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31 August 2016

The Hon. Nick Goiran, MLC
Chairman
Joint Standing Committee on the Corruption and Crime Commission
Legislative Assembly Committee Office
Parliament of Western Australia
Level 1, 11 Harvest Terrace
WEST PERTH WA 6005



Dear Mr Goiran

Inquiry into the efficiency and timeliness of the current appointment process for Commissioners and Parliamentary Inspectors of the CCC

Thank you for your letter of 18 August 2016 inquiring in relation to the *Independent Commissioner Against Corruption Act 2012 (SA)* ('ICAC Act') and its operation in relation to investigation and prosecution.

The ICAC Act empowers investigators employed by the Commissioner to arrest persons without warrants for obstruction.

Section 33 provides:

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).*

You will see in s 33(2) that an investigator is empowered to arrest a person without warrant if the investigator reasonably suspects that the person has committed, is committing, or is about to commit one of the offences mentioned in s 33(1) and the other matters in s 33(2) are satisfied.

You will see in s 33(3) that the investigator must immediately deliver the person who has been arrested into the custody of a Police Officer.

An investigator who is a secondee from South Australia Police ('SAPOL') (which is permitted by s 14(4) of the ICAC Act) is entitled to continue to exercise all powers vested in a Police Officer.

Section 14(4a) provides:

- (4a) *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 South Australia Police or constable in the exercise of functions and powers under this Act during the period of secondment (and section 67(3) of the Police Act 1998 does not apply in relation to the secondment).*

The effect of s 14(4a) is that a seconded Police Officer can arrest a person who the Police Officer reasonably suspects has committed or is about to commit an offence of any kind including the offence of obstruction in s 33 and can exercise the power to arrest a person for the substantive offence in addition to the offence of obstruction.

'Corruption' is defined in the ICAC Act s 5, which provides:

- (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.*
- (2) *If the Commissioner suspects that an offence that is not corruption in public administration (an **incidental offence**) may be directly or indirectly connected with, or may be a part of, a course of activity involving the commission of corruption in public administration (whether or not the Commissioner has identified the nature of that corruption), then the incidental offence is, for so long only as the Commissioner so suspects, taken for the purposes of this Act to be corruption in public administration.*

You will see that the effect of s 5 is that a person cannot engage in corruption for the purpose of the ICAC Act unless that person commits a criminal offence.

It follows therefore that when the Commissioner investigates corruption the Commissioner is investigating the commission of a criminal offence.

The Commissioner has no power to prosecute any person who is arrested for an offence that constitutes corruption. The Commissioner's function is to provide the evidence that has been obtained in the investigation either to a law enforcement agency for investigation and prosecution or to the Director of Public Prosecutions ('DPP') for prosecution.

A 'law enforcement agency' is defined in s 4:

Law enforcement agency means—

- (a) *the Australian Crime Commission; or*
- (b) *the Australian Federal Police; or*
- (c) *the Australian Commission for Law Enforcement Integrity; or*
- (d) *South Australia Police; or*
- (e) *the Police Ombudsman; or*
- (f) *the police force of another State or a Territory of the Commonwealth; or*
- (g) *in relation to New South Wales—the Crime Commission, the Independent Commission Against Corruption, the Inspector of the Independent Commission Against Corruption, the Police Integrity Commission or the Inspector of the Police Integrity Commission; or*
- (h) *in relation to Queensland—the Crime and Misconduct Commission; or*
- (i) *in relation to Tasmania—the Integrity Commission; or*

- (j) *in relation to Victoria—the Office of Police Integrity, the Independent Broad-based Anti-corruption Commission or the Independent Broad-based Anti-corruption Commission Committee; or*
- (k) *in relation to Western Australia—the Corruption and Crime Commission or the Parliamentary Inspector of the Corruption and Crime Commission; or*
- (l) *a Royal Commission of the Commonwealth, the State or another State or a Territory of the Commonwealth; or*
- (m) *a person or body declared by regulation to be a law enforcement agency.*

The ICAC Act contemplates that the Commissioner could refer a matter for prosecution for a summary offence to SAPOL but as a matter of practice in South Australia, with the agreement of the DPP, all matters for prosecution are referred to the DPP.

The effect of the ICAC Act is that the Commissioner's functions insofar as investigations into corruption are concerned are discharged when a matter is either referred to a law enforcement agency for further investigation and prosecution or to the DPP for prosecution.

There are offences that may be committed by persons under the ICAC Act itself. An investigation into offences of that kind will generally be made by SAPOL and must be made by SAPOL if the person of interest is not a public officer. If the person is a public officer and the offence occurred whilst the public officer was carrying out his or her public duties the Commissioner could investigate the conduct. But as I say, generally, SAPOL would investigate the matter.

Again, the Commissioner has no power to prosecute anyone for the commission of an offence under the ICAC Act.

The protocol that has been agreed with the DPP is that if an offence against the ICAC Act is identified then the DPP will decide whether a prosecution should be launched.

The ICAC Act contemplates that the Commissioner will identify and investigate corruption in public administration and prevent or minimise misconduct and maladministration in public administration. As I have said, when the Commissioner has completed his or her investigation and provided the evidence gathered during the investigation to the DPP, his or her functions are discharged.

I support the model that has been adopted in South Australia.

I think it appropriate that the investigator (the Commissioner) is not empowered to prosecute the person or persons who have been investigated.

The requirement to provide the evidence to a law enforcement agency or the DPP provides the necessary detachment from the investigation process before a prosecution is launched.

The prosecution of a person for corruption should be initiated, in my opinion, by an agency that has not had the responsibility for the investigation of the alleged offence.

I hope that addresses the questions raised in your letter of 18 August 2016.

Yours sincerely



The Hon. Bruce Lander QC

INDEPENDENT COMMISSIONER AGAINST CORRUPTION