

**East Arnhem Regional Council Supplementary  
Submission on the Northern Territory  
Independent Commission against Corruption -  
Draft Legislation  
SOCIAL POLICY SCRUTINY COMMITTEE  
September 2017**

The East Arnhem Regional Council (EARC) made a submission to the Northern Territory (NT) Anti-Corruption Integrity and Misconduct Commission Inquiry on the establishment of an independent anti-corruption body in the NT in February 2016 and a Supplementary submission July 2017. EARC welcomes the further opportunity to make another supplementary submission with a further reference to the draft legislation (Bill) – *“A Bill for an Act to establish an Independent Commissioner Against Corruption, to provide for the protection of whistleblowers, to repeal the Public Interest Disclosure Act, and for related purposes”*.

This supplementary submission will make reference to the four (4) points identified in the letter of request for submissions and will also draw on the conclusion and recommendations presented in EARC’s original submission and previous Supplementary (July 2017) submission.

**Social Policy Scrutiny Committee Four (4) Points**

- a) Whether the Assembly should pass the Bill;

EARC has reviewed the Bill and is supportive of its intent in assisting in delivering and continuing trust within Government.

- b) Whether the Assembly should amend the Bill;

As EARC has expressed previously and attached below there needs to be serious consideration to ensure that:-

- i) Referrals to Local Government Councils takes into account the costs that will be incurred in conducting a thorough investigation into matters disclosed. EARC is currently involved in a Public Interest Disclosure (PID) matter where EARC Solicitors have estimated that the costs to bring to Court would be in excess of \$150,000. This cost represents the investigation and legal costs and does not consider the administrative costs which could be equivalent when considering EARC staff hours and resources expended. The Supplementary

submission, July 2017, discusses this issue and makes a recommendation that may be considered through some form of amendment.

- ii) Related to this current PID disclosure are the physical and mental impacts on EARC staff particularly related to what is referred to by the Northern Territory (NT) Ombudsman as an “unreasonable complainant” (Managing Unreasonable Complainant Conduct – Practice Manual, 2<sup>nd</sup> Edition, May 2012). Local Government staff, particularly senior staff such as Chief Executive Officers (CEO) and Directors that have the full delegation under the Local Government Act (2008) and Council can be targeted by disgruntled staff leading to severe physical and mental stress. This is evident with regards to the current PID issue as indicated in ii) above. Serious consideration must be made regarding the protection of senior staff such as the CEO who must administer and deal with staff as required by legislation. Hiding behind the “protections” expressed in the Bill when making malicious, false and misleading representations should not be tolerated. In this case the victim may have been carrying out the expected roles and responsibilities of his/her position as a CEO or Director. From the reading of the Bill there appears to be sufficient supporting sections regarding protecting the “victim”, however, it appears not to be clear enough that there are full and clear protections. As seen below there is an appearance, however, the Sections of the Bill range from S89, S92 and S149 when identifying “false” and “misleading” information.

S92 of the Bill, Meaning of engage in retaliation, appears to give some protection to a senior manager that could be the subject of malicious and vengeful retaliation to a reasonable management decision and particularly S92 (3) which states ***“It is irrelevant whether or not the victim is a protected person”***.

S89, Meaning of protected action, clause (2) ***“Despite subsection (1), and action is not protected action to the extent the action involves the provision of communication of information the person taking the action knows or believes is misleading information”***.

S149, Misleading information, also appears to give comfort to senior managers that may be subjected to malicious and vengeful retaliation through penalties if:-

- (a) “the person intentionally gives information to another person; and  
(b) the information is misleading and the person has knowledge of that  
circumstance; ...”***

East Arnhem Regional Council respects highly the office of the CEO and Directors that control the operations of Council. EARC expects, as referenced in the NT Local Government Act (2008) (NTLGA) Guideline 3:-

### ***3. Appointing a CEO***

#### ***1. Objectives***

- (1) To guide the council in appointing a high quality and appropriately skilled CEO;***
- (2) To ensure the ongoing viability of the Council by appointing a CEO with financial management experience; and***
- (3) To maintain the integrity of the Council by ensuring that the council is aware of any conflicts of interest that the CEO might have.***

Guideline 3 continues with:-

#### ***2. Background to Guidelines***

***(2) The CEO is responsible, among other things, for: the implementation of council policy; the day-to-day management of the Council, which includes the appointment and management of Council staff; providing advice and information to the council to facilitate council decision-making; communication between the council and its constituency; management and maintenance of council assets and resources and ensuring the proper financial management of the council. (See s101 of the Local Government Act 2008 for the full outline of these responsibilities).***

***(3) Selecting and appointing a CEO is one of the most important tasks elected members may undertake during their term of office. In light of this, it is essential that the recruitment process ensures that only appropriately qualified and suitable persons are appointed to the position of CEO as this will facilitate the smooth and efficient running of council. Choosing the right***

***CEO is paramount in ensuring that the council is both functional and progressive.***

The quality of EARC Directors is to a similar high standard as the NTLGA requires the CEO, in consultation with the President/Mayor to appoint a delegate (acting CEO) during the CEO's absences. Assuming six (6) weeks annual leave, ten (10) days personal leave and other extended leave or absences there will be upwards of 12 weeks per year that an acting CEO will be appointed from the Directors of EARC. With that said, EARC expects its Directors to be of a standard equivalent to "a high quality and appropriately skilled CEO".

EARC recognises that these senior officers must be protected from malicious and vengeful action that utilises false and misleading information that leads to physical or mental "harm".

However, if the allegation/disclosure are found to be substantiated then EARC supports the full intention of the Bill in "restoring trust in Government".

- c) Whether the Bill has sufficient regard to the rights and liberties of individuals; and,

As indicated in b) above "the rights and liberties of individuals" must clearly reflect the serious impact of false and misleading allegations against senior managers making reasonable and appropriate managerial decisions when dealing with Councillors, employees, residents, contractors and stakeholders within the Local Government Area.

- d) Whether the Bill has sufficient regard to the institution of Parliament.

EARC believes that there is sufficient regard to the institution of Parliament.

Below, for reference, is the Conclusion and Recommendations from the July 2017 submission from EARC:-

***Conclusion***

*When considering the introduction of an NT ICAC the financial ability of the Local Government that maybe the subject of a complaint of misconduct or corrupt conduct should be taken into account. The financial ability could be related to the Local Governments*

*position on the ABS Socio-Economic Indexes for Areas (SEIFA) or some other rating that ensures that the Council can meet the associated costs of a “referred” complaint.*

*Malicious action that could be taken by a disgruntled employee, rate payer or community member does not receive protection under the Act and assistance is given to Councils in some form so that the costs of an independent investigation are covered. Again some form of rating can be applied as previously mentioned.*

### **Recommendations**

- 1. Financial assistance is provided for any “referred” complaints and associated independent investigations to those Councils identified by ABS, SEIFA, Local Government Area (LGA) Index of Relative Socio-economic Disadvantage within the relevant Census period.**
- 2. Financial assistance is provided for any “referred” complaints where the independent investigation findings indicate that the complaint was malicious. This will assist in taking action against the complainant to recover costs for those Councils identified by ABS, SEIFA, Local Government Area (LGA) Index of Relative Socio-economic Disadvantage within the relevant Census period.**
- 3. That employees and Councillors are protected from intentional malicious and defamatory action by not allowing the complainant any privilege of protection under the Act.**

### **Clarification**

With reference to the Bill and EARC’s Recommendations we note the following:-

**Part 2. Section 16. Functions (2)(b) (p.19)** which states “*the ICAC should refer all other matters that may involve improper conduct to another entity, unless there is a good reason for the ICAC to deal with the matter.*”

**Section 16. Functions (3)** states “*Without limiting subsection (2)(b), it is a good reason for the ICAC not to refer a matter to another entity if referring the matter:*

- (a) may adversely affect the performance or future performance of the ICAC’s functions;*
- or*
- (b) may reveal the identity of a protected person.*

EARC proposes that there is a third clause (b or c) which states:-

**(b or c) may adversely affect the performance or future performance of the other entity particularly a public body.**

This additional clause may take into consideration the ability of the other “entity”, particularly a public body, being able to meet the costs of any such referral due to the particular expertise and experience the referral may require. The Table on page 22 of the Bill (**Division 4 Referrals 23(2)**) identifies a public body as a “Referral entity”.

It is appreciated that **s24** states that *“The ICAC may consult a referral entity in deciding whether to make a referral to the entity”*. This consultation would hopefully lead to a clear and concise understanding of the requirements and possible costs that could be incurred by the entity in such a referral.

Further to the above **s36(1)** states that *“The ICAC may conduct an investigation as a joint investigation with a referral entity in relation to a matter, whether or not the ICAC has referred the matter to the entity under Division 4”*. This clause identifies that “joint investigations” are possible and in turn a “joint” approach will assist in reducing the impacts on the public body.

However, it is believed that to strengthen the understanding that a referred matter could lead to negative human resource and/or financial impacts that the inclusion of the proposed clause above be made. That is **Section 16. Functions** would appear something like:-

- (3) Without limiting subsection (2)(b), it is a good reason for the ICAC not to refer a matter to another entity if referring the matter:
  - (a) may adversely affect the performance or future performance of the ICAC’s functions; or
  - (b) may adversely affect the performance or future performance of the other entity particularly a public body.**
  - (c) may reveal the identity of a protected person.

### Recommendation

**That Part 2. S16(3) of the Bill include the clause (or words to this effect):-**

**“may adversely affect the performance or future performance of the other entity particularly a public body”.**