Report of the operation of the *Independent Commissioner Against Corruption Act 2012* pursuant to section 61 of the Act

For the period 20 December 2012 to 24 November 2017

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REPORT PURSUANT TO SECTION 61 OF THE INDEPENDENT COMMISSIONER AGAINST CORRUPTION ACT 2012 ON THE OPERATION OF THE ACT FOR THE PERIOD 20 DECEMBER 2012 TO 24 NOVEMBER 2017

INTRODUCTION

The *Independent Commissioner Against Corruption Act 2012* (the Act) received the Royal Assent on 6 December 2012. Some sections of the Act commenced on 20 December 2012, but the majority of its provisions came into operation on 1 September 2013.

Section 61 of the Act provides that the Attorney-General must, within five years after the commencement of the Act, cause a report to be prepared on the operation of the Act. A copy of the report must be laid before each House of Parliament.

The Attorney-General has appointed me to prepare this report, the first five-year report on the operation of the Act. Since the commencement of ICAC I have prepared Annual Reports on the operations of ICAC and the OPI as the reviewer of ICAC.

The Act created the office of the Independent Commissioner Against Corruption (ICAC) and the Office for Public Integrity (the OPI).

The primary objects of the Act, as stated in section 3, were to establish ICAC for the purpose of identifying and investigating corruption in public administration and the prevention or minimisation of corruption, misconduct and maladministration in public administration. The OPI was established to manage complaints concerning public administration with a view to identifying corruption, misconduct and maladministration in public administration and to ensure that complaints about public administration were dealt with by the most appropriate person or body.

The two offices commenced operations on 2 September 2013.

JURISDICTION

At the inception of ICAC, there were five anti-corruption bodies operating in Australian States. These bodies and their dates of commencement are:

The New South Wales Independent Commission Against Corruption (NSW ICAC) (1988), the Queensland Crime and Misconduct Commission (2001) now the Crime and Corruption Commission, the Western Australian Corruption and Crime Commission (2004), the Tasmanian Integrity Commission (2010) and the Victorian Independent Broad-based Anti-corruption Commission (IBAC) (2012).

Although anti-corruption investigation is common to all of these bodies and the South Australian ICAC, they differ from one another in the scope of their jurisdiction and investigative powers.

The South Australian jurisdiction is primarily confined to conduct by "public officers" as defined in the Act and is concerned with three categories of conduct:

1. Corruption in public administration.

2. Misconduct in public administration.

3. Maladministration in public administration.

An investigation by the Commissioner may also relate to a person who is not a public officer but is alleged to have bribed or corrupted a public officer.

Corruption in public administration is defined in section 5(1) of the Act which provides that it is conduct that constitutes –

(a) an offence against Part 7 Division 4 (Offences relating to public officers) of the *Criminal Law Consolidation Act 1935* which includes the following offences:

(i) bribery or corruption of public officers;

(ii) threats or reprisals against public officers;

(iii) abuse of public office;

(iv) demanding or requiring benefit on basis of public office;

(v) offences relating to appointment to public office; or

(b) an offence against the *Public Sector (Honesty and Accountability) Act 1995* or the *Public Corporations Act 1993*, or an attempt to commit such an offence; or

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

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

Maladministration in public administration is defined in section 5(4)(a) as-

(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.

Section 5(4)(b) states that maladministration in public administration includes conduct resulting from impropriety, incompetence or negligence. The conduct referred to in section 5(4) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions (section 5(4)(c)).

It was made clear in the second reading speech in Parliament that, under the bill, ICAC would perform an investigative role and would not have any capacity to lay charges or prosecute matters, this responsibility remaining with existing law enforcement and prosecuting agencies.

ACTION THAT MAY BE TAKEN

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 or another law enforcement agency for investigation (section 24(1)).

The powers of the Commissioner to investigate corruption in public administration are set out below.

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 ;

(b) in the case of a matter raising potential issues of serious or systemic maladministration or misconduct in public administration – the Commissioner may exercise the powers of an inquiry agency in dealing with the matter if satisfied that it is in the public interest to do so;

(c) the matter may be referred to a public authority and directions or

guidance may be given to the authority in respect of the matter.

THE OPI

The OPI receives and conducts an original assessment of complaints and reports about public administration from members of the public, public authorities and public officers.

The role of the OPI has been described in Annual Reports of the Commissioner and in my Annual Reports to the Attorney- General. It consists of a Manager, a senior assessment officer, a senior assessment officer reviews, other assessment officers, complaints officers and an administrative officer. The senior assessment officers, assessment officers and complaints officers are legally qualified.

Complaints and reports are received by telephone, written correspondence, online, by email or through personal interviews.

Under the original legislation, the OPI was required to undertake an assessment of complaints and reports and then make recommendations to the Commissioner as to whether and by whom those matters should be investigated. As stated below, following amendments to the Act, the OPI now has authority to refer matters raising a potential issue of misconduct or maladministration in public administration to a public authority and give directions and guidance to that authority.

The functions of the OPI have expanded significantly since the commencement of the *Police Complaints and Discipline Act 2016* on 4 September 2017 which entrusts the OPI with the oversight of complaints against the police and the oversight of investigations into police misconduct.

I should add that the OPI undertakes a significant number of functions in addition to those which I have just described.

THE POWERS OF THE COMMISSIONER TO INVESTIGATE ALLEGATIONS OF CORRUPTION IN PUBLIC ADMINISTRATION

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

The powers of the Commissioner to undertake such an investigation are extensive and include coercive measures.

The Commissioner must oversee the investigation (section 27(1)). He is assisted in this respect by trained legal officers and investigators.

Pursuant to section 29 of the Act, he may direct that an examination take place as

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 (Schedule 2 cl 3(3)).

Counsel may be appointed to assist the examiner. The examiner may order that proceedings before the examiner not be communicated or provided to any person. 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.

There are other coercive powers which are available under the Act in an investigation into corruption in public administration.

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.

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.

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 a deposit holder for the purpose of inspecting and taking copies of the records.

The notice issued pursuant to section 29A is served on a deposit holder such as a bank or friendly society or institution which holds money in accounts on behalf of other persons.

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.

Section 34 of the Act provides that 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 the 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.

THE EXERCISE BY THE COMMISSIONER OF THE POWERS OF AN INQUIRY AGENCY

As stated above, if a matter is assessed as raising a potential issue of serious or systemic misconduct or maladministration in public administration, one of the options available to the Commissioner is to exercise the powers of an inquiry agency in dealing with the matter if the Commissioner is satisfied that it is in the public interest to do so. The Commissioner usually takes into account such matters as the seriousness of the allegations, the likely complexity of the investigation and the seniority of the public officers allegedly involved. More often than not, the powers utilised are those of the South Australian Ombudsman. The Ombudsman has the powers of a commission as defined in the Royal Commissions Act 1917. These include the power to summons witnesses and take evidence on oath, affirmation or declaration

OVERSIGHT OF ICAC AND THE OPI

The Reviewer

Schedule 4 clause 2 of the Act provides for the appointment of a reviewer:

> **2—Appointment of reviewer**
>
> (1) The Attorney-General must appoint a person (the ***reviewer***)—
>
> (a) to conduct annual reviews examining the operations of the Commissioner and the Office during each financial year; and
>
> (b) to conduct reviews relating to relevant complaints received by the reviewer; and
>
> (c) to conduct other reviews at the request of the Attorney-General or the Committee; and
>
> (d) to perform other functions conferred on the reviewer by the Attorney-General or by another Act.

Schedule 4 clause 3(1) provides:

> **3—Reviews**
>
> (1) Without limiting the matters that may be the subject of a review, the reviewer—
>
> (a) must, in the case of an annual review, consider the following in relation to the financial year to which the review relates:
>
> (i) whether the powers under this Act were exercised in an appropriate manner, including—
>
> (A) whether there was any evidence of—
>
> • maladministration in public administration on the part of the Commissioner or employees of the Commissioner or of the Office; or
>
> • unreasonable delay in the conduct of investigations under this Act; or
>
> • unreasonable invasions of privacy by the Commissioner or employees of the Commissioner or of the Office; and
>
> (B) whether undue prejudice to the reputation of any person was caused;
>
> (ii) whether the practices and procedures of the Commissioner and the Office were effective and efficient;
>
> (iii) whether the operations made an appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration in public administration; and
>
> (b) may examine any particular exercises of power by the Commissioner or the Office; and
>
> (c) may make any recommendations to the Commissioner or to the Attorney-General that the reviewer thinks fit.

An important component of the annual reviews is to examine the exercise of the coercive powers in corruption investigations by the Commissioner and members of his staff. These powers are far-reaching and it is standard practice for anti-corruption legislation to provide a mechanism for their oversight. Most of the material detailing their exercise is available on the computer programs used by ICAC to store records, documents and videos compiled in the course of investigations. If I need further information, I seek the assistance of the Commissioner and staff members. Also available to me is administrative documentation such as standard operating procedures.

In the course of my Annual Review I read the transcripts of examinations of witnesses called to give evidence at hearings in order to satisfy myself that the hearings are justified and conducted in a fair manner.

Although the reviewer is given power under the Act to inspect all relevant records relating to the exercise of ICAC's powers, the original legislation did not provide any mechanism for persons affected by the exercise of the powers to make complaints concerning the manner of their exercise. This was out of step with legislation regulating anti-corruption bodies elsewhere in Australia.

In my first report, for the period 1 September 2013 to 30 June 2014, I drew attention to the desirability of providing a mechanism for such complaints to be made to me and recommended that consideration be given to amending the legislation accordingly. I pointed out that it was important to confine any such procedure to complaints about conduct in the exercise of the coercive powers and other functions and not to extend it to a review of the appropriateness or otherwise of decisions by ICAC to investigate or decline to investigate complaints or to the merits of conclusions reached or recommendations made by ICAC in relation to matters under investigation.

Amendments to the Act passed in 2016 addressed this issue. There is now provision for persons affected by the exercise of the functions and powers of ICAC to complain about an alleged abuse of power, impropriety or other misconduct on the part of the Commissioner or employees of the Commissioner or of the Office (Fourth Schedule clauses 1 and 2(1)(b)). A website explaining the role of the reviewer and providing a protected facility for making complaints is now in operation. [1]

THE CRIME AND PUBLIC INTEGRITY POLICY COMMITTEE OF THE PARLIAMENT OF SOUTH AUSTRALIA

The Crime and Public Integrity Policy Committee of the Parliament of South Australia is established under the *Parliamentary Committees Act 1991*. It reviews the operations of South Australian integrity bodies including ICAC and the OPI and reports to Parliament on matters relating to public policy in relation to these bodies. The ICAC Commissioner and I report to the committee annually.

MAJOR AMENDMENTS TO THE ICAC ACT

Unsurprisingly in the case of a new organisation created by comprehensive legislation, the experience gleaned from the practical operation of ICAC and the OPI since their inception has resulted in various suggestions for improvements in the legislation. This has culminated in two major sets of amendments, the *Independent Commissioner Against Corruption (Miscellaneous) Amendment Act 2014* (the 2014 amendments) and the *Independent Commissioner Against Corruption (Miscellaneous) Amendment Act 2016* (the 2016 amendments). Most of these amendments were recommended by the Commissioner and his staff.

THE 2014 AMENDMENTS

These changes to the Act —

• clarified the meaning of the word "publish" in its application to section 56 of the Act which restricts the publication of certain information and evidence associated with ICAC investigations. An amendment to section 4 of the Act defined "publish" to mean publish by –

(a) newspaper, radio or television; or

(b) internet or other electronic means of creating and sharing content with the public or participating in social networking with the public;
or

(c) any similar means of communication to the public.

The amended definition makes it clear that "publish" does not include communication from one person to another.

• clarified the arrangement whereby police officers who are members of South Australia Police are seconded to ICAC and the police powers which they carry over with them to their employment with ICAC.

• provided for circumstances in which the Commissioner could delegate certain of his duties. This change was specifically to allow the Commissioner to delegate his power to issue search warrants to an examiner.

• empowered the Commissioner to authorize the inspection of financial records by an investigator.

• clarified the delineation between search warrants issued by the Commissioner and those which could be issued by the Supreme Court.

The amending legislation also brought about other changes which have been of assistance in streamlining the operations of OPI and ICAC.

THE 2016 AMENDMENTS

A number of these amendments were implemented on the initiative of the government to ensure that the Commissioner was able to focus on the more serious matters by assigning more tasks to the OPI. Other amendments gave effect to recommendations made by the Commissioner in his report to the Attorney-General *Review of Legislative Schemes*.

Section 3 of the Act was amended so as to emphasise that the primary object of the Commissioner was to investigate corruption in public administration. This and

other amendments ensured that many matters raising potential issues of misconduct or maladministration in public administration could be referred to an inquiry agency or public authority enabling the Commissioner to concentrate on dealing with serious or systemic maladministration in public administration through the exercise of the powers of an inquiry agency.

In accordance with this aim, the role of the OPI was enlarged so as to empower it to refer complaints and reports to inquiry agencies, public authorities and public officers in circumstances approved by the Commissioner and to give directions or guidance to public authorities in circumstances approved by the Commissioner. Other changes were made to improve the liaison between the OPI and relevant agencies and authorities. As stated previously, prior to this amendment, the OPI was restricted to receiving and assessing complaints and reports about public administration and making recommendations as to whether and by whom they should be investigated to the Commissioner who was not bound by the recommendation.

The 2016 amendments were also aimed at improving the apparatus for issuing warrants.

Further amendments to section 42 of the Act enlarged the power of the Commissioner to publish findings and recommendations resulting from completed investigations in reports to public authorities, the Attorney-General and the Parliament. Restrictions on this power are set out in the section.

Reference has already been made to the extension of the duties of the reviewer so as to enable the reviewer to receive complaints concerning conduct by officers of ICAC or the OPI amounting to abuse of power, impropriety or other misconduct.

The 2016 amendments recast section 54 of the Act so as to clarify the concept of confidentiality in its application to ICAC matters.

Section 56A of the Act was amended so as to enable evidence or information obtained by the otherwise lawful exercise of powers in relation to suspected corruption, misconduct or maladministration public inspiration notwithstanding a jurisdictional error in the exercise of those powers.

Finally, a scheme was introduced into the legislation to regulate the management of claims of privilege over items to be seized under a search warrant.

COMPLAINTS AGAINST POLICE

The enactment of the *Police Complaints and Discipline Act 2016* and consequential amendments to the ICAC Act, have had the effect of repealing existing legislation dealing with complaints about the police. The office of Police Ombudsman has been abolished and the OPI is now responsible for the independent oversight of complaints against the police and the oversight of investigations into police misconduct.

PUBLIC HEARINGS

South Australia is the only State in which the Commissioner has no power to conduct hearings in public except for hearings in relation to the review of legislative schemes or for the purposes of conducting an evaluation of the practices, policies and procedures of inquiry agencies and public authorities with a view to advancing comprehensive and effective systems for preventing or minimising corruption, misconduct and maladministration in public administration.

In view of the controversy surrounding this issue it is appropriate that I say something about it.

The situation in other jurisdictions is best explained by reference to the relevant legislation in each State.

New South Wales

Independent Commission Against Corruption Act 1988 - section 31

Public inquiries

(1) For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry.

(2) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:

(a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
(b) the seriousness of the allegation or complaint being investigated,
(c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
(d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

Victoria

Independent Broad-based Anti-corruption Commission Act 2011 – Section 117

Examinations generally to be held in private

(1) Subject to subsection (2), an examination is not open to the public unless the IBAC considers on reasonable grounds—

(a) there are exceptional circumstances; and
(b) it is in the public interest to hold a public examination; and
(c) a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing.

(2) The IBAC must not hold an examination in public if the examination may disclose particulars likely to lead to the identification of a person who has made an assessable disclosure.

(3) However, the IBAC may hold an examination in public if the information that may be disclosed is information to which section 53(2)(a), (c) or (d) of the Protected Disclosure Act 2012 applies.

(4) For the purposes of subsection (1)(b), the factors the IBAC may take into account in determining whether or not it is in the public interest to hold a public examination include, but are not limited to—

(a) whether the corrupt conduct or the police personnel conduct being investigated is related to an individual and was an isolated incident or systemic in nature;

(b) the benefit of exposing to the public, and making it aware of, corrupt conduct or police personnel misconduct;

(c) in the case of police personnel conduct investigations, the seriousness of the matter being investigated.

(5) Not less than 7 days before a public examination is held, the IBAC must—

(a) inform the Victorian Inspectorate that the IBAC intends to hold the public examination; and

(b) provide a written report to the Victorian Inspectorate giving the reasons the IBAC decided to hold a public examination in accordance with subsection (1).

(6) A judicial officer is not required to attend a public examination but may consent to doing so.

Queensland

Crime and Corruption Act 2001 - section 177

Whether hearings are to be open or closed

(1) Generally, a hearing is not open to the public.

(2) However—

(a) for a hearing for a crime investigation, the commission may open the hearing to the public (public hearing) if it—

(i) considers opening the hearing will make the investigation to which the hearing relates more effective and would not be unfair to a person or contrary to the public interest; and
(ii) approves that the hearing be a public hearing; or

(b) for a witness protection function hearing, the commission may open the hearing to the public if it—

(i) considers opening the hearing will make the hearing more effective and—

(A) would not be unfair to a person or contrary to the public interest; and

(B) would not threaten the security of a protected person or the integrity of the witness protection program or other witness protection activities of the commission; and

(ii) approves that the hearing be a public hearing; or

(c) for a hearing other than a hearing mentioned in paragraph (a) or (b), the commission may open the hearing to the public if it—

(i) considers closing the hearing to the public would be unfair to a person or contrary to the public interest; and
(ii) approves that the hearing be a public hearing.

(3) A decision about whether a hearing should be a public hearing must not be delegated.

(4) If the commission decides to open a hearing to the public, the presiding officer for the hearing may close the hearing for a particular purpose.

Western Australia

Corruption, Crime and Misconduct Act 2003 – section 140

Public examination, when allowed

(1) This section does not apply to an organised crime examination.

(2) The Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.

(3) A decision to open an examination to the public may be made at any time before or during the examination.

(4) If the Commission decides to open an examination to the public, the Commission may close the examination for a particular purpose.

The question as to whether anti-corruption bodies should be empowered to hold public hearings has proved to be a controversial issue which has been the subject of continuous debate since the introduction of such bodies in Australia.

The issue has been the subject of comment in several reviews of anti-corruption legislation interstate.

An extensive review of the New South Wales Act has been undertaken by a former Chief Justice of the High Court, the Honourable Murray Gleeson AC QC and Bruce McClintock SC, who is now the Inspector of ICAC (NSW) [2]. This review adopted the comments made by Mr McClintock in a report of an earlier review in which he said [3]:

> I do not agree, as some have argued, that public hearings are unnecessary or that the power to hold them should be removed. Quite the contrary, in my opinion, public investigations are indispensable to the proper functioning of ICAC. This is not only for the purpose of exposing reasons why findings are made, but also to vindicate the reputations of people, if that is appropriate, who have been damaged by allegations of corruption that have not been substantiated. Moreover, if issues of credibility arise, it is, generally speaking, preferable that those issues are publicly determined.

[2] Murray Gleeson and Bruce McClintock SC, *Independent Panel-Review of the Jurisdiction of the Independent Commission Against Corruption: Report* (30 July 2015).
[3] *Independent Review of the Independent Commission against Corruption Act 1988,* Final Report (2005), 6.5.25).

The authors of the 2015 Review commented on these remarks in their report:

> 9.4.6 The views expressed [in the McClintock Report] are the views of the current Panel. In particular, the Panel accepts that public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes. The Panel is not attracted to the idea that the powers of the ICAC should all be exercised in private.

The former High Court judge the Hon Ian Callinan AC QC and Professor Nicholas Aroney, conducted a review of the *Crime and Misconduct Act 2001 (Qld)* and reported on 28 March 2013. Their summary of the various State approaches to public hearings is instructive [4]. They stated:

> *Public hearings and private examinations*
>
> All the State anticorruption agencies possess wide-ranging inquisitorial powers when investigating allegations of misconduct or corruption, including power to compel witnesses to give evidence on oath and to produce documents, and to do so either in private interviews or public hearings. When first enacted, the New South Wales ICAC Act provided that ICAC hearings would ordinarily be held in public, unless ICAC directed otherwise. Subsequent amendments have enabled ICAC more readily to hold hearings in private, and the frequency of the use of public hearings has declined. Under the current legislative scheme in New South Wales, when deciding whether to proceed by way of private "examination" or "public inquiry", ICAC is now required only to consider whether the use of either of these procedures would be in the public interest, bearing in mind, in the case of public inquiries:
>
> (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
>
> (b) the seriousness of the allegation or complaint being investigated,
>
> (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
>
> (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.
>
> By contrast, hearings conducted by the CMC [5] are ordinarily (and we think appropriately so) not open to the public unless the CMC decides otherwise and in so deciding in relation to misconduct inquiries the CMC is required to consider whether opening the hearing to the public would be unfair to a person or contrary to the public interest. We note that in 2011-2012, the CMC reported holding investigative hearings over a total of 145 days. During the same period ICAC undertook a total of I0 public inquiries over 70 days of hearings, compared with 135 compulsory examinations over 59 days.
>
> Like the CMC and unlike ICAC hearings undertaken by the Western Australian CCC are ordinarily not open to the public unless, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, the CCC considers it is in the public interest to open the hearing to the public. During 2010-2011, the CCC held a total of II hearings of 52 days, four of which were in public over 29 days, seven of which were held in private over 23 days; during 2011-2012, it held a total of seven hearings of 21 days, all of which were held in private.
>
> The IBAC scheme in Victoria has a similar approach to Queensland's and Western

[4] Callinan and Aroney, Report of the Independent Advisory Panel, *Review of the Crime and Misconduct Act and Related Matters,* 28 March 2013 at 66.
[5] Crime and Misconduct Commission Queensland

> Australia's. In Victoria, examinations are not to be held in public unless IBAC considers on reasonable grounds:
>
> (a) there are exceptional circumstances; and
>
> (b) it is in the public interest to hold a public examination;
>
> and
>
> (c) a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing.
>
> In considering whether or not it is in the public interest to hold a public examination, IBAC may take into account:
>
> (a) whether the corrupt conduct or the police personnel conduct being investigated is related to an individual and was an isolated incident or systemic in nature;
>
> (b) the benefit of exposing to the public, and making it aware of, corrupt conduct or police personnel misconduct;
>
> (c) in the case of police personnel conduct investigations, the seriousness of the matter being investigated.

The panel did not recommend any changes to the Queensland provisions relating to public hearings.

In its submission to the 7th PCMC's (Parliamentary Crime and Misconduct Committee) Review, Queensland the CMC submitted:

> The hearings power is an important investigative tool which is used to gather information. The CMC uses its hearings power judiciously and in accordance with appropriate checks and balances. In particular, the power to conduct a hearing in public may only occur in relation to a misconduct investigation and is a decision made by the Commission when satisfied that it is not in the public interest to close the hearing.

SUBMISSIONS TO THE SENATE SELECT COMMITTEE INQUIRY ON THE ESTABLISHMENT OF A NATIONAL INTEGRITY COMMISSION

The Gilbert Tobin Centre of Public Law at the University of New South Wales in its submission to the Select Committee on the establishment of a National Integrity Commission [6] warned of the problems associated with public hearings into alleged corruption and argued that public hearings are not justified in the ordinary case. However, the submission continued:

> An alternative view within our group is that, used prudently and relatively sparingly, public hearings are a valuable tool in exposing for public attention the existence of serious wrongdoing within politics or public administration, and for deterring future conduct of that kind. The conventional criminal justice system carries out the lion's share of this role in society, through trials conducted in public with particular legal safeguards in place for the accused. According to this alternative view, however, we cannot rely exclusively on the conventional court process to address reasonable public

[6] Gilbert Tobin Submission to Select Committee on the establishment of a National Integrity Commission 20 April 2016

expectations about the investigation and exposure of corrupt conduct, and the risks of the public confusing one process for the other are not as high as others suggest. Even within this view, the power to hold public hearings should be statutorily circumscribed to matters where the Commissioner determines it is in the public interest to do so, such as is required by s 31 of the *Independent Commission Against Corruption Act 1988* (NSW).

The Law Council of Australia also commented on public hearings in its submission to the Select Committee on the establishment of a National Integrity Commission (NIC). The submission argued as follows: [7]

Public Hearings

47. One issue to be assessed in deciding whether to establish a standing commission into corruption is whether to empower the commission to conduct public hearings. This decision is not uncontroversial. The NSW ICAC has the power to conduct public hearings, as does Victoria's IBAC; however, not all Australian corruption commissions are so empowered. For example, South Australia's ICAC conducts all examinations in private.

48. The NSW ICAC must consider various factors in determining whether or not it is in the public interest to conduct a public inquiry, including:

- the benefit of exposing corrupt conduct to the public;
- the seriousness of the allegation or complaint being investigated;
- any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry); and
- whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

49. Key advantages associated with the conduct of public hearings include transparency, instilling public confidence in dealing with corruption, and deterrence to engaging in corruption.

50. Conversely, public hearings can significantly impact on the rights of individual persons appearing before the ICAC. Appearances before a corruption inquiry may generate substantial media interest, and taint a witness's reputation. These issues might be compounded by factors including:

- usually only part of an investigation is conducted in public, which may distort the public's understanding of events;
- persons of interest ordinarily have no right to subpoena witnesses or documents;
- members of the public may fail to appreciate the distinction between a commission of inquiry, often presided over by a former judge, and a court; and
- inquiries often involve multiple persons of interest such that decisions whether to conduct hearings in public are made globally and not with the interests of an individual in mind.

51. If the implementation of a NIC includes the power to hold public hearings it is important that there be an appropriate balance between transparency and the

[7] Law Council of Australia submission to the Select Committee on the Establishment of a National Integrity Commission Submission 20 April 2016,18)

abrogation of rights and reputation of individuals appearing before such a Commission.

52. The Law Council considers that the approach in Queensland which enables the CCC to conduct private hearings should be the default model adopted in proceedings before a federal ACA.

ICAC (NSW) made the following submission to the Select Committee: [8]

> Public inquiries are a significant mechanism for exposing truth and encouraging high standards of behaviour in public officials and others. Public inquiries provide transparency in the way in which the Commission operates and promotes public confidence in those operations . They may also result in people with relevant information becoming aware of the Commission's interest in a particular matter and coming forward with that information. A public inquiry may also be used to "clear the air" where public attention has been drawn to significant allegations which, upon investigation, are found to be baseless.

DISCUSSION

The New South Wales ICAC has conducted more public hearings than any other Australian anti-corruption body. In part, this has been due to the legislative scheme which previously regulated such hearings. The provisions regulating hearings in New South Wales has been amended on a number of occasions. In the original Act, which came into operation in 1988, section 31 provided that a hearing before the Commission was to be held in public, unless the Commission directed that it be heard in private.

The section was amended by the *Independent Commission Against Corruption (Amendment) Act 1991* to provide that a hearing may be held in public or in private, or partly in public and partly in private, as decided by the Commission. In reaching these decisions, the Commission was obliged to have regard to any matters which it considered to be related to the public interest.

Section 31 in its present form is set out above.

Over the years the number of public hearings in New South Wales and the manner in which they were conducted have attracted considerable criticism. There was particular concern over extensive publicity given to matters in which corruption charges were subsequently laid and the consequent potential impact on the fair trial of persons concerned.

I mention this because in the wake of the publicity given to these hearings it is not difficult to understand why a more conservative approach was taken when drafting the South Australian legislation.

However, in the light of the experience of operating under the legislation in this State, the complete bar on public hearings in all cases has been questioned.

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[8] ICAC Submission to the Senate Select Committee on the Establishment of a National Integrity Commission April 2015,17

It is important to note that the discussion around the advisability or otherwise of public hearings elsewhere has taken place in the context of hearings in relation to corruption. In New South Wales, for example, there is power to conduct public enquiries in relation to corrupt conduct or conduct which is connected with corrupt conduct or liable to encourage corrupt conduct.

By way of contrast, the jurisdiction of ICAC in South Australia, is divided into the categories of corruption in public administration, misconduct in public administration and maladministration in public administration.

In my view, there are good reasons for maintaining the requirement that inquiries into corruption in public administration be held in private. If the evidence collected warrants referral to the Director of Public Prosecutions and a decision is made to launch a prosecution, the facts of the matter will be made public as part of the prosecution process. Nevertheless it is not difficult to appreciate that the often sensational publicity surrounding public hearings can prejudice a subsequent criminal trial.

On the other hand, there may well be investigations into misconduct in public administration or maladministration in public administration which would justify a public hearing of all or some of the evidence.

In the event of the Commissioner being given a discretion to hold hearings in public, one would still expect that the vast majority of examinations would be heard in private.

Unlike investigations into corruption in public administration, it is open to the Commissioner in investigations into maladministration or misconduct in public administration to make findings in relation to public officers and practices. In some cases, it would be appropriate if the process leading to such findings took place at a public hearing. Apart from acknowledging the vested interest of the public in evidence given at such an inquiry and being able to observe the process, the inquiry itself may well benefit by receiving information from the public arising from an informed understanding of what it is that the Commissioner is enquiring into. I am also of the view that a better understanding of the work of the Commissioner and added confidence in the institution would result.

I recommend that the Act be amended so as to provide that the default position in the case of hearings into misconduct or maladministration in public administration, is that they be held in private. However, it is my view that the Commissioner should be given a discretion to hold a hearing or part of a hearing in public.

I think the legislation should set out the grounds upon which the discretion is to be exercised. It is significant that in Victoria, Queensland, Western Australia and now New South Wales the discretion whether to order a public hearing is to be exercised by reference to criteria which is set out in the relevant legislation.

In my view, the Act should specifically address the issue of public hearings in relation to those cases of alleged misconduct or maladministration which the Commissioner decides to investigate himself. I am not in favour of a provision which simply states that the Commissioner is to have the powers of a Royal Commission. I recommend an amendment which would make it clear that in

matters in which there is to be a hearing, the default position is that it is to be in private unless the Commissioner orders a public hearing and that, in making that decision, regard is to be had to matters specified in the legislation. The Victorian legislation provides some guidance for the matters which are relevant for this purpose. They include the requirement that a public hearing should only be held in exceptional circumstances where it is in the interests of the public to hold a public examination and where such an examination can be held without unreasonable damage to a person's reputation

EDUCATION AND PREVENTION

Section 3 (1) (a) (ii) provides that one of the primary objects of the Act is –

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

A central feature of the requirement to keep the public informed of the existence and operations of ICAC is through the website which the Commissioner is required to maintain. In addition to that, it is common for the Commissioner to provide information through public statements and media releases. There is also a dedicated program of education through information sessions to various groups throughout the community. The statistics relevant to educational activities are set out in the following table:

FACE-TO-FACE EDUCATION SESSIONS				
	2013/2014	2014/2015	2015/2016	2016/2017
	116	96	76	87
Attendees	6,200	4,300	2,900	3,019

MAKING A DIFFERENCE TO THE PREVENTION OR MINIMISATION OF CORRUPTION, MISCONDUCT AND MALADMINISTRATION IN PUBLIC ADMINISTRATION

When conducting the Annual Review of the operations of the Commission and the OPI, the reviewer is required to consider whether the operations made an appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration in public administration. The nature of this assessment has been discussed from time to time at the hearings of the Parliamentary Crime and Public Integrity Policy Committee of the Parliament of South Australia.

In my Annual Report for the period 1 July 2016 to 30 June 2017, I suggested a possible approach as follows:

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

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

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

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

This was the point made by the Hon Murray Gleeson AC and Bruce McClintock SC in their report on ICAC (NSW) [9] when they quoted with approval an earlier report [10] which stated:

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

The Select Committee on the Establishment of a National Integrity Commission makes the following comments [11]:

> 3.91 The expenditure of public money always requires justification. Any expansion of public services should be accompanied by expectations and measures of success. In a polity with no corruption, there would be no need to take any anti-corruption measures. In the absence of anti-corruption measures it is doubtful that any corruption would be uncovered, creating the impression of there being no corruption; even if this is only because there is no-one looking.
>
> 3.92 Careful thought needs to be given to measuring success in the case of an anticorruption agency. An anti-corruption agency that uncovers no corruption may be any of; extremely successful, incompetent, severely under resourced, or operating in a corruption free environment. The response to this problem in Australia has typically been to rely on qualitative measures of trust in government and perceptions of corruption. As the former NSW Premier Nick Greiner argued:
>
> > …it would also be crass and naïve to measure the success of the independent commission by how many convictions it gets or how much corruption it uncovers. The simple fact is that the measure of its success will be the enhancement of integrity and, most importantly, of community confidence in public administration in this State.

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[9] *Independent Panel-Review of the Jurisdiction of the Independent Commission Against Corruption,* 30 July 2015, 75.

[10] Bruce McClintock*, Independent Review of the Independent Commission Against Corruption Act 1988, Final Report* (2005) 3.4.22.

[11] *Select Committee Interim Report (May 2016).*

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

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

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

OPERATIONS OF ICAC

I have reported on various aspects of the operations of ICAC and the OPI in my Annual Reports. The extent of the investigational operations since the commencement of ICAC and the OPI is evident from the following statistics.

COMPLAINTS AND REPORTS				
	2013/2014	**2014/2015**	**2015/2016**	**2016/2017**
Complaints	**462**	**453**	**463**	**428**
Reports	**461**	**474**	**600**	**772**
Total	**923**	**927**	**1,063**	**1,200**
Giving rise to	**2,276 Issues**	**1,525 Issues**	**1,693 Issues**	**1,797 Issues**

CORRUPTION IN PUBLIC ADMINISTRATION **Corruption Matters Referred to SAPOL, Police Ombudsman or another Law Enforcement Agency**			
2013/2014	**2014/2015**	**2015/2016**	**2016/2017**
82	**74**	**79**	**114**
Corruption Investigations commenced by ICAC (including joint investigations with SAPOL)			
2013/2014	**2014/2015**	**2015/2016**	**2016/2017**

71	**82**	**32**	**34**

MISCONDUCT OR MALADMINISTRATION IN PUBLIC ADMINISTRATION **Matters Referred to Inquiry Agency**			
2013/2014	**2014/2015**	**2015/2016**	**2016/2017**
65	**89**	**82**	**90**
Matters Referred to a Public Authority			
2013/2014	**2014/2015**	**2015/2016**	**2016/2017**
52	**120**	**187**	**347**
Matters where Commissioner Exercised Powers of Inquiry Agency			
2013/2014	**2014/2015**	**2015/2016**	**2016/2017**
22	**12**	**2**	**3**

NO FURTHER ACTION TAKEN				
	2013/2014	**2014/2015**	**2015/2016**	**2016/2017**
Complaints	**327**	**342**	**326**	**350**
Reports	**145**	**186**	**201**	**310**

As stated in my Annual Reports, it is apparent that the OPI is well administered and efficient. No doubt the volume and difficulty of performing the “shop front” tasks involved has led to some mistakes, but I have not detected any significant problems in this area.

I pay close regard to the exercise of the investigational powers of ICAC and I am satisfied that there is a consciousness of the importance of observing correct procedures and that the system which has been put in place is calculated to instill proper practice in this regard.

The Commissioner keeps a close eye on the task of recommending legislative changes when required and this has resulted in periodic amendments to the Act to ensure that it has the capacity to meet its major purposes.

The Hon Kevin Duggan AM QC
Reviewer of ICAC
November 2017