduct of that kind.

In an understanding of any Bill that is or will be introduced to provide for the ICAC to have the power to conduct investigations into maladministration in public or hold public hearings it must be understood that at present:

(a) the ICAC can only investigate serious or systemic maladministration where the ICAC considers it in the public interest to do so; and
(b) the ICAC has all the powers of a Royal Commission in doing so.

As I explained to the Crime and Public Integrity Policy when I gave evidence on Monday 27 August 2018 a trial and an investigation are quite dissimilar.[17]

A trial takes place after the parties to the proceedings have gathered all of the evidence which they wish to place before the trial judge and after the parties have exchanged that evidence so that all of the parties to the proceedings are aware of the whole of the evidence that may adduced before the trial judge. In some cases the parties are compelled to produce the oral evidence of their witnesses prior to the hearing.

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[11] Section 12(1) RCA
[12] Section 13 RCA
[13] Section 16 RCA
[14] Section 18(2) of the Ombudsman Act
[15] Section 24(2)(b) of the ICAC Act
[16] Section 24(2)(c)
[17] Pages 339 to 441

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The purpose of the trial is for the trial judge to determine the issues raised by the parties. The trial judge does not go outside those issues and determine any other issues. Nor does the trial judge attempt to obtain any further evidence in relation to the issues to be decided or any other issues. The trial judge is confined to the evidence adduced by the parties.

The purpose of the trial is to determine which of the contentions of the various parties should be accepted.

An investigation is quite different. When an investigation commences there is little or no evidence but allegations and suspicion. The purpose of the investigation is to obtain evidence by observation, obtaining documents and interviewing witnesses for the ultimate purpose of the decision maker finding facts and making a decision as to whether or not the person or agency under investigation has engaged in the conduct the subject of the allegations.

Trial processes have no part to play in an investigation.

Although the ICAC may appear to have some of the trappings of a judge the ICAC is not a judge.

I invite you to consider my evidence before the Committee in relation to this issue.[18]

With the greatest respect I think most of the Maher Amendments are misconceived and misunderstand the difference between a trial process and an investigation. They also ignore the public interest in the ICAC identifying, investigating and preventing misconduct and maladministration in public administration.

If the proposed amendments were to be passed by the Parliament the ICAC's powers in relation to investigations into misconduct and maladministration would be almost entirely emasculated.

Although I think the ICAC Bill has serious flaws for the reasons I have expressed in correspondence to the Deputy Premier, if Parliament were to accept the Maher Amendments not only would the ICAC not be able to carry out investigations in public but I think ICAC would not be able to carry out any investigations into misconduct or maladministration.

It is not clear whether the purpose and objects of the proposed amendments are to prevent the ICAC investigating serious or systemic misconduct or maladministration at any time but if that is the purpose and objects, and that is the will of the Parliament, then I suggest the whole of the ICAC Act would need to be reconsidered.

I do not intend to comment upon Amendments 6, 7, 11, 12, 15 and 16 all of which are policy decisions for the Parliament.

I will not deal with the matters in the order of the Maher Amendments but will deal with the proposals in the order in which they will need to be addressed by the ICAC if the ICAC were to consider carrying out any sort of investigation into misconduct or maladministration in public administration.

Amendment 24

Amendment number 24 is intended to be inserted in Schedule 3A of the ICAC Bill.

Schedule 3A is included in the ICAC Bill to address investigations into misconduct and maladministration. It proposes that the ICAC no longer have the powers of the Ombudsman in carrying out such investigations but ICAC have its own powers which are to be conferred in Schedule 3A.

Schedule 3A applies to all investigations to be carried out by the ICAC into misconduct and maladministration whether conducted in private or public. So any proposed amendment to Schedule 3A in the Maher Amendments might have a reach further than public investigations or public hearings.

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[18] Pages 339 to 441

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Schedule 3A only applies to investigations by ICAC and only applies to investigations into misconduct or maladministration.[19]

That means that if a matter is referred to a public authority for investigation the public authority will continue to investigate without powers. If a matter is referred to the Ombudsman, the Ombudsman will continue to investigate the conduct exercising all the powers of a Royal Commission.

Proposed cl.8A reads:

> ***8A – Right to refuse to participate in investigation***
>
> *(1) If allegations of potential misconduct or maladministration in public administration are made against a person and an investigation is to be conducted under this Act in relation to the matter –*
> *(a) the person heading the investigation must (without derogating from clause 4 of this Schedule), ensure that the person is aware of those allegations before any power is exercised under this Schedule to compel the person to attend an examination, answer a question, provide information or produce a document or thing; and*
> *(b) the person against whom the allegations have been made is entitled to refuse to participate in the investigation (despite any other provision of this Act).*
> *(2) A person who intends to refuse to participate in an investigation may give notice in writing of that intention to the person heading the investigation and, on giving such notice, the person may not be required to attend any examination, answer any question, provide information or produce a document or thing under this Schedule.*
> *(3) The fact that a person has refused to participate in an investigation in accordance with this clause is not admissible in evidence against the person in any civil or criminal proceedings in any court.*

Clause 8A is a provision that applies to any investigation to be conducted under the ICAC Act into misconduct or maladministration whether in private or public.

Clause 8A requires the person heading the investigation to ensure that the person subject to the allegations is aware of the allegations made before any power mentioned in cl.8A(1)(a) is exercised under the Schedule.

Clause 8A would allow a person who is under investigation for serious or systemic misconduct or maladministration in public administration to refuse to participate in the investigation by not attending any examination, not answering any question and not providing information or producing a document or thing in accordance with Schedule 3A.

Moreover Clause 8A (3) would not allow that person's refusal to participate in an investigation to become known by way of evidence to a court in any civil or criminal proceedings.

As I have mentioned the only misconduct or maladministration that ICAC can investigate under Schedule 3A whether in private or in public is serious or systemic misconduct or maladministration, the definition of which I have referred to earlier in this letter.

If clause 8A were to be included in the ICAC Bill, and be enacted, the ability of the ICAC to carry out any investigation into serious or systemic misconduct or maladministration could be compromised because most persons subject to allegations would avail themselves of the rights contained in cl.8A(1)(b) to avoid the consequences of their alleged misconduct or maladministration becoming known by refusing to participate in the investigation.

It would mean that a public officer who might have engaged in the most egregious misconduct or maladministration would have the right to refuse to participate in an investigation to the extent that that person could refuse to produce relevant evidence to the investigation and thereby frustrate the investigation.

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[19] See Clause 8 of the ICAC Bill which would introduce section 36A into the ICAC Act

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The amendments would, in practical terms, render the coercive powers contained in the Schedule to be no more than requests for voluntary cooperation. In practice there would be little utility in having the coercive powers at all.

The clause has other serious difficulties which are not addressed in the Maher Amendments including for example being silent in relation to whether if, notwithstanding the refusal of a person to participate in the investigation the investigation proceeds, that person must be accorded procedural fairness even though that person is not participating in the investigation. What would be the point of according that person procedural fairness if that person has evinced an intention not to participate?

The clause is also silent as to whether or not findings could be made against a person who refuses to participate.

It may be both in both those cases the common law obligations would prevail but that is not clear.

If this clause were to be included then all investigations of misconduct or maladministration would have to be carried out by the Ombudsman or by a public authority. As I have said a public authority has no powers. The Ombudsman could require a person who refuses to participate in an investigation by ICAC to participate in an investigation using the powers under the RCA. If the Ombudsman conducted the investigation it would have to be in private notwithstanding s.6 of the RCA.[20]

Amendment 19

Amendment 19 identifies a further circumstance that would prevent the Commissioner conducting a public inquiry.

The proposed subclause (6) to cl.2 of Schedule 3A of the ICAC Bill would prevent the Commissioner determining to conduct a public inquiry for the purpose of an investigation in accordance with that clause if witnesses have already been examined or summoned to appear before an examiner for the purposes of the investigation.

It is not obvious to me why there is a need for this provision.

There may be circumstances where the Commissioner becomes aware, during private examinations, that the matter which is under investigation ought to be conducted in public because having taken into account the matters in clause (2) the Commissioner is satisfied that the investigation ought to be conducted by way of a public inquiry.

That might occur where evidence is obtained in private of which the Commissioner was previously unaware and which makes the conduct more serious than the Commissioner first thought when the Commissioner commenced on a private inquiry or where the public interest would be best served by the matter being continued in public.

I do not agree with this proposal.

The second aspect of amendment 19 is to provide that if the Commissioner revokes the determination to conduct a public inquiry and determines to continue the investigation in private the schedule applies as if the investigation were continuing in public.

I cannot see any reason for this provision. If the other provisions relating to public inquiries are necessary because an investigation is being conducted in public then they have no application to an investigation being conducted in private.

This clause pays no attention to the public interest in being aware of investigations into serious or systemic misconduct or maladministration.

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[20] Section 18(2) of RCA

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Amendment 18

Amendment 18 deals with public inquiries and seeks to amend clause 2 of Schedule 3A in the ICAC Bill. Subclause (2) seeks to limit the circumstances in which the Commissioner can conduct a public inquiry.

It is proposed that subclause (2) of the Maher Amendments be substituted for Clause 2(2) in the ICAC Bill.

Subclause (2) must be understood by reference to subclause (1) in the ICAC Bill which is not sought to be amended but which reads:

> *(1) For the purposes of an investigation into misconduct or maladministration in public administration, the Commissioner may, if the Commissioner is satisfied that it is in the public interest to do so, conduct a public inquiry.*

Subclause (2) in the ICAC Bill identifies the factors that the Commissioner ought to take into account in considering whether it is in the public interest to conduct a public inquiry.

The sole criterion for the holding of a public inquiry in the ICAC Bill is that it must be in the public interest.

The proposed subclause (2) in the Maher Amendments address different issues and in some respects contradicts subclause (1) which as I have said is not sought to be amended. Subclause (2a) of the Maher Amendments reinforces my view that subclause (2) of the Maher Amendments contradicts subclause (1) of the ICAC Bill because subclause (2a) deals with the matters in subclause (2) of the ICAC Bill.

Subclause (1) allows the Commissioner to conduct a public inquiry if satisfied that it is in the public interest to do so. That subclause is unambiguous.

However subclause (2) in the Maher Amendments contradict subclause (1) in the ICAC Bill by not only requiring the Commissioner to be satisfied that it is in the public interest to hold the public inquiry but that there be exceptional circumstances and that the public inquiry can be held without causing unreasonable damage to a person's reputation, safety or wellbeing. That imposes further criteria for the holding of a public inquiry. It would not be sufficient that the investigation proceed by public inquiry because it is in the public interest, the other two criteria would also need to be satisfied.

It is difficult to understand why it is not sufficient that the test for holding a public inquiry is whether it is in the public interest to do so which must be measured against the criteria in the existing subclause (2) in the ICAC Bill.

I ask rhetorically what are 'exceptional circumstances' that are not matters relevant to the question of the public interest and how does the Commissioner identify those circumstances for the purpose of making his or her decision?

The introduction of the requirement of "exceptional circumstances" would make clause 2 of the ICAC Bill unworkable.

Subclause (2a) in the Maher Amendments like subclause (2) in the ICAC Bill identifies factors to be taken into account in determining what is in the public interest. Subclause (2a) is in addition to subclause (2).

Subclause (2a) of the Maher Amendments does not seem to recognise the existing provisions in the ICAC Act that the only misconduct or maladministration that the Commissioner can investigate is serious or systemic misconduct or maladministration.

Subclause (2a) is in my opinion unnecessary.

Clause (2b) of the Maher Amendments is proposed apparently in addition to clause 2(3) in Schedule 3A of the ICAC Bill.

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Not only under this proposal must the Commissioner comply with clause 2(3) and publish on a website and in a newspaper the written notice mentioned in that subclause the Commissioner would need to provide the same information to each person that the Commissioner thinks might reasonably be expected to be required to give evidence in the investigation.

That proposal requires the Commissioner, at least 28 days before the public inquiry is commenced to invite persons who the Commissioner thinks might reasonably be expected to give evidence, to make submissions to the Commissioner within a reasonable period specified in the notice in relation to the determination to conduct the public inquiry.

There are serious problems with this proposal. The first is the Commissioner would probably not know at that stage all of the persons who might be expected to give evidence in the inquiry. At that stage the Commissioner would not have yet begun to obtain evidence. That would be the whole purpose of the investigation.

What would be the consequences of the Commissioner not giving notice to a person who is subsequently called to give evidence before the inquiry? The answer to that question is not in Amendment 3 which addresses rights of appeal but only provides those rights to persons who have been given notice. Those persons may appeal against the decision to hold the public inquiry. Persons who have not been given notice have no rights of appeal.

There is a more serious problem. I cannot see the purpose of clause 2b(d) in inviting a person to make submissions in relation to the determination to conduct the public inquiry. At that stage the decision will have already been made to conduct the public inquiry. Subclause (2b)(c) provides that the written notice must set out the basis on which the Commissioner has determined that it is in the public interest to conduct the public inquiry. The determination must have been made. Clause 2(2b)(d)has no work to do.

Clause (2b)(d) therefore gives a person of whom the Commissioner might be unaware a right to receive a notice allowing that person to make submissions on a decision that has already been made.[21] That person has no right of appeal if notice is not given.

There is one other problem with the notice mentioned in (2b). It does not address the matters the Commissioner must address in relation to proposed clause (2a).

Amendment 17

Amendment 17 is consequential on amendment 18 and if my views are accepted in relation to that amendment, Amendment 17 would be unnecessary.

Amendments 1 & 2

Amendments 1 and 2 relate to the proposed s.36B which is in clause 8 of the ICAC Bill.

I have previously given the Attorney-General my comments in relation to my view of s.36B which is contained in my letter of 18 October and I will not repeat those comments.

The proposed amendments will only exacerbate the problems associated with the extended right of appeal given by s.36B.

For that reason I do not favour those amendments.

Amendment 3

For the reasons given in relation to amendment 18 I do not agree with amendment 3.

I do not agree with a right of appeal of any kind for reasons I expressed in my correspondence with the Deputy Premier.

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[21] Amendment 3

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However there are further problems with amendment 3. First it would give a right of appeal to a person that might be expected to give evidence in the inquiry. That person may not in fact give evidence but have a right of appeal. That person need not be the person who is under investigation. It would mean in a large inquiry that any person who might be reasonably expected to give evidence in the inquiry and who has been the recipient of a notice under clause (2b) in amendment 18 would be entitled to appeal.

The further problem is an appeal against what. As I have mentioned clause (2b) seems to operate in circumstances where the Commissioner has determined that it is in the public interest to conduct the public inquiry: clause (2b)(c). In those circumstances I cannot think what submissions could be put under clause (2b)(d) which would give a right of appeal.

Amendments 4 & 5

Amendments 4 and 5 are consequential upon Amendment 3 and Amendment 18.

Because I disagree with Amendment 18 and Amendment 3 it follows that I see no reason for the proposed Amendments 4 and 5.

Amendments 9 & 10

Amendments 9 and 10 seek to amend proposed clause 39A which is in clause 10 of the ICAC Bill. The proposed amendments have nothing to do with the question of public hearings which underlies the ICAC Bill. Moreover those amendments do not seem to recognise that clause 39A is not new to the ICAC Act but simply picks up the existing section 26 of the ICAC Act and would be re-enacted in exactly the same form.

The need for the amendment proposed in amendment number 10 is not obvious but I will address it in any event.[22]

The standard operating procedures (SOPs) are designed to advise members of the public about the manner in which powers will be exercised by investigators under the ICAC Act and provide those persons with appropriate information about their rights, obligations and liabilities under that Act.

SOPs are not a pre-condition to the exercise of the powers that are given to investigators under the ICAC Act.

The existing s.26(3) of the ICAC Act which is replicated in clause 39(3) of the ICAC Bill is designed to ensure that the investigators comply with the SOPs.

The proposal in Amendment 10 is designed to give rights to persons adversely affected by the exercise of a power in contravention of an operating procedure and in particular a right to apply to the Court for a declaration of the kind mentioned in subclause (4).

The proposal is that the Court could also make a related or ancillary order in the discretion of the Court.

This amendment is designed to make adherence to the SOPs a pre-condition to the exercise of power. That is inappropriate.

The power and any pre-conditions to the exercise of power is and are contained in the ICAC Act or other relevant empowering Act.

It would be inappropriate to condition the exercise of power upon adherence to a standard operating procedure.

No such obligation is imposed upon SAPOL.

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[22] Amendment 9 is consequential upon Amendment 10 and does not need to separately discussed

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I cannot see the purpose of giving a person a right to apply for a declaration unless a consequential order should be made. The Courts have said time and time again that a declaration should only be made when there is some utility in doing so. A declaration by itself that an investigator has not complied with a SOP would be of no utility.

The Court might be asked to make a consequential order of a kind that might be relevant to the admissibility of any evidence obtained in circumstances where an investigator did not comply with an SOP in the applicant's subsequent trial. However the Court would be unlikely to make such an order. A civil court does not make orders that would bind a criminal court in the conduct of a trial in that criminal court. Any proceeding for declaration would be of no utility and it would simply delay the investigation and increase the cost.

I do not think there is any need for amendments 9 and 10.

Amendment 13

Amendment number 13 seeks to include s.62 which calls for a review of the Act by the Crime and Public Integrity Policy Committee.

This proposed amendment also has nothing to do with the question of public hearings.

I note that this review would be in addition to the review provided for in s.61 which in fact has been conducted by the Hon. KP Duggan AM QC and whose report has been tabled in Parliament and which was a review into the same matter as in clause 62(1).

However the question of review of the ICAC Act is a matter for Parliament.

Amendment 8

There are three types of appeal from a judicial decision of an inferior Court to the Supreme Court; an appeal simpliciter, an appeal *de novo* and a rehearing.

The decision which might be the subject of appeal, if Parliament did not accept my advice, is not an appeal from a decision of a court but from an administrative decision maker.

An appeal from an administrative decision maker is usually confined to whether the administrative decision maker acted within or outside jurisdiction or failed to exercise jurisdiction because the merits of the decision are for the administrative decision maker.

The proposed amendment is inappropriate because it confuses an appeal from a judicial decision with an appeal from an administrative decision maker.

Amendment 20

The Maher Amendments seek to substitute amendment 20 for clause 4 of the ICAC Bill.

Clause 4 is in similar terms to s.7 of the Royal Commissions Act.

Clause 4 is a standard form of provision for a tribunal or for an administrative decision maker not exercising judicial power.

The rules of evidence were created and designed for trials so as to ensure that the best evidence is admitted in a trial.

I repeat what I have said before and that is that an investigation is not a trial.

For that reason I do not think amendment number 20 is appropriate.

More particularly clauses 4(1) and (3) of amendment number 20 are unnecessary.

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It is beyond doubt that an administrative decision maker must provide a person whose rights, interests or legitimate expectations might be adversely affected with procedural fairness.

I am not sure what is meant by clause 4(2).

Examiners and cross examiners are not bound by the rules of evidence. The rules of evidence are designed to provide a process that will aid in determining the admissibility of evidence. A judge will disallow a question for example that would admit of a hearsay answer but not because the examiner must comply with the rules of evidence but because the answer would be irrelevant because the answer would be inadmissible.

It is the decision maker to whom the rules of evidence are directed.[23]

Curiously this clause does not purport to impose upon the person heading the investigation the need to comply with the rules of evidence in arriving at his or her decision.

That points out the inappropriateness of requiring the examinations to be conducted in accordance with the rules of evidence.

I am not aware of the practices and procedures applicable to a witness giving evidence in summary proceedings in the Magistrates Court and I am not sure why the practices and procedures of that court are preferred to the practices and procedures of any other court, if in fact they are any different.

But in any event a court's processes are not relevant to an investigation.

Amendment 14

Amendment 14 seeks to introduce into Schedule 4 which is the schedule which relates to reviews by the Reviewer an obligation on the Reviewer to consider whether, if any determination was made by the Commissioner to conduct a public inquiry, the determination was properly made in accordance with clause 2 of schedule 3A.

I am not sure what the purpose is in imposing such an onerous obligation upon the Reviewer.

Does the Reviewer have to comply with that obligation if an appeal has been brought to the Supreme Court against a decision by the Commissioner to hold a public inquiry and the Supreme Court has dismissed that appeal? It would not seem to be appropriate that the Reviewer would then need to carry out the review and determine otherwise.

On the other hand must the Reviewer conduct a review in circumstances where no one who has been affected by the Commissioner's decision to conduct a public inquiry has complained. If so why?

The obligation that is contained in amendment number 14 would impose upon the Reviewer a very onerous obligation to identify the material that was available to the Commissioner in order to determine whether the decision was properly made.

Moreover what is meant by "properly made"?

Is the Reviewer to determine whether the determination made by the Commissioner was within power or must the Reviewer address the merits of the determination?

I do not agree with amendment number 14.

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[23] See s.7 of RCA

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Amendment 21

This amendment would, if enacted, allow a person who has appeared as a witness in a public inquiry to call and present evidence and make submissions to the person heading the investigation.

This proposal is inappropriate.

A witness, who is not a person of interest, has no interest in the outcome of the investigation and therefore should not be entitled to call evidence himself or herself. Moreover a witness whose rights, interests or legitimate expectations are not be affected by a decision of the Commissioner should not be entitled to make submissions unless the Commissioner considered further evidence or submissions would be of relevance to the investigation.

This proposal would take the control of the investigation out of the examiner's hands and would extend and make an investigation more complicated.

Amendment 22

This amendment has the same vice as amendment 21. It assumes in clause 5(1)(a) that a person who has been called as a witness is entitled to call another witness.

The proposal in clause 5(1)(b) is in my opinion extraordinary.

I could not see how a person who is not a person of interest and is not a witness to an inquiry should be entitled to make submissions in relation to the investigation. That person could have no interest whatsoever in the outcome of the investigation.

Amendment 23

I do not disagree with a person who is required to give evidence being represented by a legal practitioner at the time that person gives his or evidence and I do not disagree with that person being represented at any subsequent hearing. However that person's legal representative would need to identify an interest before he or she would be given leave to cross-examine any other witness.

Amendment 25

For the reasons given in relation to amendment 20 I do not support that amendment.

Amendment 26

I disagree with this proposal because it would not allow the examiner to control cross-examination of a witness which would subvert the whole process. The examiner must be able to control the examination for no other reason than to protect the witness who is being examined.

Amendment 27

I disagree with this proposal because I do not think it precise enough to be meaningful. A witness is not entitled to be represented in the Magistrates Court so Amendment 27 must be speaking of a defendant in that Court. (I am assuming, although it is not clear, that the amendment is speaking of the criminal jurisdiction not the civil jurisdiction of that court). However under the Maher Amendments a witness in an investigation is entitled to be represented by a legal practitioner.

This proposal assumes that a legal practitioner representing the person of interest at an investigation has the same rights in an investigation as a legal practitioner acting for a defendant or witness in a proceeding in the Magistrates Court.

The two positions cannot be equated. As I have said a witness is not entitled to be represented in the Magistrates Court.

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A person of interest is protected by the obligation to provide that person with procedural fairness. To introduce processes that are peculiar to proceedings in the Magistrates Court can only promote confusion.

Amendment 28

I disagree with this proposal.

A court does not have to be satisfied before it issues a subpoena to a witness that it is reasonable to do so. Nor does a court give reasons for the issue of that subpoena after the issue of the subpoena.

A Royal Commission does not have to be satisfied that it is reasonable in the circumstances to issue a summons. Nor does a Royal Commission have to give reasons for the issue of that summons.

No court process which provides for summoning witnesses, of which I am aware, requires the information contained in subclause(1c).

Amendment 29

This proposal is extraordinary. It would impose upon the Commissioner an obligation that would be so onerous as to make the task impossible.

Moreover it would forewarn every witness about any matter that the witness might be examined upon for the purpose of the investigation.

Apart from all of the other proposals in the Maher Amendments which would hinder an investigation into serious or systemic misconduct or maladministration this proposal alone if it were adopted would mean that no Commissioner could proceed to hold a public hearing because the purpose of the hearing would be thwarted by the obligation included in clause 10A and the investigation would become so burdensome as to make it impossible to continue with that investigation.

The proposal is not only directed to the person of interest but any witness most of whom are summoned to assist in an investigation into the conduct of someone else.

Conclusion

The proposals generally that are contained in the Maher Amendments seek to divest the Commissioner of any authority in conducting investigations and to empower persons against whom serious allegations have been made to frustrate any investigation into allegations of serious or systemic conduct on their part.

The proposals also would empower witnesses to frustrate the investigation by imposing unreasonable burdens on the Commissioner.

The purpose of giving the ICAC the power to investigate serious or systemic misconduct or maladministration in public administration is to serve the public interest. The public interest is best served by a public administration that is competent, acts with integrity and is transparent.

The Maher Amendments pay no attention to the public interest but empower those who are under investigation to avoid the consequences of their conduct.

You may of course bring this letter to the attention of the Legislative Council.

I have today written to the Deputy Premier expressing the same view and making the same comments as are contained in this letter.

Please would you advise whether you have any objection to me releasing this letter publicly.

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If there is anything you wish to discuss about the Maher Amendments and about my comments I should be glad to meet with you.

Yours faithfully

The Hon. Bruce Lander QC
INDEPENDENT COMMISSIONER AGAINST CORRUPTION

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