

HOUSE OF ASSEMBLY  
LAID ON THE TABLE

29 Nov 2016

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

For the period 1 July 2015 to 30 June 2016

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# REPORT TO THE ATTORNEY-GENERAL THE HONOURABLE JOHN RAU PURSUANT TO SECTION 46 OF THE INDEPENDENT COMMISSIONER AGAINST CORRUPTION ACT 2012 FOR THE PERIOD 1 JULY 2015 to 30 JUNE 2016

## 1. 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).

Section 46 of the Act requires the Attorney-General to appoint a person to conduct a review of the operations of ICAC and the OPI during each financial year. It provides as follows:

### **46 - Annual review of exercise of powers**

- (1) The Attorney-General must, before the end of each financial year, appoint a person who would be eligible for appointment as the Commissioner to conduct a review of the operations of the Commissioner and the Office [OPI] during the financial year.
- (2) Without limiting the matters that may be the subject of a review, the person conducting a review-
  - (a) must consider-
    - (i) whether the powers under this Act were exercised in an appropriate manner and, in particular, whether undue prejudice to the reputation of any person was caused; and
    - (ii) whether the practices and procedures of the Commissioner and the Office were effective and efficient; and
    - (iii) whether the operations made an appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration in public administration; and
  - (b) may make recommendations as to changes that should be made to the Act or to the practices and procedures of the Commissioner or the Office.
- (3) The Commissioner must ensure that a person appointed to conduct a review is provided with such information as he or she may require for the purpose of conducting the review.
- (4) A report on a review must be presented to the Attorney-General on or before

30 September in each year.

- (5) The report must not include information if publication of the information would constitute an offence against section 56.
- (6) The Attorney-General must, within 12 sitting days after receipt of the report, cause copies of the report to be laid before each House of Parliament.

Pursuant to appointments by the Attorney-General pursuant to s 46, I have conducted and reported on reviews of the exercise of the powers of ICAC in relation to the periods 1 July 2013 to 30 June 2014 and 1 July 2014 to 30 June 2015.

Subsequently, I was appointed to conduct the review for the period 1 July 2015 to 30 June 2016 and now report on that review.

In order to provide the necessary context for the present report, it is appropriate to refer to relevant provisions of the Act along with summaries of the operation of ICAC and the OPI which I set out in earlier Reports.

Section 3 of the Act states that the primary object of the Commissioner is to investigate serious or systemic corruption in public administration and to refer serious or systemic misconduct or maladministration in public administration to the relevant body, giving directions or guidance to the body or exercising the powers of that body as the Commissioner considers appropriate.

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, assesses the complaints and reports and makes recommendations to the Commissioner. The Commissioner then considers the matter and determines what action is to be taken in accordance with the requirements of the Act.

## 2. 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
  - (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; or
  - (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.

### **3. ACTION WHICH MAY BE TAKEN BY THE COMMISSIONER**

The type of action which may be taken by the Commissioner 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. It states:

**24 - Action that may be taken**

- (1) 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-
  - (a) investigated by the Commissioner; or
  - (b) referred to South Australia Police, the Police Ombudsman (if the issue concerns a police officer or special constable) or other law enforcement agency.
- (2) If a matter is assessed as raising a potential issue of misconduct or maladministration in public administration, the matter must be dealt with in one or more of the following ways:
  - (a) the matter may be referred to an inquiry agency and, if the Commissioner



considers it appropriate, the Commissioner may give directions or guidance to the agency in respect of the matter;

- (ab) the Commissioner may exercise the powers of an inquiry agency in respect of the matter;
  - (b) the matter may be referred to the public authority concerned and, if the Commissioner considers it appropriate, the Commissioner may give directions or guidance to the authority in respect of the matter.
- (3) If a matter is assessed as raising other issues that should be dealt with by an inquiry agency, public authority or public officer, the matter must be referred, or the complainant or reporting agency advised to refer the matter, to the agency, authority or officer.
  - (4) If a matter is assessed as trivial, vexatious or frivolous, the matter has previously been dealt with by an inquiry agency or public authority and there is no reason to re-examine the matter or there is other good reason why no action should be taken in respect of the matter, no action need be taken in respect of the matter.
  - (5) The same matter, or different aspects of the same matter, may be dealt with contemporaneously under more than one subsection.

#### **Example -**

A matter that is assessed as raising a potential issue of corruption in public administration that could be the subject of a prosecution and a potential issue of misconduct or maladministration in public administration may be dealt with under both subsection (1) and subsection (2).

- (6) A matter may be dealt with under this section even if it is a matter referred to an inquiry agency or public authority under another Act.
- (7) The making of an assessment, and whether action is taken, and what action is taken, in respect of a matter is at the absolute discretion of the Commissioner and, if an assessment is modified in the course of dealing with the matter, the Commissioner may deal with the matter according to the modified assessment.
- (8) Subject to any directions of the Commissioner, reasonable steps must be taken to ensure that a complainant or reporting agency receives an acknowledgement of the complaint or report and is informed as to the action, if any, taken in respect of the matter.

## **4. 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. All the assessment officers have legal qualifications.

The OPI is responsible for receiving complaints concerning alleged corruption and the various types of misconduct and maladministration which ICAC is charged with investigating. 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. This assessment involves consideration of whether and by whom complaints and reports should be investigated.

In the course of the assessment, the OPI officers may have to obtain further information from complainants, reporters or agencies. However, such enquiries do not extend beyond the acquisition of information necessary for the OPI to perform its task.

An assessment of the matter is carried out and a recommendation made pursuant to s 24 of the Act. The recommendation is entered into a Microsoft Windows based case management system known as Resolve and forwarded to the Commissioner for consideration. During the reporting period the Commissioner accepted 91 per cent of the recommendations of the OPI.

In the event that a matter is eventually referred by the Commissioner to an inquiry agency or public authority, the OPI is responsible for actioning that directive and communicating with the authority and the complainant or reporting party.

Detailed procedural steps for the exercise of the functions of the OPI are set out in the OPI Operations Policy document.

Where the Commissioner refers a matter to an inquiry agency or public authority, the Commissioner will give a direction to the agency or authority requiring a report to be provided to the Commissioner dealing with:

1. the issues addressed;
2. the findings made and the reasons for those findings; and
3. the action taken and the reasons for that action, or, if no action was taken, the reason why no action was taken.

The OPI receives a report ("report back") from inquiry agencies and public authorities on behalf of the Commissioner.

These reports are initially processed by an officer within the OPI and added to Resolve.

When a report back is received, the report is allocated to the Senior Assessment Officer Reviews ("SAOR"). The SAOR reviews the report back and prepares a memorandum which includes a recommendation as to whether action has duly and properly been taken in respect of the issues referred. The SAOR may recommend that further information be sought from the agency or authority before an assessment is made.

In all cases, the SAOR makes a recommendation to the ICAC Director of Legal Services, who has delegated authority to consider the action taken in respect of a matter pursuant to



section 37(7) or 38(7) of the Act. If the Director of Legal Services considers that the matter ought to be considered personally by the Commissioner, it will be referred to the Commissioner accordingly.

Neither the Commissioner nor the Director of Legal Services are bound by the recommendations of the SAOR.

Once the Commissioner or the delegate is satisfied that proper action has been taken or that further information is required, the SAOR is responsible for preparing draft correspondence to give effect to that decision.

Occasionally the Commissioner or delegate will raise issues of a general nature associated with the action that has been taken by the inquiry agency or public authority in respect of the referral. The purpose of raising such issues is to assist that agency or authority to improve the manner in which it deals with alleged misconduct or maladministration.

In all cases, both the inquiry agency or public authority concerned and the complainant or reporter, are advised of the outcome of the matter before the file on Resolve is closed.

In the course of this review, I visited the OPI and discussed its functions and operations with the Manager and members of the OPI staff. I have also perused assessments and correspondence from the OPI officers in Resolve when reviewing the files I have examined.

Officers of the OPI continue to develop considerable expertise in the important task of assessing and administering complaints and reports received by them. I am satisfied that they provide a professional interface between ICAC and members of the public and that they act as an effective conduit between ICAC and inquiry agencies and public authorities. Their work is constant and demanding. However, the staff assess reports and complaints in an effective and timely manner.

## **5. COMPLAINTS, REPORTS AND OWN INITIATIVE MATTERS**

1063 complaints and reports were made to ICAC during the reporting period. This was an increase of 14.7 per cent over the previous reporting period. 463 of these matters were complaints from members of the public and 600 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 1693 separate issues were identified and assessed.

### **Matters assessed as raising a potential issue of corruption**

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

During the reporting period 24 corruption investigations were commenced by the Commissioner in relation to matters received during that period. A further eight corruption investigations were commenced by the Commissioner into matters received in a previous reporting period. An additional 54 corruption investigations commenced in the previous reporting period were carried over to the present reporting period.

A total of 78 matters assessed as raising a potential issue of corruption were referred to the SA Police and one further such matter was referred to the Police Ombudsman. Of the 79 matters, 77 were received in the present reporting period and the remaining two matters were received in a previous reporting period.

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

As previously stated, 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 either –

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

During the reporting period, 82 matters comprising 67 received during the present reporting period and 15 received in a previous reporting period, were assessed as giving rise to a potential issue of misconduct or maladministration in public administration. Of these, 42 were referred to the Ombudsman and 40 to the Police Ombudsman.

A further 187 matters assessed as raising a potential issue of misconduct or maladministration in public administration were referred to a public authority, of which 165 were received in this reporting period. The remaining 22 were received in a previous reporting period. The Commissioner exercised the powers of an inquiry agency on two occasions. One of these matters was received during this reporting period and the remaining matter was received in a previous reporting period.

### **No Further Action**

The Commissioner determined to take no further action in respect of 527 matters received in this reporting period. The Commissioner also determined to take no further action in respect of a further 42 matters received in a previous reporting period.

The decision not to take any further action was made for one or more of the following reasons:

- the matter fell outside the jurisdiction of ICAC;



- the matter did not raise a potential issue of corruption, misconduct or maladministration in public administration;
- the matter was trivial, vexatious or frivolous;
- the matter was previously dealt with by an inquiry agency or public authority and there was no reason to re-examine the matter;

or

- there was other good reason why no action should have been taken in respect of the matter.

### **Prosecutions and disciplinary action**

During the reporting period, 13 public officers were charged with criminal offences arising out of investigations by the Commissioner or joint investigations with SA Police. Ten matters were also referred to a public authority for potential disciplinary action following an investigation by ICAC.

## **6. 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.

## **7. 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.

## **8. 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 may, by written notice, require an inquiry agency, 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 the Resolve case file. An entry is to be made in Resolve recording 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 an appendix to the Standard Operating Procedure.

No s 28 notices were issued during the reporting period.

## **9. 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 subclause (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 seven such notices were prepared and served. I have perused the records relating to these notices. The procedure prescribed by the Act was followed on each occasion.

## **10. 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 the appendix 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, 52 such notices were authorised and served. I perused the records relating to the majority of these notices. The correct procedure was followed in each case.

## **11. 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 an appendix to the Standard Operating Procedure.

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

## **12. 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 may issue a retention order in respect of anything that the investigator 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. 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 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 the appendix to the Standard Operating Procedure.

There were no retention orders issued during the reporting period.

## **13. SECTION 34 NOTICES LIMITING ACTION BY OTHER AGENCIES AND AUTHORITIES**



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, five s 34 notices were issued. 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.

## **14. 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. There is an obvious awareness on the part of ICAC staff of the relevance and importance of observing proper procedure and the checks which have been put in place by the Commissioner are an effective means of ensuring continuing compliance.

## **15. 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 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.

Section 31(2) empowers a judge of the Supreme Court to issue a warrant authorising an investigator 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(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 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 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 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 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.

In my last Report I recommended that certain changes be made to the information sheet and appropriate amendments have now been made to the document.

During the reporting period, 22 search warrants were issued, eight by the Commissioner and 14 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 my first Report which related to the period 1 September 2013 to 30 June 2014, I drew attention to the fact that police officers seconded to ICAC as investigators retained certain police powers including the powers under a general search warrant if they were currently in possession of such a warrant issued by the Commissioner of Police.

In view of the strict requirements in s 31 of the Act, governing applications to the Commissioner and the Supreme Court for search warrants, I suggested that it would seem desirable for some 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. The warrant holder must also submit a report on the use of the warrant which is modelled on the SA 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.

## 16. THE POWER OF ARREST

Section 33 of the Act creates several offences under the heading of "Obstruction". ICAC investigators are empowered by the section to arrest persons reasonably suspected of breaches against the section. The section provides as follows:

### 33 — Obstruction

(1) A person must not—

- (a) refuse or fail to provide a statement of information as required by the person heading an investigation; or
- (b) include information in a statement of information knowing that it is false or misleading in a material particular; or
- (c) without lawful excuse, refuse or fail to comply with a requirement or direction of an investigator under this Act; or
- (d) alter, destroy, conceal or fabricate a document or other thing knowing that it is or is likely to be required by an investigator performing functions under this Act; or
- (e) otherwise hinder or obstruct an investigator, or a person assisting an investigator, in the performance of his or her functions.

Maximum penalty: \$10 000 or imprisonment for 2 years.

(2) An investigator may arrest a person without warrant if the investigator reasonably suspects that the person has committed, is committing, or is about to commit, an offence against subsection (1) and —

- (a) when required to do so by an investigator the person failed to state truthfully his or her personal details or to produce true evidence of those details; or
- (b) the investigator has reasonable grounds for believing that the person would, if not arrested—
  - (i) fail to attend court in answer to a summons issued in respect of the offence; or
  - (ii) continue the offence or repeat the offence; or
  - (iii) alter, destroy, conceal or fabricate evidence relating to the offence; or
  - (iv) intimidate, harass, threaten or interfere with a person who may provide or produce evidence of the offence.



- (3) On arresting a person under this section, the investigator must immediately deliver the person, or cause the person to be delivered, into the custody of a police officer (and the person will, for the purposes of any other law, then be taken to have been apprehended by the police officer without warrant).

There is a further circumstance in which an arrest can occur. Clause 9 of Schedule 2 of the Act provides that, upon the application of an examiner under the Act, a judge of the Supreme Court may issue a warrant for the apprehension of a person if there are reasonable grounds to believe that the person is likely to leave Australia for the purpose of avoiding giving evidence before the examiner in the circumstances described in clause 9(1)(a) or who is required by summons to attend for examination and has absconded or is likely to abscond or who is attempting to evade the service of a summons to attend an examination or who has failed to attend as required by a summons.

The Act does not specifically provide for a power of arrest in any other circumstances. However, s 14(4) of the Act states that a police officer or special constable seconded to assist the Commissioner is an investigator for the purposes of the Act. Furthermore, s 14(4a) provides that, unless otherwise agreed, by instrument in writing, between the Commissioner and the Commissioner of Police, a police officer or special constable seconded to assist the Commissioner may continue to exercise all powers and authorities vested in the person by or under the *Police Act 1998*, or another Act or law, as a member of the South Australia Police or constable in the exercise of functions and powers under this Act during the period of the secondment. These powers would include the powers of arrest of a police officer. Several investigators are seconded SA Police officers.

The Standard Operating Procedure on arrests states that its purpose -

"is to provide direction to investigators when exercising a power of arrest at any time either for an offence against the *Independent Commissioner Against Corruption Act 2012* or any other legislation and provide appropriate information about the rights obligations and liabilities of persons in relation to whom powers are exercised under the ICAC Act".

The document goes on to provide that if an investigator is considering arresting a person for Obstruction the investigator must advise the person of the conduct in which the person has engaged that amounts to "Obstruction" and warn him or her of the consequences. There follow directions as to the procedure which is to apply whenever the power of arrest is exercised and the person is taken into custody. Reference is made in the Standing Operating Procedure to the applicability of s 79A of the *Summary Offences Act 1953* which sets out a person's rights upon arrest.

The outlined procedures refer to their purpose of providing information about the power of arrest for an offence against the Act "or any other legislation", but there is no specific mention in the outlined procedures of the circumstances giving rise to the police power of arrest. This information is well known to the investigators, but the purpose of requiring the Standard Operating Procedures to be placed on the ICAC website is for the information of



the public. Furthermore it is important for a person arrested to be aware of the nature of the power which is being exercised.

It follows from what I have said that, in my view, it would be helpful to explain in this Standard Operating Procedure that the additional power of arrest arises when a police officer is seconded to ICAC. I also recommend that the procedure require this explanation to be given to a person at the time of the arrest.

The circumstances in which the police power of arrest is used by an ICAC investigator are rare. I have been advised that the Commissioner is advised if such an arrest is anticipated. In my view a description of this practice should be incorporated into the Standard Operating procedure along with reference to the requirement that the DPP or other appropriate prosecuting authority be advised of the arrest as soon as possible so that any subsequent court proceedings can be taken over by that authority. Again, I understand this is the procedure presently adopted by ICAC

## **17. 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.

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, six examinations for the purposes of an investigation into



corruption in public administration took place.

The Commissioner also conducted six hearings exercising the powers of an inquiry agency.

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.

I should add that their use in these matters demonstrated the clear potential they have as an investigational tool.

### **Information for witnesses**

The summons for a person to attend to give evidence at an examination contains information about various aspects of the examination. It is important that this information is provided at the time of service. However, for the most part, it is conveyed by quoting sections in the Act and clauses in Schedule 2.

In my view the information should be more user friendly and take the form of simple summaries of the relevant topics dealing with matters such as----

- The obligation to attend the examination to answer questions and produce documents and the consequences of the failure to do so
- The penalties for false or misleading evidence
- The right to legal representation
- Whether details of the evidence may be communicated to others
- Who may be present at an examination
- Who may examine or cross-examine a witness
- Restrictions on disclosing the existence of the summons and other information concerning the examination
- Whether evidence given or documents produced are admissible in criminal or other proceedings
- The protection of witnesses from harm or intimidation

I think it would also be appropriate to provide information in a similar form in the case of summonses to give evidence in hearings to be conducted under the powers of an inquiry agency.

## **18. 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 180 recontacts in the reporting period in relation to

141 complaints.

As was the case in my examinations of these matters in my two previous inspections, almost all of the recontacts I perused involved a complaint that ICAC had decided not to proceed with an investigation, either because there was no jurisdiction to do so or for some other reason.

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

## **19. COMPLAINTS CONCERNING THE EXERCISE OF ICAC POWERS**

I refer to comments which I have made in my previous Reports concerning complaints as to the conduct of officers of ICAC. I pointed out that the Act does not provide any procedure for the making of complaints of abuse of the exercise of the powers of the Commissioner or other forms of misconduct on the part of officers of ICAC.

I recommended that consideration be given to amending the Act so as to provide for a mechanism for the making of complaints similar to that which exists in the Commonwealth and State models which I listed in the First Report.

The legislation governing all anti-corruption bodies, with the exception of Tasmania, provides an avenue for a person to make a complaint of this nature. In these jurisdictions complaints can be made to the independent inspector. The Tasmanian legislation does not include provision for an independent reviewer or inspector in relation to the exercise of the powers of the anti-corruption body in that State.

As I noted in the First Report, if the facility to make a complaint were introduced, the subject matter of any complaint should be restricted to the exercise of the coercive powers of ICAC. It is the exercise of the coercive powers which constitutes the principal focus of my role as reviewer. I refer in particular to the powers of search and seizure under s 31 of the Act and the powers set out in sections 28, 29, 29A, 30, 32 and 34.

As I am presently required to consider whether practices and procedures of the Commissioner are effective and efficient, any complaint of alleged excessive and unwarranted delay in investigation should also be included.

In drawing attention to this issue I have noted that my recommendation that a person should be able to complain to an independent entity had not emanated from evidence of any misconduct which I have uncovered in the course of my inspections.

It is important to stress that any power to consider complaints should not extend to a review of decisions of the Commissioner to investigate or decline to investigate an allegation of corruption, misconduct or maladministration or other investigational decisions. Nor should it apply to any finding of the Commissioner as to the appropriate disposal of a matter.

Since the publication of the First Report, these recommendations have been considered by



The Crime and Public Integrity Committee of Parliament ("the Committee"). In the First Report of that Committee into Public Integrity and The Independent Commissioner Against Corruption, it was recommended in general terms that the person conducting the Review under s 46 of the Act should have power to deal with complaints of the nature referred to above.

This issue is addressed in the *Independent Commissioner Against Corruption (Miscellaneous) Amendment Bill 2016* which is before Parliament at the time this Report is being written. The provisions for the appointment and functions of the reviewer of ICAC are set out in the Fourth Schedule of the Bill. 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."

## 20. 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 reviews under section 46 ; 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.

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 48 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 provides considerable information concerning the operation of the organisation. I have found it of considerable assistance in my inspectorial role.

## **21. COMPUTERISED CASE AND DOCUMENT MANAGEMENT SYSTEMS**

I have referred to Resolve, 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 was introduced during the time I was conducting this audit and I found it to be an effective means of identifying and perusing documents relevant to my inspection.

## **22. THE EFFICIENCY OF OPERATIONS UNDER THE ACT**

Section 46 of the Act requires that this Report consider whether the practices and procedures of the Commissioner and the OPI were effective and efficient.

As a result of conducting this and previous inspections, it has become apparent to me that constant consideration has been given to the most effective manner in which ICAC is to perform its functions under the Act. The Commissioner's Annual Reports provide ample explanation of the systems and procedures which have been introduced to achieve this goal.

The establishment of an organisation such as ICAC poses a considerable challenge which requires planning for a wide variety of functions including administrative organisation, receiving complaints and reports, conducting complex investigations, supervising other agencies in investigating matters and educating the public generally on the nature and functions of ICAC.

I have commented above on the operation of the OPI in these respects. According to the Commissioner's Annual Report, there has been a 20 per cent improvement in the average



time a matter remains in the assessment stage compared with the previous reporting period. It is apparent that considerable thought has been given to the efficient conduct of the operations of ICAC and the need to adapt to changing conditions including the increasing workload of the organisation.

Key Performance Indicators have been promulgated to assist in the assessment of certain aspects of the organisation's performance. They address the periods of time within which it is expected that various stages of investigations should be completed.

The indicators were set as follows:

1. 30 per cent of all investigations will be completed within nine months of assessment;
2. 70 per cent of all investigations will be completed within 12 months of assessment;  
and
3. 95 per cent of all investigations will be completed within 18 months of assessment.

In the case of corruption investigations during the 2015–16 reporting period, 41 per cent of all corruption investigations were completed within 9 months, 57 per cent were completed within 12 months and 73 per cent were completed within 18 months.

It would seem that the original indicators were somewhat optimistic and it is clear that a number of complex investigations have occupied more time than was originally estimated.

The Commissioner has stated that the 2016–18 Strategic Plan has set performance indicators aimed at better reflecting the resource requirements of investigations.

## **23. THE EFFECT OF OPERATIONS OF ICAC**

Section 46 (2)(a)(iii) of the Act requires me to consider-

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

A summary of the core functions of ICAC is set out in the Commissioner's Report for the current reporting period.

A principal function of ICAC is to identify and investigate allegations of corruption in public administration.

Another important role is to assist other agencies in dealing with allegations of misconduct and maladministration.

A third role is to initiate education and training programs.

The Commissioner is also expected to make recommendations with respect to legislative changes in appropriate cases in the light of the experience of the operations of ICAC.

The statistics relating to the Commissioner's role in investigating alleged corruption appear in his Report. Any assessment of this role is not to be determined by reference to the number of investigations or the numbers of charges laid as a result of ICAC investigations. On the other hand, it is pertinent to have regard to the manner in which those investigations are conducted and the effect which this has had on revealing corruption and misconduct which has occurred. The confidentiality provisions in the Act prevent me from giving details of matters investigated, but I repeat my confidence in the ability of ICAC to expose corrupt conduct where it exists and in this respect the organisation is having the effect for which it was created.

There is also ample evidence in the files which I have read which establishes the extensive attention which is given to instructing other agencies as to the manner in which to investigate and deal with misconduct and maladministration and also to rigorously supervise the investigation of the matters which have been referred to them for investigation.

The nature of the extensive awareness and education sessions undertaken by the Commissioner and his staff is apparent from the current Report of the Commissioner. Liaison with the media has also increased awareness of the role of ICAC.

Finally, the Commissioner has made a number of recommendations which have led to amendments to the Act designed to improve the effectiveness of the legislation.

## 24. TELECOMMUNICATIONS 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 September 2015 to 28 February 2016 and 1 March 2016 to 31 August 2016. In each of those reports I stated that ICAC has complied with the record-keeping requirements of the Commonwealth and State legislation.

## CO-COPERATION

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

30/9/2016