

**TELECOMMUNICATIONS (INTERCEPTION AND ACCESS – INDEPENDENT
COMMISSION AGAINST CORRUPTION OF SOUTH AUSTRALIA)
DECLARATION 2023**

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General
in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

The purpose of the *Telecommunications (Interception and Access – Independent Commission Against Corruption of South Australia) Declaration 2023* (the Declaration) is to declare the Independent Commission Against Corruption of South Australia (SA ICAC) an agency that may apply for and execute telecommunication interception warrants under the *Telecommunications (Interception and Access) Act 1979* (the TIA Act).

Background

On 7 October 2021, the *Independent Commission Against Corruption (CPIPC Recommendations) Amendment Act 2021* (SA) amended the *Independent Commissioner Against Corruption Act 2012* (SA), to become the *Independent Commission Against Corruption Act 2012* (SA). As a result, the entity previously known as the Independent Commissioner Against Corruption of South Australia is now the SA ICAC.

The *Crimes and Other Legislative Amendment (Omnibus) Act 2023* amended references to the Independent Commissioner Against Corruption of South Australia in the *Crimes Act 1914*, *Criminal Code Act 1995*, *Privacy Act 1988*, *Surveillance Devices Act 2004* and the TIA Act to reflect the new name of the body.

The power to intercept telecommunications under a warrant for the purposes of law enforcement is confined to the Australian Federal Police, the Australian Crime Commission or an ‘eligible authority’ of a State in relation to which a declaration under section 34 is in force.

Under section 34, the Attorney-General may declare an eligible authority of a State to be an agency for the purposes of the TIA Act if the relevant law of the State provides for certain matters relating to keeping and inspecting records, and the State has entered into an agreement to pay all costs connected with the issue of warrants. Both of these conditions have been satisfied in this instance.

Under section 37 of the TIA Act a declaration of an eligible authority as an agency which is in force under section 34 may be revoked if requested by the Premier of a State.

Details of the Declaration are set out in **Attachment A**.

Exemption from sunseting

The Declaration is exempt from sunseting as it is made pursuant to section 34 of the TIA Act, which is listed at item 62 of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* as a particular legislative instrument for the purposes of paragraph 54(2)(b) of the *Legislation Act 2003*.

Declarations made pursuant to section 34 of the TIA Act are not intended to be remade frequently. They are important for allowing agencies with a central role in investigating criminal offences to maintain their legislative functions. Significant uncertainty and disruption would result if they were to sunset.

CONSULTATION

The Office of Impact Analysis (OIA) has advised that a Regulation Impact Statement is not required (OBPR consultation reference number: OIA23-05181). The OIA considered this Declaration is unlikely to have a more than minor impact, introducing no significant regulatory burden or impact for Australian individuals, businesses, or community organisations.

This Declaration was made on request from the Premier of South Australia. The Commonwealth Attorney-General's Department consulted the South Australia Attorney-General's Department and SA ICAC to ensure all legislative requirements have been met. Additional consultation was not required as the instrument is technical in its operation and merely updates the reference to the SA agency to reflect its new name.

The Declaration is an instrument subject to disallowance under section 42 of the *Legislation Act 2003* and therefore a Statement of Compatibility with Human Rights has been provided at **Attachment B**.

DETAILS OF DECLARATION

Item 1 – Name of declaration

Item 1 states that the Declaration is the *Telecommunications (Interception and Access – Independent Commissioner Against Corruption of South Australia) Declaration 2023*.

Item 2 - Commencement

Item 2 states that the declaration will commence on the later of the date after this instrument is registered and the *Crimes and Other Legislative Amendment (Omnibus) Act 2023* receives Royal Assent. This guards against retrospective commencement.

Item 3 – Declaration of agency

Item 3 declares that the Independent Commission Against Corruption of South Australia (SA ICAC) is an agency for the purposes of the *Telecommunications (Interception and Access) Act 1979*. As a declared agency, the SA ICAC will be eligible to apply for and execute interception warrants under Part 2-5 of the *Telecommunications (Interception and Access) Act 1979*.

Item 4 - Revocation

Item 4 revokes the *Telecommunications (Interception and Access – Independent Commissioner Against Corruption of South Australia) Declaration 2013*, which declared the former Independent Commissioner Against Corruption of South Australia to be an agency for the purposes of the TIA Act.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Telecommunications (Interception and Access – Independent Commission Against Corruption of South Australia) Declaration 2023

The *Telecommunications (Interception and Access – Independent Commission Against Corruption of South Australia) Declaration 2023* (the Declaration) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Declaration declares the Independent Commission Against Corruption of South Australia (SA ICAC) an interception agency for the purposes of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act), and revokes the *Telecommunications (Interception and Access – Independent Commissioner Against Corruption of South Australia) Declaration 2013*.

The Declaration, made by authority of the Attorney-General, grants the SA ICAC the power to intercept telecommunications under a warrant for the purposes of law enforcement.

Background information

Under section 34 the TIA Act, authorised agencies are permitted to intercept telecommunications under a warrant for the purposes of law enforcement. The Independent Commissioner Against Corruption of South Australia (the Commissioner) was previously declared an authorised agency for the purposes of the TIA Act.

On 7 October 2021, the *Independent Commission Against Corruption (CPIPC Recommendations) Amendment Act 2021* (SA) commenced and replaced the *Independent Commissioner Against Corruption Act 2012* (SA). This amended the title of the entity to the SA ICAC and transferred some of the functions of the Commissioner to the SA ICAC. This meant that references to the Independent Commissioner Against Corruption of South Australia in Commonwealth legislation were no longer correct.

Accordingly, Schedule 10 of the *Crimes and Other Legislative Amendment (Omnibus) Act 2023* corrected references in the TIA Act, *Crimes Act 1914*, *Criminal Code Act 1995*, *Privacy Act 1988*, and the *Surveillance Devices Act 2004* to reflect the correct name for the SA ICAC.

In July 2023, the Premier of South Australia wrote to the Attorney-General to request that the SA ICAC be declared an agency for the purposes of the TIA Act.

Human right implications

The Declaration engages article 17 of the International Covenant on Civil and Political Rights (ICCPR) – privacy.

Article 17 - privacy

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour or

reputation, and that everyone has the right to the protection of the law against such interference or attacks.

The instrument allows the SA ICAC to apply for warrants to intercept a person's private communications in certain circumstances, limiting the right to privacy under Article 17. However, the right to privacy under the ICCPR can be limited as it is not an absolute right. The right can be limited if the limitation is not incompatible with the right itself and the limitation is authorised by law, is for a legitimate objective and is reasonable, necessary and proportionate to that objective.

Interception

The Declaration makes the SA ICAC eligible to apply for warrants to intercept a person's private communications in certain circumstances.

Interception of telecommunications may only occur subject to a warrant issued by an issuing authority, namely an eligible judge or a nominated member of the Administrative Appeals Tribunal. Before an issuing authority may issue a warrant, they must be satisfied that interception is appropriate in the circumstances. In coming to this conclusion, the issuing authority must consider several factors, including the privacy impacts of the interception, the gravity of the offence, the likely usefulness of interception information to the relevant investigation and the extent to which other methods of investigating the offence have been used or are available.

The instrument will serve the legitimate objective of the investigation and prosecution of serious crime and corruption and is reasonable, necessary and proportionate to achieving this end. Interception will only be available to the SA ICAC in relation to the investigation of serious offences, which generally includes offences punishable by imprisonment for a maximum period of at least seven years. Other State integrity agencies also have interception powers under the TIA Act, and this instrument will ensure the SA ICAC has access to the same powers and is subject to the same obligations.

Use of information

The TIA Act strictly regulates the use and communication of information obtained by law enforcement agencies under interception warrants. Any information collected by the SA ICAC may only be used for defined purposes and purposes connected with the investigation of serious offences. Communications are destroyed where the chief officer of the agency is satisfied that the record is no longer required for a purpose permitted by the legislation.

Persons affected by an interception warrant have relevant judicial avenues through which to challenge the validity of the interception and the use of any intercepted communications. They also have the right to access communications being used as evidence against them during prosecution.

The instrument does not affect rights to a fair trial and fair hearing, the presumption of innocence and minimum guarantees in criminal proceedings, or existing legislation relating to procedural fairness.

Record-keeping and reporting

The SA ICAC will be subject to stringent recordkeeping and reporting obligations. Subsection 35(1) of the TIA Act requires the relevant State to make satisfactory provision for these obligations prior

to the instrument being made and these are contained in the *Telecommunications (Interception) Act 2012* (SA). These requirements include requiring regular inspection of records to ensure compliance with the Act and regular reporting to the responsible Minister. Agencies must also report annually to the Attorney-General on the effectiveness of warrants.

Conclusion

The instrument is compatible with human rights because to the extent that it limits human rights, those limitations are authorised by law, reasonable, necessary and proportionate.

The details of previous declarations under section 34 of the TIA Act are as follows:

Victoria Police	28 October 1988
New South Wales Crime Commission	30 January 1989
New South Wales Police Force	30 January 1989
Independent Commission Against Corruption (NSW)	6 June 1990
South Australia Police	10 July 1991
Western Australia Police	15 July 1997
New South Wales Police Integrity Commission	14 July 1998
Corruption and Crime Commission of Western Australia	24 March 2004
Tasmania Police	5 February 2005
Northern Territory Police	25 October 2006
Victoria Office of Police Integrity	18 December 2006
Queensland Police Service	8 July 2009
Queensland Crime and Misconduct Commission	8 July 2009
Independent Broad-based Anti-corruption Commission (VIC)	18 December 2012
Independent Commissioner Against Corruption of South Australia (SA)	17 June 2013
Law Enforcement Conduct Commission (NSW)	11 May 2017