



**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

**Social Policy Scrutiny Committee**

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**Inquiry into the Independent  
Commissioner Against  
Corruption (Consequential and  
Related Amendments) Bill 2017**

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**February 2018**



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## Chair's Preface

This report details the Committee's findings regarding its examination of the Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017. The Bill amends a number of Acts in relation to the establishment of an Independent Commissioner Against Corruption and repeal of the *Public Interest Disclosures Act*.

The Committee has recommended that the Assembly pass the Bill with the amendment proposed in Recommendation 2, regarding the new section 75C of the *Criminal Code*. As currently drafted, section 75C outlines improper conduct, but the Committee does not believe that it provides enough protection by way of a safeguard for those who have undertaken trivial improper conduct where damage to the public interest is minimal.

Whilst section 75C could result in a large amount of reporting of improper conduct due to the provision allowing the courts to look at all available evidence before determining whether the improper conduct warrants criminal sanction, the Committee was concerned that there was potential for the public to not report improper conduct that does not warrant criminal sanction.

On behalf of the Committee, I would like to thank Professor Aughterson and the Department of the Attorney-General and Justice for their advice. I would also like to thank Committee members for their bipartisan support of the legislative review process.



**Ms Ngaree Ah Kit MLA**

**Chair**

## Committee Members

	<b>Ms Ngaree Ah Kit MLA</b> Member for Karama	
	<b>Party:</b>	Territory Labor
	<b>Committee Membership</b>	
	Standing:	Standing Orders and Members' Interests
	Sessional:	Social Policy Scrutiny
	Select:	Estimates
	Chair:	Social Policy Scrutiny, Estimates
	<b>Mrs Robyn Lambley MLA</b> Member for Araluen	
	<b>Party:</b>	Independent
	Parliamentary Position:	Acting Deputy Speaker
	<b>Committee Membership</b>	
	Standing:	Standing Orders and Members' Interests
	Sessional:	Social Policy Scrutiny
	Deputy Chair:	Social Policy Scrutiny
	<b>Mrs Lia Finocchiaro MLA</b> Member for Spillett	
	<b>Party:</b>	Country Liberals
	Parliamentary Position:	Deputy Leader of the Opposition, Opposition Whip
	<b>Committee Membership</b>	
	Standing:	Public Accounts, Privileges
Sessional:	Social Policy Scrutiny	
	<b>Ms Sandra Nelson MLA</b> Member for Katherine	
	<b>Party:</b>	Territory Labor
	<b>Committee Membership</b>	
	Standing:	House
	<b>Mr Chansey Paech MLA</b> Member for Namatjira	
	<b>Party:</b>	Territory Labor
	Parliamentary Position:	Deputy Speaker
	<b>Committee Membership</b>	
Standing:	House	
Sessional:	Social Policy Scrutiny	
Select:	Estimates	

## **Committee Secretariat**

Committee Secretary: Julia Knight

Administration/Research Officer: Annie McCall

Administration Assistant: Kim Cowcher

Contact Details: GPO Box 3721 DARWIN NT 0801

Tel: +61 08 8946 1485

Email: [SPSC@nt.gov.au](mailto:SPSC@nt.gov.au)

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## Terms of Reference

### Sessional Order 13

#### *Establishment of Scrutiny Committees*

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints the following scrutiny committees:
  - (a) The Social Policy Scrutiny Committee
  - (b) The Economic Policy Scrutiny Committee
- (3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.
- (4) The functions of the scrutiny committees shall be to inquire and report on:
  - (a) any matter within its subject area referred to it:
    - (i) by the Assembly;
    - (ii) by a Minister; or
    - (iii) on its own motion.
  - (b) any bill referred to it by the Assembly;
  - (c) in relation to any bill referred by the Assembly:
    - (i) whether the Assembly should pass the bill;
    - (ii) whether the Assembly should amend the bill;
    - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
      - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
      - (B) is consistent with principles of natural justice; and
      - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
      - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and
      - (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
      - (F) provides appropriate protection against self-incrimination; and
      - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

- (H) does not confer immunity from proceeding or prosecution without adequate justification; and
  - (I) provides for the compulsory acquisition of property only with fair compensation; and
  - (J) has sufficient regard to Aboriginal tradition; and
  - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
  - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
  - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

## **Recommendations**

### **Recommendation 1**

The Committee recommends that the Legislative Assembly pass the Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017 with the amendment proposed in Recommendation 2.

### **Recommendation 2**

The Committee recommends that section 75C be amended to clarify that the finder of fact must find that conduct warrants criminal sanction unless the conduct is trivial or the damage to the public interest is minimal.

# 1 Introduction

## Introduction of the Bill

1.1 The Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017 (the Bill) was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA, on 19 October 2017. The Assembly subsequently referred the Bill to the Social Policy Scrutiny Committee for inquiry and report by 6 February 2018.<sup>1</sup>

## Conduct of the Inquiry

1.2 In accordance with its *Standard Procedures for Bill Inquiries*, on 20 October 2017 the Committee called for submissions by 8 November 2017. The call for submissions was advertised via media release, the Legislative Assembly website, Facebook, Twitter feed and email subscription service. The Committee did not receive any submissions to its inquiry.

1.3 The Bill and associated Explanatory Statement was forwarded to Professor Ned Aughterson for review of fundamental legislative principles under Sessional Order 13(4)(c). On 10 November 2017, the Committee wrote to the Attorney-General and Minister for Justice seeking a response to the issues raised by Professor Aughterson.

## Outcome of Committee's Consideration

1.4 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:

- (i) whether the Assembly should pass the bill;
- (ii) whether the Assembly should amend the bill;
- (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
- (iv) whether the bill has sufficient regard to the institution of Parliament.

1.5 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with the amendment proposed in Recommendation 2.

### Recommendation 1

**The Committee recommends that the Legislative Assembly pass the Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017 with the amendment proposed in Recommendation 2.**

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<sup>1</sup> Parliamentary Record, (Hansard) and Minutes of Proceedings, 13<sup>th</sup> Assembly, Debates, 19/10/2017, pp.2-6, <https://parliament.nt.gov.au/business/hansard/draft/DEBATES-DAY-6-19-OCTOBER-2017.pdf>

## **Report Structure**

- 1.6 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.7 Chapter 3 considers the main issues raised in evidence received.

## 2 Provisions of the Bill

### Background to the Bill

2.1 The Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017 amends a number of Acts in relation to the establishment of the Independent Commissioner Against Corruption and repeal of the *Public Interest Disclosures Act*.

### Purpose and Overview of the Bill

2.2 As noted in the Explanatory Statement, the Bill:

- amends the *Correctional Services Act* to facilitate the ICAC's access to Correctional premises and to prisoners as required;
- amends the Criminal Code to update the offences and penalties of a number of offences concerning government corruption which the ICAC can investigate;
- provides that the ICAC can handle and disclose spent convictions for certain purposes by amending the *Criminal Records (Spent Convictions) Act*;
- amends the *Legislative Assembly (Disclosure of Interests) Act* to provide that the ICAC has access to the register of interests for the Legislative Assembly;
- amends the *Procurement Act* to guarantee that the ICAC has complete independence as to whom it chooses to contract to conduct investigative and legal work;
- amends the *Police (Special Investigative and Other Powers) Act* to give the ICAC the power to apply for warrants to conduct controlled operations;
- amends the *Surveillance Devices Act* to give the ICAC the power to apply for warrants to use and install surveillance devices;
- amends the *Witness Protection (Northern Territory) Act* to provide that witnesses for the ICAC can be considered for the witnesses protection program, and that the ICAC can apply to the court for a witness to be given an assumed identity;
- amends the *Telecommunications (Interception) Northern Territory Act* to give the ICAC the power to intercept telecommunications; and
- removes obsolete references to the *Public Interest Disclosure Act* and replaces them with references to the *ICAC Act* as appropriate from the *Housing Act*, the *Education and Care Services (National Uniform Legislation) Act*, the *Evidence (National Uniform Legislation) Act*, and the *Rail Safety (National Uniform Legislation) Act*.<sup>2</sup>

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<sup>2</sup> Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017* (Serial No. 35), <https://parliament.nt.gov.au/committees/spsc/CRA>, pp.1-2

### 3 Examination of the Bill

#### Introduction

- 3.1 Following consideration of the Bill, Professor Aughterson raised concerns regarding proposed amendments to sections 75C and 79 of the *Criminal Code*. Professor Aughterson's advice and subsequent response from the Department of the Attorney-General and Justice are discussed below.

#### Improper Conduct

- 3.2 The Bill includes 'improper conduct' as an element of certain offences in the *Criminal Code*.<sup>3</sup> Section 75C is a new section which is designed to provide "a standard, consistent element of impropriety across the amended offences of Part IV."<sup>4</sup> Conduct is defined as improper 'if the finder of fact is satisfied that the conduct, in the circumstances, warrants criminal sanction.' In deciding whether a person's conduct warrants criminal sanction, s 75C(2) requires that the judge or jury have regard to the following matters:

- (a) if the person is a public officer – whether the person behaved in a way reasonably expected of a public officer;
  - (b) if the person is not a public officer – whether the person behaved in a way reasonably expected of the person;
  - (c) whether the person acted in an honest and reasonable belief that the person was lawfully entitled to act in the manner the person acted in the conduct being considered;
  - (d) the seriousness of the conduct and result of the conduct;
  - (e) whether the conduct occurred:
    - (i) as an isolated incident; or
    - (ii) as part of repeated similar conduct; or
    - (iii) as part of a course of conduct.
- 3.3 Noting that s 75C follows the approach adopted by South Australia<sup>5</sup> in relation to similar offences, the Explanatory Statement states that:

this test recognises that the conduct technically criminalised by these offences ranges from very serious corruption, down to the kind of errors of judgement by new employees that would typically be addressed by performance management...Given that these offences are being broadened to apply not only to employees in the public service, but to all public officers, it is particularly appropriate this test be included to avoid criminalising low-level conduct that would not be viewed as criminal by community standards. The definition of public

<sup>3</sup> Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017 (Serial 35), <https://parliament.nt.gov.au/committees/spsc/CRA>, ss 76, 77, 78, 79, 80,81

<sup>4</sup> Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017 (Serial No. 35)*, <https://parliament.nt.gov.au/committees/spsc/CRA>, pp.4-5

<sup>5</sup> *Criminal Law Consolidation Act 1935 (SA)*, s.238

officer is very broad and includes persons working for private and non-government organisations that receive government funding under agreements (such as contractors and recipients of government grants).<sup>6</sup>

3.4 While it is acknowledged that there are a range of objective elements to the amended offences that must be proved before a person can be found guilty, the Committee notes that determining whether the conduct is improper and warrants criminal sanction nevertheless requires the judge or jury to subjectively assess the conduct, rather than to determine whether the conduct meets the criteria set out by the Parliament.

3.5 As highlighted in Professor Aughterson's advice regarding application of the definition of improper conduct to the offence of 'disclosure of confidential information' under s 76:

There is a question of whether the statutory explanation of what conduct warrants criminal sanction gives rise to uncertainty as to when an offence might have been committed and whether it unduly imports subjective considerations. As to the latter, the role of courts is to determine whether, on the available evidence, the prescribed elements of an offence have been satisfied, rather than determining for itself what sort of conduct 'warrants criminal sanction'. That blurs the demarcation between the roles of the courts and prosecutors and legislators.<sup>7</sup>

Leaving it to the court to determine whether the conduct 'warrants criminal sanction' is unusual. Other than the present provision and the South Australian provision...I am not aware of any other instance where criminal liability depends on an assessment by a court as to whether the conduct 'warrants criminal sanction'. Certainly, that will be the rationale for and the policy underlying the establishment and also the prosecution of many criminal offences, but it is another thing to make it an element of the offence. Generally, offences set out the conduct and states of mind that are proscribed and which can be objectively assessed through evidence.<sup>8</sup>

[Courts] act as independent triers of fact and on the basis of criteria that are objectively ascertainable by citizens and courts alike. Criminal liability does not depend on the subjective assessment of judges or juries.<sup>9</sup>

3.6 Given that judges and juries will inevitably have differing views, Professor Aughterson also points out that determining whether conduct warrants criminal sanction is more difficult in a multi-cultural society and questions the extent to which such assessments are to take into account "differing value systems, including those of Indigenous peoples."<sup>10</sup>

3.7 Noting that s 75C might be improved if the circumstances in which criminal sanction is warranted, as set out in subsection 75C(2), were more clearly articulated, Professor Aughterson highlights three main difficulties with this provision:

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<sup>6</sup> Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017* (Serial No. 35), <https://parliament.nt.gov.au/committees/spsc/CRA> pp. 4-5

<sup>7</sup> Professor Ned Aughterson, *Review of the ICAC (Consequential and Related Amendments) Bill 2017*, (unpublished), 8 November 2017, p.1

<sup>8</sup> Professor Ned Aughterson, *Review of the ICAC (Consequential and Related Amendments) Bill 2017*, (unpublished), 8 November 2017, pp.1-2

<sup>9</sup> Professor Ned Aughterson, *Review of the ICAC (Consequential and Related Amendments) Bill 2017*, (unpublished), 8 November 2017, p.2

<sup>10</sup> Professor Ned Aughterson, *Review of the ICAC (Consequential and Related Amendments) Bill 2017*, (unpublished), 8 November 2017, p.2

First, subsection 75C(2) does not specify that these are the only matters that might be taken into account by the finder of fact. A prescription that a court 'must' have regard to specified matters (without the additional word 'only') does not necessarily mean that it cannot have regard to other matters. That begs the question of whether other unspecified factors may be taken into account in determining whether the conduct warrants criminal sanction, which would add to the subjective quality of the provision. Second, what relative weight is to be given to the various listed matters? There is room for a great deal of subjectivity in determining what emphasis should be given to each of the listed matters and, in consequence, whether the conduct 'warrants criminal sanction'. Third at subsection 2(d), what is meant by the 'seriousness' and 'result' of the conduct? Is the court to set its own criteria as to what is 'serious' and as to what sorts of 'results' of conduct warrant criminal sanction?

Overall, it appears that there is great latitude for individual finders of fact to determine what conduct 'warrants criminal sanction' and, as a result, what is and is not 'improper conduct'. Not only is it questionable that such a role should be given to the courts, but it is also likely to lead to considerable diversity of opinion and uncertainty as to when an offence has been committed.<sup>11</sup>

- 3.8 With regards to s 238 of the *Criminal Law Consolidation Act 1935* (SA), on which s 75C is modelled, Professor Aughterson notes that while that provision is framed somewhat differently, it is still problematic:

Under s 238(1) the question is whether the public officer knowingly or recklessly acted contrary to specified standards, which it is presumed, can be established by reference to public service codes of conduct, rules, policies etc. Subsection 238(2) then imposes a qualification: the person will not be taken to have acted improperly unless the conduct was such that 'the imposition of a criminal sanction is warranted'. In that sense, it is not a positive element of the offence, but more in the nature of an excuse. Nevertheless, it does create difficulties in the sense of importing a significant degree of subjectivity and it seems that it has not yet been the subject of judicial comment in South Australia. However, the South Australian provision does not have the 3 difficulties referred to above in relation to the NT Bill. While subsection 238(3) does give 3 alternative mitigating factors, they are expressed in the alternative and also deal with questions such as 'honest and reasonable belief', 'lawful authority', 'reasonable excuse' and 'triviality', which factors are commonly considered by the courts.<sup>12</sup>

- 3.9 The Department advised it was of the view that the provisions in the Bill were not only "substantially very similar" to the South Australian legislation but that "the definition of what warrants criminal sanction is more defined and hence less subjective in the Northern Territory Bill."<sup>13</sup>
- 3.10 As noted previously, the purpose of s 75C is to provide a safeguard against criminalising lower-level conduct that would be more appropriately dealt with by way of training or disciplinary action. While acknowledging that in doing-so it does introduce an element of subjectivity, the Department advised the Committee that:

Given the broad nature of these offences, and the broad range of circumstances in which they might apply, it is very difficult to exclude lower-level conduct with

<sup>11</sup> Professor Ned Aughterson, *Review of the ICAC (Consequential and Related Amendments) Bill 2017*, (unpublished), 8 November 2017, pp.2-3

<sup>12</sup> Professor Ned Aughterson, *Review of the ICAC (Consequential and Related Amendments) Bill 2017*, (unpublished), 8 November 2017, p. 3

<sup>13</sup> Department of the Attorney-General and Justice, *Response to Professor Aughterson's advice regarding ss 75C and 79 of the Criminal Code*, (unpublished) 17 November 2017, p.3

objective criteria without creating loopholes that could be exploited to avoid criminal sanction for more serious conduct.<sup>14</sup>

Inserting section 75C recognises that the offences to which it applies are intended to deter and punish public officers who wilfully betray the trust of the public through making decisions in their own personal interest, rather than the interest of the public. They are not intended to create a climate of fear that anyone who works in or with the public sector is only one poor judgement call away from committing an offence, no matter the circumstances.<sup>15</sup>

- 3.11 With regards to Professor Aughterson's query as to whether application of s 75C might create difficulties in a multi-cultural society, the Department advised that s 75C is intended to provide an opportunity to take into consideration factors such as the accused's level of education, experience or cultural background.

Section 75C is a safety valve that allows consideration of these kinds of differences prior to returning a verdict. While it is true that judges and juries may have differing views, the Government has taken the view that it is nevertheless best to allow them to make a decision as to whether the safety valve should be applied on a case by case basis, looking at all the available evidence, rather than prohibit this from occurring in any case.<sup>16</sup>

- 3.12 The Department further advised that should the Committee have concerns about s 75C, it would be better to narrow the provision rather than abandon it altogether since to do so would:

merely leave unconscious bias, and differing value systems and structural barriers to function to filter out prosecutions at the stage of reporting and early investigation.<sup>17</sup>

As such, the Department suggested that s 75C could be amended to:

clarify that the finder of fact must find that conduct warrants criminal sanction unless the conduct is trivial or the damage to the public interest is minimal. This would clearly delineate that section 75C only applies to lower-range behaviour.<sup>18</sup>

The Committee notes that this would more closely reflect s 238(3)(c) of the South Australian legislation whereby a person is not be taken to have acted improperly if 'the act was of a trivial character and caused no significant detriment to the public interest.'

### **Committee's Comments**

- 3.13 The Committee was concerned that the proposed s 75C inappropriately gives the court rather than the Parliament the role of determining the conduct that 'warrants

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<sup>14</sup> Department of the Attorney-General and Justice, *Response to Professor Aughterson's advice regarding ss 75C and 79 of the Criminal Code*, (unpublished) 17 November 2017, p.2

<sup>15</sup> Department of the Attorney-General and Justice, *Response to Professor Aughterson's advice regarding ss 75C and 79 of the Criminal Code*, (unpublished) 17 November 2017, p.2

<sup>16</sup> Department of the Attorney-General and Justice, *Response to Professor Aughterson's advice regarding ss 75C and 79 of the Criminal Code*, (unpublished) 17 November 2017, p.4

<sup>17</sup> Department of the Attorney-General and Justice, *Response to Professor Aughterson's advice regarding ss 75C and 79 of the Criminal Code*, (unpublished) 17 November 2017, p.4

<sup>18</sup> Department of the Attorney-General and Justice, *Response to Professor Aughterson's advice regarding ss 75C and 79 of the Criminal Code*, (unpublished) 17 November 2017, pp.2-3

criminal sanction' and thereby introduces explicitly subjective elements into a criminal offence.

- 3.14 The Department explained that the purpose of the proposed s 75C is to “safeguard against the rigid application of the offence provisions to lower-level conduct that is more appropriately dealt with by way of training or disciplinary action.”<sup>19</sup> The Committee notes that an alternative method of safeguarding against the prosecution of lower-level conduct is to narrow the terms of the offence so such conduct is excluded. Sound application of prosecutorial discretion, including requiring particular authorisations for a prosecution to proceed, is another orthodox means of preventing trivial cases coming before courts.
- 3.15 The Department further noted concerns that not having the proposed s 75C may have a chilling effect on reporting offences as “a person who has knowledge of serious offences may be unwilling to report for risk of being prosecuted for the kind of low-level behaviours that section 75C is intended to exclude”.<sup>20</sup>
- 3.16 The Department also stated that “given the broad nature of these offences, and the broad range of circumstances in which they might apply, it is very difficult to exclude lower-level conduct with objective criteria without creating loopholes that could be exploited to avoid criminal sanction for more serious conduct”.<sup>21</sup> The Committee considers that if it is not possible to draft effective exclusion of lower-level conduct from these broad offences, then a more appropriate method of addressing this problem is to narrow the provisions of s 75C as suggested by the Department.
- 3.17 To avoid any potential chilling effect on reporting offences, the Committee considers that s 75C should be redrafted to clarify that trivial conduct or instances where the damage to the public interest is minimal does not warrant criminal sanction.

## Recommendation 2

**The Committee recommends that section 75C be amended to clarify that the finder of fact must find that conduct warrants criminal sanction unless the conduct is trivial or the damage to the public interest is minimal.**

## Advancing Secret Personal Interests

- 3.18 Section 79 updates the two offences relating to failing to disclose private interests currently dealt with at ss79 and 80 of the *Criminal Code*.<sup>22</sup> The new s 79 contains two broad offences regarding failure to disclose conflicts of interest. Section 79(1) retains the existing offences as they apply to persons employed in the public service and requires that public sector employees:

<sup>19</sup> Department of the Attorney-General and Justice, *Response to Professor Aughterson's advice regarding ss 75C and 79 of the Criminal Code*, (unpublished) 17 November 2017, p.2

<sup>20</sup> Department of the Attorney-General and Justice, *Response to Professor Aughterson's advice regarding ss 75C and 79 of the Criminal Code*, (unpublished) 17 November 2017, p.5

<sup>21</sup> Department of the Attorney-General and Justice, *Response to Professor Aughterson's advice regarding ss 75C and 79 of the Criminal Code*, (unpublished) 17 November 2017, p.2

<sup>22</sup> Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017 (Serial No. 35)*, <https://parliament.nt.gov.au/committees/spsc/CRA>, p.8

disclose any substantial conflicts of interest, whether or not they intend to act on that conflict of interest, to ensure persons do not exert unofficial influence through close working relationships and reflects the kind of ethical obligations generally placed on public servants.<sup>23</sup>

3.19 Accordingly, s 79(1) provides that a public officer who is a public sector employee commits an offence if:

- (a) the officer knowingly holds a private interest; and
- (b) the officer would be able to exercise the officer's duties or functions as an officer in a manner that substantially affects the private interest and the officer is reckless in relation to that circumstance; and
- (c) the officer had a reasonable opportunity to disclose the private interest to an appropriate person; and
- (d) the officer fails to disclose the private interest to an appropriate person and is reckless in relation to that failure; and
- (e) the conduct mentioned in paragraph (d) is improper.

3.20 However, Professor Aughterson advised that it is unclear as to how the fault element of recklessness operates in relation to s 79(1)(b) given that:

presumably a public officer will be in such a position by virtue of the nature of the function or role assigned to the officer, so that it is not clear as to how recklessness is involved where the private interest was pre-existing – the duty to disclose that interest is a separate element under s 79(1)(c), so that recklessness for the purposes of s 79(1)(b) is unrelated to the issue of disclosure.<sup>24</sup>

3.21 In responding to Professor Aughterson's query, the Department advised that section 43AK(2) of the *Criminal Code*, provides that a person is reckless in relation to a circumstance, such as the proposed s 79(1)(b), if:

- (a) the person is aware of a substantial risk that the circumstance exists or will exist; and
- (b) having regard to the circumstances known to the person, it is unjustifiable to take that risk.<sup>25</sup>

3.22 The Department explained how the fault element of recklessness would apply in subsection 79(1)(b) by way of the following hypothetical example:

Suppose the public officer in question was a regulator who inspected private businesses for the purpose of ascertaining compliance with legislation, and that the inspector has the power to issue infringement notices or temporarily prohibit such businesses from operating if he determines the business to be non-compliant. Suppose further that the public officer has a financial interest in a business called 'XYZ' that operates under the legislation, and this interest has been undisclosed to the Agency that employs the public officer. However, there are a lot of businesses that the officer could inspect, and XYZ is in a different

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<sup>23</sup> Explanatory Statement, *Independent Commissioner Against Corruption (Consequential and Related Amendments) Bill 2017 (Serial No. 35)*, <https://parliament.nt.gov.au/committees/spsc/CRA>, p.8

<sup>24</sup> Professor Ned Aughterson, *Review of the ICAC (Consequential and Related Amendments) Bill 2017*, (unpublished), 8 November 2017, p.3

<sup>25</sup> *Criminal Code Act (NT)*, s 43AK(2); see also Department of Attorney-General and Justice, *Response to Professor Aughterson's advice regarding ss 75C and 79 of the Criminal Code*, (unpublished) 17 November 2017, pp.5-6

geographical area to the businesses that the officer is generally assigned to inspect.

The public officer's interest in XYZ is the **private interest**. Inspecting private businesses is the relevant **duty or function** that the officer could exercise which could substantially affect the private interest. The public officer's private interest is in this case pre-existing, and has not been disclosed.

While the officer could potentially have duties or functions that allow the officer to affect the private interest, it is not apparent at this stage that the officer would be able to exercise those duties and functions in a way that substantially affects the private interest.

Now, assume the officer is assigned to inspect business PQE. The officer believes that PQR is planning an event that weekend that will be particularly competitive with XYZ, but he does not know this for sure. If this is true, the officer could substantially advance XYZ's interests by suspending PQR's business for the weekend. It is likely that the element of **recklessness** would at this point require the officer to disclose the private interest, even though it is not certain that the rival business is going to conduct the event in question.<sup>26</sup>

### **Committee's Comments**

- 3.23 The Committee is satisfied with the Department's clarification regarding the application of the fault element of recklessness in subsection 79(1)(b).

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<sup>26</sup> Department of the Attorney-General and Justice, *Response to Professor Aughterson's advice regarding ss 75C and 79 of the Criminal Code*, (unpublished) 17 November 2017, pp.5-6

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