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## The ICAC Act in South Australia — towards public hearings?

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In May 2018, the Independent Commissioner Against Corruption (Investigation Powers) Amendment Bill 2018 (SA) (the First Bill), was introduced in parliament in South Australia. The First Bill was intended to give effect to an election “promise” from the Liberal Party, to reform certain powers and functions under the Independent Commissioner Against Corruption Act 2012 (SA) (the ICAC Act). Indeed, it was touted as one of the issues the new government intended to give effect to in its first 100 days in office, particularly following the Oakden and Gillman scandals that had plagued the outgoing Labor Government.

Whilst the government proposed broad reform, one of the key amendments was to give the Independent Commissioner Against Corruption (ICAC) discretionary power to hold public hearings in relation to investigations pertaining to serious or systematic maladministration or misconduct in public administration. This is a substantial proposed amendment, as the existing regime requires that all investigations be conducted in private.

On 26 July 2018, the First Bill was referred to the Crime and Public Integrity Committee (the Committee) for its consideration, and subsequent report to parliament.

Following receipt of the Committee’s report, inclusive of eight recommendations, the First Bill was redrafted and reintroduced into the Legislative Council on 15 November 2018, this time, as the Independent Commissioner Against Corruption (Investigation Powers) No 2 Amendment Bill 2018 (SA) (the Second Bill).

Following its introduction to parliament, the Second Bill was adjourned, and has only recently been the subject of further debate in parliament’s first session in 2019, which commenced Tuesday, 12 February 2019.

### Proposed reform

The Second Bill seeks to adopt seven of the eight recommendations made by the Committee (either in part or in full), and includes, amongst other things, the following set out below.

#### *Powers of an inquiry agency*

Currently, ss 7 and 24 of the ICAC Act variously provide that the ICAC will have the ability to “exercise

the powers of an inquiry agency in dealing with” serious or systemic maladministration and/or misconduct in public administration.

An “inquiry agency” is defined by the ICAC Act as the Ombudsman, or otherwise a person declared by regulation to be an inquiry agency. No other person has been declared an inquiry agency under the Independent Commissioner Against Corruption Regulations 2013 (SA) (the Regulations).

However, cll 4 and 5 of the Second Bill propose to remove the ICAC’s reliance on “the powers of an inquiry agency”, enabling the ICAC to exercise original powers, as proposed to be provided for under the ICAC Act.

That is, the Second Bill seeks to substitute the existing s 36A, which relates to the ICAC’s exercise of powers of an inquiry agency, with new ss 36A–36C which refer to a new Sch 3A, titled “Investigations into misconduct and maladministration”.

Importantly, this amendment reflects the ICAC’s earlier recommendations to amend the ICAC Act to provide clarity regarding the ICAC’s power to investigate (and report on those investigations) other than by reference to the Ombudsman Act 1972 (SA).

Indeed, in his report *Oakden: A Shameful Chapter in South Australia’s History*<sup>1</sup> (the Oakden Report), ICAC specifically recognised that “the current regime creates some legislative tensions and it is a clumsy and overly complicated way of empowering the ICAC to investigate serious or systemic misconduct or maladministration.”<sup>2</sup>

It therefore comes as no surprise that the government is seeking to remove this requirement, considering the ICAC’s comments on the same.

#### *Proposed Sch 3A*

The insertion of Sch 3A into the ICAC Act is the most significant amendment, insofar as it seeks to allow the ICAC to conduct public inquiries into allegations of misconduct and/or maladministration in public administration, in circumstances where the ICAC is “satisfied that it is in the public interest to do so”.<sup>3</sup>

That is, there is a “public interest test” that must be satisfied prior to a public inquiry being held, together

with certain procedural steps, including a requirement for the ICAC to give public notice of any proposed public inquiry at least 21 days prior to its commencement, outlining the basis upon which the ICAC “is satisfied that it is in the public interest to conduct the public inquiry.”<sup>4</sup>

Section 2(5) of Sch 3A retains a discretion in the ICAC to continue to hold hearings closed to the public “unless the Commissioner makes a determination in accordance with this clause, an investigation into misconduct or maladministration in public administration must be conducted in private.”

Accordingly, an investigation will be conducted in private, unless the ICAC takes active steps to declare that hearings are to be held in public.

Notwithstanding this, proposed new s 36B of the ICAC Act contains provisions for a party to make application to the Supreme Court, for the purposes of determining whether the ICAC has jurisdiction to conduct a public inquiry, or whether a decision to conduct a public inquiry has been properly made. It has been said that this provision was inserted to provide additional “checks and balances”, particularly in circumstances where an investigation is proposed to be held in public.

Section 3 of Sch 3A permits the person heading an investigation (being either the ICAC, or someone appointed by the ICAC) to make an order for the purposes of preventing “undue prejudice or undue hardship to any person, or otherwise in the public interest”. Such an order may include directions that certain evidence be received privately, rather than by way of a public inquiry, and prevents “the publication or disclosure of specified evidence, or of any account or report of specified evidence, either absolutely or subject to conditions.”<sup>5</sup>

Proposed new s 36C of the ICAC Act then provides for applications to be made to the Supreme Court in circumstances where the person heading the investigation has *refused* to make an order forbidding publication or disclosure of a matter under s 3(1). The insertion of this section gives effect to procedural fairness obligations to persons involved in an investigation.

In addition to the above, Sch 3A also includes (but is not limited to) provisions relating to the following matters:

- The ICAC (or person appointed by the ICAC to undertake the investigation) is not required to observe the rules of procedure and evidence that apply in legal proceedings before a court or tribunal.<sup>6</sup>
- Persons participating in investigations (and particularly in public hearings) are entitled to legal representation throughout the same.<sup>7</sup>

- Persons participating in investigations (and particularly in public hearings) are afforded the privilege against self-incrimination,<sup>8</sup> and are similarly permitted to claim the protections afforded under the principles of legal professional privilege and public interest immunity.<sup>9</sup>
- Statements made by persons participating in investigations under the ICAC Act are not admissible in evidence against a person in any civil or criminal proceedings against that person.<sup>10</sup> That is, evidence compelled to be given under an ICAC Act investigation cannot later be used against *that person* in separate proceedings.

### *Previous ss 26–27 and 33–36 of the ICAC Act*

Sections 26–27 and 33–36 of the existing ICAC Act (being sections relating to action in relation to corruption) are proposed to be repealed under the Second Bill and (largely) reproduced in new ss 39A–39F.

The most notable difference in this “reshuffle” of the provisions is that the standard operating procedures (existing s 26 and proposed new s 39A) and the provision relation to the management of investigations (existing s 27, proposed new s 39B) will now apply to *all investigations* (being maladministration, misconduct and corruption) whereas they previously only applied to corruption investigations.

### **Opposition Party amendments**

In advance of the first session of parliament for 2019, the South Australian Shadow Attorney-General, the Hon Kyam Maher MLC, was reported<sup>11</sup> as stating that the Labor Party intended to introduce further amendments, seeking to ensure that the principles of procedural fairness and the rules of evidence would apply to public hearings conducted by the ICAC, to ensure the same protections are afforded to persons involved in public hearings, as is afforded to defendants in a criminal trial.

It was also reported that the Labor Party propose to include an amendment that would see the Committee undertake a further inquiry into the operation of the ICAC Act, with a further report to be returned to the parliament by July 2020.

On 12 February 2019, Maher confirmed these reports in parliament, stating the proposed amendments would include, amongst other things:

... the rules of evidence applying to hearings; a witness being entitled to call other witnesses and make submissions; a witness having a right to refuse to participate in an investigation; a person having a right to cross-examine witnesses; that the summons must set out why a person is being summoned; if a public hearing is to be held, that the

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commissioner must head that public inquiry; that an examiner appointed by the commission must be a legal practitioner; and that the commissioner must decide whether or not to make an inquiry public before witnesses have been examined.<sup>12</sup>

Whilst the Opposition's amendments had yet to be moved in the Legislative Council at the time of writing, it is anticipated this will occur shortly, and the same will be the subject of robust debate.

## The ICAC's position

Notwithstanding the seemingly bipartisan support for amendments to the ICAC Act (albeit the extent of which remains the subject of debate), it appears that the ICAC does not support all the amendments proposed and considers in some circumstances that they will make the legislation unworkable.

It has been reported in the media that the ICAC considers the Second Bill, in its current form (and without the additional "safeguards" mooted by the Labor Party), does little to facilitate public hearings, noting that it provides for an "appeal" process to the Supreme Court of South Australia (under proposed s 36B).

The ICAC has been reported as stating that:

... what will happen in fact is that the lawyers will move in, they will appeal that process... and that will stop the investigation for a period of time.

Lawyers will use this and parties will use this to slow down and stop investigations [and] in most cases, the risk of carrying out an investigation using a public hearing will be too great, because the investigation itself will be frustrated by the fact of the appeal process[.]

I think it is a very bad provision.<sup>13</sup>

## Conclusion

The amendments proposed by the Second Bill will unequivocally change the landscape of the South Australian public integrity framework, enabling the ICAC to introduce public visibility into investigations that the ICAC considers warrants the same.

For many, this is heralded an important reform for South Australia, noting commentary surrounding controversial investigations in recent years, such as those pertaining to the Oakden facility and the Gillman land deal, that many consider would have benefitted from being held in the public domain.

However, noting the ICAC's concerns in relation to the "appeals" process (as well as any other issues raised in submissions on the proposed reforms), the question remains as to whether the proposed amendments can, practically, be given effect.



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## Footnotes

1. ICAC *Oakden: A Shameful Chapter in South Australia's History* (28 February 2018) [https://icac.sa.gov.au/system/files/ICAC\\_Report\\_Oakden.pdf](https://icac.sa.gov.au/system/files/ICAC_Report_Oakden.pdf). For an overview, see T Riddle and T Johns "The power to report — Oakden: A Shameful Chapter in South Australia's History" (2018) 17(4) *LGovR* 50.
2. Above, at 31.
3. Independent Commissioner Against Corruption (Investigation Powers) No 2 Amendment Bill, proposed Sch 3A s 2(1).
4. Above, proposed Sch 3A s 2(3)(c).
5. Above n 3, proposed Sch 3A s 3(c).
6. Above n 3, proposed Sch 3A s 4.
7. Above n 3, proposed Sch 3A s 6.
8. Above n 3, proposed Sch 3A s 7.
9. Above n 3, proposed Sch 3A s 8.
10. Above n 3, proposed Sch 3A s 9.
11. T Richardson "ICAC set for review as Labor takes aim at open hearings legislation" *InDaily* 8 February 2019 <https://indaily.com.au/news/local/2019/02/08/icac-set-for-review-as-labor-takes-aim-at-open-hearings-legislation/>.
12. South Australia *Hansard* Legislative Council 12 February 2019 Second Reading speech at 2564.
13. T Richardson "ICAC at odds with both parties on open hearings" *InDaily* 12 February 2019 <https://indaily.com.au/news/local/2019/02/12/icac-at-odds-with-both-parties-on-open-hearings/>.