

25 March 2011

The Honourable John Rau MP
Attorney-General
DX 336
ADELAIDE SA

Dear Mr Attorney

An Integrated Model: A review of the Public Integrity institutions in South Australia and an integrated model for the future

We refer to your letter of 25 November 2010 advising of the release by you and the Premier of the Discussion Paper "*An Integrated Model: A review of the Public Integrity institutions in South Australia and an integrated model for the future*", and inviting submissions thereon.

The Society and Bar Association established a joint group to review the Discussion Paper. The members of the group are Mr Jonathan Wells QC, Mr Malcolm Blue QC, Ms Deslie Billich, Ms Jan Martin and Mr Ralph Bönig.

The Society and Bar Association make the following comments on the Discussion Paper.

We commend the Government for addressing this issue by way of this Discussion Paper. The proposed model provides a blueprint and foreshadows greater detail and we look forward to the opportunity to comment further on the next stage of its development.

We support and encourage the Government's proposal to develop a model specifically and culturally relevant to the South Australian community.

At this stage we intend to comment only on those aspects of the discussion paper that bear upon the essential features of the proposed model; more detailed comment is best left for the next stage.

- 1 Scope of jurisdiction of Public Integrity Commissioner:** Paragraphs 6.0.4, 6.0.5 (and 1.2.4, 1.4., 4.0.1 and 5.1.5); Recommendation 28 (and 24 and 26)

These paragraphs and recommendations might be read as suggesting that the scope of the jurisdiction of the Commissioner to *investigate* conduct should be confined to conduct capable of constituting 'corruption' and that for this purpose "corruption" should be defined as conduct involving the misuse of entrusted powers for private gain (**corrupt conduct**) amounting to a *criminal offence*.

Elsewhere, however, the Discussion Paper proceeds on the basis that the scope of jurisdiction of existing investigative bodies is, or would be, broader than this (see eg paragraphs 1.4.3 and 2.0.8 and Recommendations 6, 7, 9, 11 and 12). The role of the Public Integrity Office as the sole avenue for complaints would also necessarily contemplate matters broader than this.

We have a preference for the international definition of corruption, that is, “*the misuse of entrusted power for private gain*” (which has otherwise been picked up by the Discussion Paper at paragraphs 1.2.4 and 6.0.4). This international definition does not confine corrupt conduct to criminal conduct under existing criminal legislation.

It is apparent from anti-corruption and public sector discourse and research that behaviours and activities that offend the international definition are not always of a criminal nature.

Moreover, it seems preferable that legislation which identifies corrupt conduct as criminal should be the result of a closer observation and a better understanding of examples of corrupt conduct identified by report and investigation (this is recognised to a degree at paragraphs 6.3 and 6.4.7 of the Discussion Paper). This will be one of the real benefits of the creation of the Public Integrity Office/Commissioner.

We strongly submit therefore that the scope of the investigative jurisdiction of the Commissioner not be confined to criminal behaviour and that, accordingly, there be a consequential amendment of Recommendation 24 to delete the words “*(that is, crimes)*” and of Recommendation 28 to substitute “corrupt conduct” for the words “criminal conduct”.

2 A Commissioner and an Office: Recommendations 26-31

We support the creation of a single entry point to perform the functions set out in the *first to fourth*, and *sixth*, dot points of Recommendation 26 and in the *second, fourth and fifth* dot points of Recommendation 28.

We strongly recommend a single portal for public sector grievances. This point is made also by paragraphs 5.0.1, 5.0.4 and 5.1.5 of the Discussion Paper.

However, the Discussion Paper proposes the creation of two agencies; namely, a Public Integrity Office *and* a Commissioner for Public Integrity.

In our submission, the existence of two agencies is unnecessarily complicated, and provides unnecessary scope for confusion. It would also cause difficulty and give rise to complexity in attempting to define the jurisdiction and powers of the two agencies and the relationship between them. Critically, the existence of two agencies would be likely to confuse the public as to their respective roles, and seriously compromise the utility of a Public Integrity body so well articulated in the Discussion Paper.

We strongly submit that only one body or entity, namely, the Commissioner, be established to perform the functions proposed by the Discussion Paper for the Office and the Commissioner combined. All grievances and complaints would be directed to the Commissioner, who would have the responsibility both to decide where to direct the complaint, and to perform such investigations

as it determined. Operationally, the Commissioner would establish two sections (or operational divisions): the processing (or co-ordination) section that would perform the roles proposed by the Discussion Paper for the Office and the investigation section to perform the roles proposed by the Discussion Paper for the Commissioner. Both sections would come under the direction and supervision of the Commissioner.

The public perception would then be of one face, namely the Commissioner.

3 Role and powers of the Commissioner (and Office): Recommendations 26-31

We fully support the recommendation that the position of Commissioner be a statutory position with entrenched independence. This is critical.

The Discussion Paper does not, however, address the issue of coercive powers. To perform the functions proposed in Chapters 5 and 6 of the Discussion Paper, it is essential (no doubt it has been assumed) that the Commissioner have coercive powers over the agencies.

We consider the public would expect the Commissioner to have coercive powers over the agencies in order to discharge his/her duties and responsibilities properly. This, in addition to obvious investigative and evidence gathering powers, will give the public confidence that the process will be effective.

An essential feature of the Commissioner's independence should be its unhindered ability to make representations and recommendations to Parliament directly on any matters involving public integrity, with a view to improving the functionality and integrity of the public sector. The independence of the Commissioner is critical both to ensuring public integrity, public confidence, compliance and to improving education and raising awareness.

We reiterate our earlier comments regarding a single entity (see comments in 2 above).

4 Own Motion Investigations: Recommendation 28

Paragraph 6.0.5, in conjunction with paragraphs 5.1.4 and 5.1.5, of the Discussion Paper envisage that the Commissioner would have 'own motion' power to investigate any apparent corrupt conduct without having to wait for an external complaint. This is reinforced by paragraph 6.0.3, which refers to exercise of powers "*at his or her absolute discretion and rang[ing] across all areas of government*". In our view, such a power is essential.

This seems to be contradicted, however, by the recommendation at the *fourth* dot point of Recommendation 28 which refers to the role of the Commissioner -

"of his or her own motion to instigate investigations of Councils where criminal conduct is involved making recommendations to the Local Government Minister and refer cases to the appropriate prosecutorial agencies as may be appropriate".

This might be understood as suggesting that the 'own motion' power to investigate is confined to investigations of Councils and does not apply to the other branches of government.

We do not believe this is intended.

In any event, there is no principled basis for limiting 'own motion' investigations to Council personnel, but excluding personnel working in other branches of government.

We strongly submit that Recommendation 28 *dot point 4* ought to be amended to apply to all governmental personnel.¹

5 Parliamentary Code of Conduct: Recommendation 3

We strongly support the formation of a Standing Committee to monitor and examine integrity and ethics matters for Members of Parliament.

We further support the enactment of a code of conduct for Members of Parliament. The code would need to include relevant sanctions for breaches and the identification and empowering of the bodies responsible, respectively, for the investigation, prosecution and imposition of those sanctions (compare Recommendations 6 and 9 for local government).

6 Executive Code of Conduct: Recommendation 4

We support the recommendation that the *Public Sector Act* (and the *Public Sector (Honesty and Accountability) Act*) be reviewed and if necessary amended to ensure that public sector codes of conduct apply to all members of the Executive including Ministers and Ministerial and Parliamentary staff.

We note that the scope of the conduct to be monitored has not been covered in this recommendation. We reiterate our earlier submission that corrupt conduct should be defined to include behaviour other than criminal conduct, such as, for example, conflict of interest, unethical conduct, procurement, and inappropriate contract management.

In addition, the Code of Conduct under the *Public Sector Act*, and the sections of that Act which provide for the investigation of breaches of the Code, should be reviewed to ensure that relevant sanctions for breaches are clearly provided for, and the bodies responsible for the prosecution and imposition of sanctions respectively, are clearly identified and equipped with adequate powers (compare Recommendations 6 and 9 for local government).

7 Local Government: Recommendations 6-11

We commend the Government for the scrutiny in the discussion paper that has been applied to local government authorities. The recommendations relating to local government are very prescriptive and we support this. We understand the historical reasons for this approach.

There is however, we submit, good reason to adopt a similar approach with respect to Members of Parliament, the Executive and the Public Sector.

¹ We have addressed at point 1 above the limitation in Recommendation 28 to "criminal" conduct.

8 South Australia Police: Recommendations 12 and 13

The processing of complaints against the police is too complex. There are several different bodies (including the Police Complaints Authority, the Commissioner of Police, Anti-Corruption Branch, Internal Affairs Branch), each operating under different, sometimes overlapping, legislation (including the *Police Act* and the *Police (Complaints and Disciplinary Proceedings) Act*), with different and often inconsistent substantive and procedural provisions relating to the different bodies and different types of complaint. There are also gaps. There is no one body to oversee all this. Confusion, difficulty and inefficiencies abound.

This situation should be thoroughly and comprehensively reviewed by the Government at an appropriate time, with a view to providing a single regime (under a single Act) for the investigation and prosecution of complaints against the police and the exercise of disciplinary powers. This is a substantial task, however, and the implementation of the recommendations in the current Discussion Paper should not be not impeded or affected by the conduct of such a review.

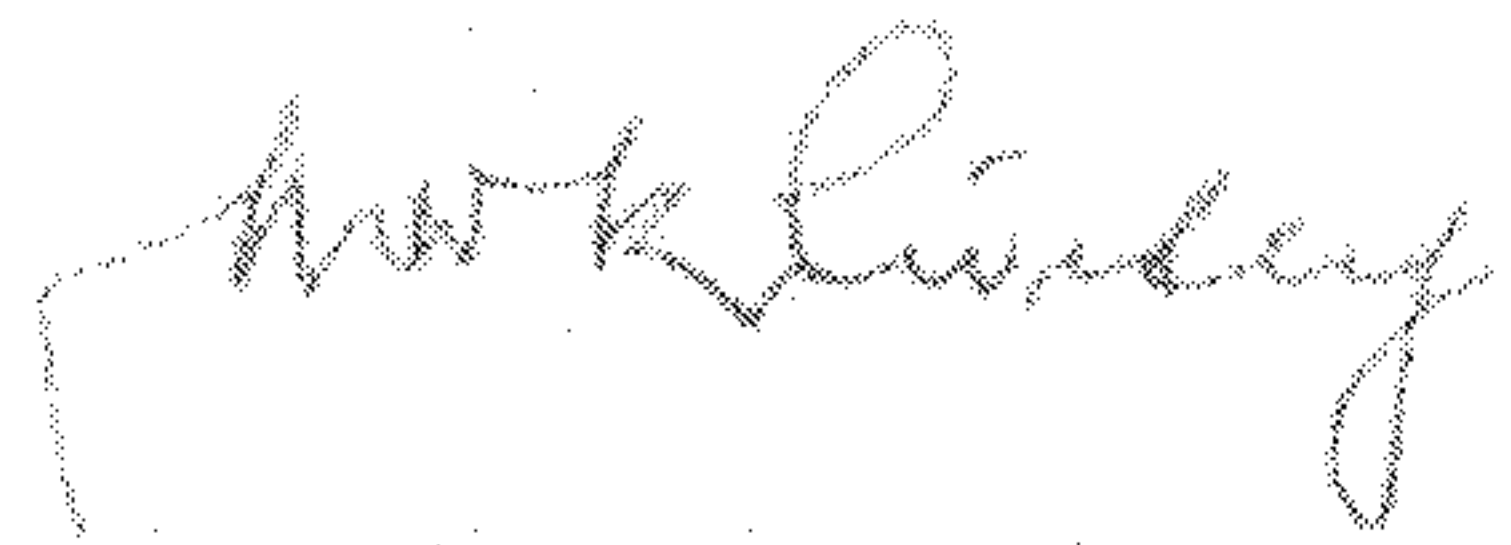
With the modifications and clarifications offered in this submission, we strongly support the proposed model for a Public Integrity body, and its creation by a single package of legislative reform across the areas identified in the Discussion Paper.

Thank you again for the opportunity to provide these comments.

Yours sincerely



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