



Anti-Corruption, Integrity and Misconduct Commission Inquiry

Final Report – May 2016

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Hon Brian Martin AO QC
Commissioner, NT Anti-Corruption, Integrity & Misconduct Commission
Inquiry

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27 May 2016

The Honourable John Hardy OAM
Administrator of the Northern Territory
GPO Box 497
Darwin NT, 0801

Your Honour,

Pursuant to my appointment as Commissioner dated 14 December 2015, I have completed my Inquiry into the establishment of an independent anti-corruption body in the Northern Territory.

I am pleased to provide my Report.

Thank you for the opportunity of assisting in this matter.

Yours sincerely

A handwritten signature in blue ink, reading "Brian Martin".

Brian Ross Martin AO QC
Commissioner

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Introduction

I wish to express my gratitude to my Personal Assistant, Mrs Barbara Backers, and to my Research Assistant, Mr Christopher Stewart, who have both provided invaluable assistance throughout the Inquiry and in the preparation of this Report. I am also grateful to Ms Adele Bogard for her excellent research assistance provided in the latter stages of this Inquiry and in the preparation of this Report.

Hon Brian Ross Martin AO QC

- [1] On 26 August 2015 the Legislative Assembly of the Northern Territory (the Assembly) resolved that the Assembly supported the establishment of an “Anti-Corruption, Integrity and Misconduct Commission” and that a person qualified to be a judge in the Supreme Court of the Northern Territory be appointed to inquire into and report to the Administrator concerning the establishment of an “independent anti-corruption body” in the Northern Territory. Acting with the advice of the Executive Council, and pursuant to s4A of the *Inquiries Act* (NT), on 14 December 2015 the Administrator appointed me to conduct the Inquiry and report to His Honour.
- [2] The terms of the resolution of 26 August 2015 are set out in the extract from Hansard of that date which is ***Annexure 1*** to this Report. The Instrument of my appointment is ***Annexure 2*** and includes a Schedule which sets out the matters concerning which I have been directed to inquire and report. The Schedule reproduces the relevant section of the Assembly’s resolution of 26 August 2015 and directs me to inquire into and report concerning:
1. The establishment of an independent anti-corruption body in the Northern Territory, including but not limited to the following considerations:
 - (a) the principles and provisions of Independent Commission Against Corruption (ICAC) and like legislation in other Australian jurisdictions and their applicability to the Northern Territory; and
 - (b) the appropriate powers such a body should have, including but not limited to:
 - (i) the power to investigate allegations of corruption, including against Ministers, Members of the Legislative Assembly and other public officials; and
 - (ii) the power to conduct investigations and inquiries into corrupt activities and system-wide anti-corruption reforms as it sees fit; and
 - (iii) the appropriate trigger for an NT ICAC’s jurisdiction and the relationship between this body and other NT bodies such as the Ombudsman; and

(iv) models from any other jurisdictions; and

(v) the use of existing NT legislation or NT statutory authorities.

2. The report is to include indicative costs of establishing the various models put forward.

3. The Commissioner is to consult with relevant stakeholders including but not limited to the Police Force of the Northern Territory, the Law Society Northern Territory and the Criminal Lawyers Association of the Northern Territory.

4. The Commissioner is to provide advice and report back to the Administrator in a timely manner.

[3] It is important to emphasise that I am bound by the terms of my appointment. Those terms do not direct me to inquire into and report as to whether an independent anti-corruption body should or should not be established in the Northern Territory. The Assembly has spoken in this regard. The resolution of 26 August 2015 states that the Assembly supports the establishment of such a body. I am directed to inquire into and report to the Administrator on the establishment of an independent anti-corruption body having regard to, but not limited to, the considerations set out in the Schedule.

[4] For the purposes of the Inquiry, advertisements inviting submissions were placed in the NT News, the Centralian Advocate and the Katherine Times. In addition I corresponded with the persons and organisations identified in *Annexure 3* inviting submissions from those persons and organisations. A list of the persons and organisations who provided submissions is *Annexure 4*. This list does not include the name of a person who requested that their name not be published. Confidential information and irrelevant material of a defamatory nature have been redacted and an exceptionally large and irrelevant volume of documentation accompanying one submission has not been included.

[5] I express my gratitude to everyone who took the time to provide submissions.

[6] In addition to written submissions, I was assisted by formal and informal discussions with:

- The Hon Trevor Riley, Chief Justice of the Supreme Court of the Northern Territory.
- Judges of the Supreme Court of the Northern Territory.
- Mr Michael Grant QC, Solicitor-General for the Northern Territory.
- Ms Brenda Monaghan, Commissioner for Public Interest Disclosures in the Northern Territory.
- Mr Peter Shoyer, Northern Territory Ombudsman.
- The Hon Gerry Wood, Member of the Legislative Assembly.
- Mr Greg Shanahan, Chief Executive Officer, Northern Territory Department of the Attorney-General and Justice.
- The Hon Bruce Lander QC, Independent Commissioner Against Corruption in South Australia.
- The Hon John Rau MP, Deputy Premier and Attorney-General of South Australia.



Summary of Recommendations

[7] My Inquiry has led me to conclusions which are set out in this Report. Those conclusions necessarily reflect my personal views and they are conclusions about which informed persons might reasonably hold different views.

[8] In summary, and without endeavouring to list every individual item, I make the following recommendations:

1. The structure of the NT Anti-Corruption Commission follow the model established in South Australia in which:
 - The Commission is headed by the Commissioner.
 - An Office for Public Integrity, acting under the overall supervision and direction of the Commissioner, receives and assesses complaints and reports about corruption, misconduct and maladministration in public administration and makes recommendations to the Commissioner as to whether and by whom complaints and reports should be investigated. In substance the Office provides the administrative, operational and legal support for the Commissioner.
2. The *Public Interest Disclosure Act* (NT) be repealed and the Office of Public Interest Disclosures be absorbed into the NT Anti-Corruption Commission as the Office for Public Integrity with, broadly speaking, the same functions and objectives as the Office for Public Integrity in South Australia.
3. The Freedom of Information and Privacy functions of the Office of Public Interest Disclosures be transferred to the Ombudsman.
4. The Hon Bruce Lander QC, Independent Commissioner Against Corruption in South Australia, be employed as the first head of the Commission, with the title Commissioner.
5. Mr Lander be appointed on a part-time basis for two years with a view to reporting to the Assembly within two years outlining all operations in that

period and providing recommendations for the future operation of the NT Anti-Corruption Commission.

6. The NT Anti-Corruption Commission be an Agency with a Chief Executive Officer appointed at the ECO5 level, replacing the ECO2 position currently occupied by the Commissioner for Public Interest Disclosures (CPID).
7. Provision be made for the appointment of a Deputy Commissioner to act as Commissioner during any period for which there is no person appointed as Commissioner or the Commissioner is absent from, or unable to discharge, official duties.
8. The Commissioner be an independent statutory officer appointed by the Administrator for a maximum term of five years and be eligible for re-appointment once only for an additional term for up to five years.
9. The appointment process include:
 - A panel such as the Judicial Appointments Panel making recommendations as to an appointment to a bipartisan Standing Committee of the Assembly.
 - The Standing Committee making recommendation to the Administrator.
 - The Standing Committee possessing the power of veto with provision for resolving any deadlock.
10. In order to be qualified for appointment as Commissioner the person must be a former Judge of a Supreme Court or the Federal or High Court, or be a legal practitioner of not less than ten years standing. No age restriction should apply.
11. The Commissioner should not hold a commission as a Judicial Officer or be a member of the Assembly.

- 12.** The jurisdiction of the NT Anti-Corruption Commission be confined to investigating conduct in the administration of public affairs, but to include conduct that might amount to an offence against the *Electoral Act* (NT):
- Ordinarily the investigative role of the Commissioner be concentrated upon corrupt conduct.
 - In the absence of good reason, conduct falling short of corrupt conduct and amounting to misconduct or maladministration be referred to the relevant agency for investigation and report to the Commissioner.
 - Corrupt conduct, misconduct and maladministration be defined as set out in paras [149 and 159] of this report.
 - The Commissioner be permitted to investigate an offence that is not corruption in public administration (an incidental offence) which is discovered in the course of investigation properly undertaken and may be connected with or part of a course of activity involving the commission of corruption in public administration.
- 13.** The jurisdiction of the NT Anti-Corruption Commission extend to investigating any person for corruption, misconduct or maladministration in public administration or for offences under the *Electoral Act* (NT).
- 14.** The NT Anti-Corruption Commission possess a broad educative function.
- 15.** Specific provision be made in the NT Commission legislation recognising the importance of judicial independence and giving direction as to who may undertake an investigation relating to the conduct of a judicial officer.
- 16.** Judicial independence and parliamentary privilege be maintained. In particular with respect to parliamentary privilege, the boundaries between the powers of the NT Anti-Corruption Commission and parliamentary privilege be clearly defined.

17. The privilege against self-incrimination be abrogated for Commission purposes but provisions be included concerning subsequent use of evidence obtained in the face of a claim of privilege.
18. Legal professional privilege and public interest immunity be maintained.
19. The NT Anti-Corruption Commission be empowered to institute investigations following complaint or report by any person or on its own motion.
20. Complaints and reports be made only to the Office for Public Integrity and not directly to the Commissioner.
21. The Office for Public Integrity not be a “one-stop shop” for complaints. For example, persons should remain free to make complaints to the Ombudsman, the Police or Heads of Public Sector Agencies.
22. Legislation not require that a complaint or report be verified on oath or be made in writing. These matters be left to administrative decisions by the Commissioner.
23. Appropriate provisions be put in place to ensure protection of complainants or persons making reports, for example, protection from reprisals and victimisation.
24. Significant penalties be prescribed for false or misleading complaints and for contempt of or obstructing and failing to comply with directions given by the NT Anti-Corruption Commission.
25. Appropriate provisions be put in place with respect to confidentiality of complaints and reports, including the identity of complainants or persons making reports, subsequent investigations and information gathered in the course of investigations. To the extent necessary and appropriate these provisions should specifically exclude the operation of the rules of natural justice.

- 26.** Senior public officers, Police Officers, Members of the Legislative Assembly, Local Government Councillors and Local Government Chief Executive Officers be required to report to the NT Anti-Corruption Commission any matter reasonably suspected of involving corruption in public administration or serious or systemic misconduct or maladministration in public administration.
- 27.** The Commissioner develop guidelines for the assistance of those to whom the mandatory reporting provisions apply.
- 28.** No time limit be imposed with respect to receiving complaints about corruption, but consideration be given to imposing a limitation in respect of less-serious matters which are properly classified as maladministration.
- 29.** If a time limit is imposed, notwithstanding that a matter is outside the time limit, the Commissioner possess a wide discretion to accept the complaint or report and to investigate if the Commissioner is of the view that it is in the public interest to do so.
- 30.** The Commissioner possess a wide and unfettered discretion to:
- Accept or reject a complaint or report.
 - Undertake an investigation or refer a matter to an agency for that purpose.
 - Give directions to an agency as to the conduct of an investigation.
 - Take back an investigation from an agency.
 - Cease an investigation and either dismiss the complaint or report or refer it to an agency.
 - Direct an agency to undertake further investigation and give directions in that regard.

- Generally alter a course of action according to information received in order to meet changing circumstances.
- 31.** The Commissioner and other members of the NT Anti-Corruption Commission not be under obligation to complete a register of pecuniary interests and personal or political associations, but be under a legislative duty to avoid actual or perceived conflicts of interest. Legislative direction may be appropriate for consequences to follow if the existence of a conflict of interest is established.
- 32.** The Commissioner not be bound by the rules of evidence.
- 33.** The NT Commission legislation not include a general provision requiring the Commissioner to observe the rules of natural justice or procedural fairness (leaving the common law to operate in conjunction with the provisions recommended in the next paragraph).
- 34.** The following provisions be enacted in order to ensure fairness to persons publicly affected by investigations:
- In a public inquiry in which allegations adverse to a person or body are aired, that person or body be provided with a reasonable opportunity to respond to the allegations both in public submissions and the presentation of evidence.
 - If the NT Anti-Corruption Commission proposes to include in a report to a Standing Committee, the Assembly or a Public Sector Agency any comment adverse to any person or body, the Commission give the person or body a reasonable opportunity to respond to the substance of the matter adverse to the person or body and include in the report the principal features of the response of the person or body to the adverse matter.

35. Inquiries be conducted in private unless the Commissioner is satisfied it is in the public interest to conduct a public inquiry:

- The legislation state that possible prejudice to a future prosecution is a factor tending against holding a public inquiry.
- Legislative guidance be provided in terms of those found in s31(2) of the *Independent Commission Against Corruption Act 1988* (NSW).
- The factors to be considered include undue hardship likely to be caused to any person if a public inquiry is conducted.

36. In conducting a public inquiry the Commissioner be able to suppress information and documents and the identity of witnesses and persons publicly identified if it is in the public interest to do so or if publicity would cause undue hardship to any person.

37. Broadly speaking, the Commissioner be given the following powers:

- Entry, search and seizure powers without warrant with respect to public premises or premises used by public persons or entities other than residential premises.
- To require productions of statements, documents or other things.
- To obtain search warrants in respect of private or residential premises or motor vehicles or ships or other forms of conveyance.
- To seek warrants under surveillance and telecommunications legislation.
- To seek authorisation to conduct unlawful activities and assume false identities.

- To require attendance at a hearing and the giving of evidence under oath or affirmation (coupled with appropriate sanctions for non-compliance and contempt).
- To second staff from other agencies or to employ investigators or to delegate powers.
- To require a public sector agency to refrain from taking action relating to a particular matter under investigation or to conduct a joint investigation with the Commissioner (SA s34¹ and WA s42²).
- To exercise the powers of a public sector agency (SA s36A³).
- Provided certain safeguards are implemented, to commence or continue an investigation notwithstanding the existence of other investigations or proceedings (NSW s18,⁴ QLD s331⁵ and VIC s70⁶).
- In referring a matter to a public sector agency, power to give directions and guidance with respect to the conduct of the matter (SA ss37 and 38⁷ and WA s41⁸) and to require the agency to provide a report as to the investigations undertaken and results.
- To refer a complaint or report concerning a Member of the Legislative Assembly (MLA) to the Speaker (the legislation requiring the Speaker to provide a report to the Commissioner as to the investigations undertaken and results).

¹ *Independent Commissioner Against Corruption Act 2012* (SA).

² *Corruption, Crime and Misconduct Act 2003* (WA).

³ *Independent Commissioner Against Corruption Act 2012* (SA).

⁴ *Independent Commission Against Corruption Act 1988* (NSW).

⁵ *Crime and Corruption Act 2001* (QLD).

⁶ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

⁷ *Independent Commissioner Against Corruption Act 2012* (SA).

⁸ *Corruption, Crime and Misconduct Act 2003* (WA).

- To evaluate the practices, policies and procedures of a public sector agency and to report to the Assembly with recommendations (SA ss40-42⁹).
- To request or recommend that a person be granted indemnity from prosecution (NSW s49¹⁰).
- To issue seizure and retention orders (SA ss31 and 32¹¹).
- To apply to the Supreme Court for injunctions to restrain certain conduct (NSW s27,¹² QLD s344,¹³ SA s35¹⁴ and TAS s99¹⁵).
- To apply to the Supreme Court for an order that a person's passport be delivered to the Commissioner (SA Schedule 2, s18¹⁶).
- To request the Auditor-General to conduct an examination of accounts (SA s39¹⁷).
- To apply to dispose of seized property (NSW s48B¹⁸).
- To enlist the services of Police personnel to assist in the conduct of investigations and the provision of security for the Commissioner, Commission investigators and staff and witnesses in circumstances where the Commissioner believes on reasonable grounds that such assistance and protection is necessary.
- To convey information to the Director of Public Prosecutions (DPP), Police or other relevant law enforcement agencies concerning proceeds of crime discovered in the course of an investigation, regardless of

⁹ *Independent Commissioner Against Corruption Act 2012* (SA).

¹⁰ *Independent Commission Against Corruption Act 1988* (NSW).

¹¹ *Independent Commissioner Against Corruption Act 2012* (SA).

¹² *Independent Commission Against Corruption Act 1988* (NSW).

¹³ *Crime and Corruption Act 2001* (Qld).

¹⁴ *Independent Commissioner Against Corruption Act 2012* (SA).

¹⁵ *Integrity Commission Act 2009* (Tas).

¹⁶ *Independent Commissioner Against Corruption Act 2012* (SA).

¹⁷ *Ibid.*

¹⁸ *Independent Commission Against Corruption Act 1988* (NSW).

whether the information concerning the proceeds of crime was directly or indirectly relevant to the investigation.

- 38.** The Commissioner be able to report at any time to the Assembly and the Standing Committee concerning investigations and opinions.
- 39.** The Commissioner possess a discretion to report confidentially or to decline to report a matter which, in the opinion of the Commissioner, should remain confidential.
- 40.** The NT Anti-Corruption Commission not be given power to institute any prosecutions.
- 41.** Other than in respect of decisions to maintain confidentiality of material (see para [388]) and in respect of claims of privilege (see para [436]), no specific provision be made with respect to appeals or judicial review (leaving the current law with respect to judicial review of administrative bodies to apply).
- 42.** The NT Anti-Corruption Commission be given budgetary flexibility.
- 43.** The NT Anti-Corruption Commission be empowered to undertake or seek security checks with respect to all staff and others retained to provide services.
- 44.** With the agreement of the Commissioner of Police and the DPP and, if necessary, the Heads of Public Sector Agencies, the NT Anti-Corruption Commission be able to retain the services of persons such as IT experts, Police Officers and DPP Prosecutors.
- 45.** Provision be made for appropriate protections and immunities for the Commissioner, staff and persons retained to provide services for the NT Anti-Corruption Commission; and for witnesses.
- 46.** The Commissioner be empowered to arrange physical and other protections for witnesses and staff.

- 47.** As in South Australia, a person be appointed on an annual basis to conduct a review of the operations of the NT Anti-Corruption Commission.
- 48.** A bipartisan Standing Committee of the Assembly be established with appropriate oversight of the NT Anti-Corruption Commission.
- 49.** Complaints against the Commissioner be dealt with by the person appointed to conduct the annual review.
- 50.** Provision be made for suspension and removal of the Commissioner.
- 51.** The Commissioner possess appropriate powers with respect to investigating complaints against staff of the NT Anti-Corruption Commission and others retained to provide services to the Commission and in relation to disciplinary and other matters concerning staff.
- 52.** Consideration be given to establishing a Commissioner for Standards to deal with less serious matters relating to Members of the Legislative Assembly.



Integrity Regimes

- [9] Each Australian State and Territory, and the Commonwealth, has developed its own body of laws designed to ensure integrity in the administration of public affairs. These laws contain measures intended to discourage misconduct and, if misconduct occurs, to detect it and deal appropriately with the offender. While the criminal law is part of the armoury in this regard, the broader concept of integrity in the administration of public affairs extends well beyond the ambit and reach of the criminal law.
- [10] In resolving to support the establishment of an Anti-Corruption, Integrity and Misconduct Commission, the Assembly was not directing its attention to the general administration of the criminal law. The Assembly had in mind the broader concept of integrity in the administration of public affairs. This is the context in which anti-corruption bodies operate in other Australian jurisdictions and in which I am required to inquire and report.



NT Overview of Current Position

- [11] The body of laws in the Northern Territory relating to integrity in the administration of public affairs includes criminal offences found in the Criminal Code¹⁹. Division 3 of Part III (ss56-60)²⁰ relates to offences against the Administrator or MLAs, including interference with or bribery of a member of the Assembly. A member of the Assembly who solicits, receives or agrees to receive a benefit on the understanding that the exercise by the member of the member's duty or authority as a member would be influenced or affected, commits an offence against s60.
- [12] Speaking generally, corruption and abuse of office by public service employees or holders of public office is dealt with under Part IV of the Code (ss76-92). Corruption by a holder of judicial office is an offence against s93. Corrupt interference with the due administration of justice by a Justice of the Peace, or by a person employed in the public service, is covered by s94.
- [13] Criminal offences are ordinarily investigated by Police and are dealt with in the criminal courts. Police powers of investigation are constrained by rules, a number of which are, speaking generally, overridden by legislation establishing anti-corruption bodies. The right to refuse to answer questions is a significant example.
- [14] In addition to the criminal law, the regime in the Northern Territory designed to ensure integrity in the administration of public affairs is currently founded primarily upon the combined powers of the CPID, the Auditor-General and the Ombudsman.

¹⁹ Schedule 1, *Criminal Code Act* (NT).

²⁰ *Criminal Code Act* (NT).

Commissioner for Public Interest Disclosures (CPID)

[15] The *Public Interest Disclosure Act* (NT) (the Disclosure Act) is described as an Act “to provide for the disclosure and investigation of improper conduct of public officers and public bodies, to protect persons making disclosures and others from reprisal, and for related purposes.” The objects of the Act are set out in s3:

- (a) to provide for disclosure of improper conduct on the part of public officers and public bodies; and
- (b) to protect the persons who make public interest disclosures and others from acts of reprisal; and
- (c) to ensure that:
 - (i) public interest information disclosed is properly investigated; and
 - (ii) any impropriety revealed by the investigation is properly dealt with.

[16] The public officers to whom the Disclosure Act applies are defined by s7 as:

- (a) an MLA;
- (b) a member, officer or employee of a public body;
- (c) a police officer;
- (d) The holder of an office established under an Act who is appointed by the Administrator or a minister.

[17] Public bodies for these purposes are defined in s6 and encompass a broad range of bodies including Local Government Councils, the Police Force and bodies established for a public purpose. However, the definition of a public body specifically excludes a court or a body established under an act that has “judicial or quasi-judicial functions in the performance of its deliberative functions”.

- [18] In addition to the exclusions found in s6, a significant number of persons involved in the administration of public affairs are excluded by s7. Persons beyond the reach of the Disclosure Act include judicial officers, the Coroner, the DPP, the Auditor-General, the Ombudsman, the Electoral Commissioner, the CPID, an officer of the Assembly, a member of the personal staff of a judicial officer or a Coroner and a member of a body established under an Act that has judicial or quasi-judicial functions in the performance of its deliberative functions.
- [19] The Disclosure Act provides that an individual may make disclosure of “public interest information” (s10). Section 20 provides that the CPID “must” investigate all public interest disclosures made or referred to the Commissioner. Significantly, the Commissioner cannot instigate an investigation without such a disclosure.
- [20] In order for a disclosure to amount to a “public interest disclosure”, it must be a disclosure of “public interest information”, namely, information that, if true, would tend to show a public officer or public body has engaged, is engaging, or intends to engage, in improper conduct (s4). Improper conduct is defined by s5 in the following terms:
- (1) Conduct on the part of a public body or public officer in, or related to, the performance of official functions is *improper conduct* if:
 - (a) the conduct involves 1 or more of the following and constitutes a criminal offence or, if engaged in by a public officer, reasonable grounds for terminating the services of the public officer:
 - (i) seeking or accepting a bribe or other improper inducement;
 - (ii) any other form of dishonesty;
 - (iii) inappropriate bias;
 - (iv) a breach of public trust;
 - (v) misuse of confidential information; or

(b) the conduct involves 1 or more of the following (whether or not the conduct constitutes a criminal offence or, if engaged in by a public officer, reasonable grounds for terminating the services of the public officer):

(i) substantial misuse or mismanagement of public resources;

(ii) substantial risk to public health or safety;

(iii) substantial risk to the environment;

(iv) substantial maladministration that specifically, substantially and adversely affects someone's interest.

(2) The following also constitute improper conduct:

(a) an act of reprisal;

(b) a conspiracy or attempt to engage in improper conduct that constitutes a criminal offence.

(3) In this section:

Substantial maladministration means conduct that includes action or inaction of a serious nature that is any of the following:

(a) contrary to law;

(b) unreasonable, unjust, oppressive, or improperly discriminatory;

(c) based wholly or partly on improper motives.

[21] The capacity to make a public interest disclosure is limited. If the disclosure relates to an MLA, other than the Speaker, the disclosure “must” be made to the Speaker. Otherwise, the disclosure “must” be made to the Commissioner or the responsible Chief Executive (s11). The Speaker possesses a discretion under s12 as to whether a disclosure made to the Speaker will be referred to the Commissioner for investigation.

[22] Section 14 provides the person making a public interest disclosure with a level of protection from civil or criminal liability and Division 3 contains provisions aimed at protecting such persons from reprisal.

- [23] The CPID possesses discretion whether to investigate a public interest disclosure (s21). If the Commissioner considers it appropriate, with the exception of a referred MLA disclosure, the Commissioner may refer the disclosure to the Ombudsman, the Police Commissioner, the Auditor-General or a person or body prescribed by regulation.
- [24] If the Commissioner decides to conduct an investigation, s25(1) directs that the investigation “must” be conducted in private. The Commissioner may make such inquiries as the Commissioner considers appropriate and may take “such other steps” as the Commissioner considers appropriate to obtain information relevant to the disclosure. In conducting the investigation the Commissioner may hold a formal hearing and is not bound by the rules of evidence. However, the Commissioner must comply with the rules of natural justice.
- [25] Speaking generally, the Commissioner is empowered to compel the provision of information and documentation or to compel the attendance of a witness and require a witness to take an oath or affirmation and answer questions (ss26 and 27). A power is conferred by s28 to pursue an investigation at premises, other than residential premises, occupied by a public officer or public body. This includes taking copies of documents located at the premises. Unlike Police investigating general crime, the Commissioner is not required to obtain a search warrant before entering such premises. However, sanctions for non-compliance with directions given by the Commissioner do not include imprisonment (ss26, 27, 51 and 52).
- [26] The Commissioner does not possess power to obtain a search warrant to enter and search private or residential premises.
- [27] Following completion of an investigation the Commissioner is required to report the Commissioner’s finding to each “responsible authority” or the public body or public officer to whom the investigation relates. The Commissioner may, except in the case of a referred MLA

investigation, make recommendations “for action to be taken as a result of the findings” (s31). At any time the Commissioner may refer a matter to the DPP.

[28] As to witnesses, the rules relating to legal professional privilege apply, but a witness is not entitled to refuse to answer questions on the ground that the answer or disclosure of information would tend to incriminate the witness of an offence or to show that the witness is guilty of a breach of discipline or to expose the witness to a penalty. However, s38 provides that the information disclosed by the witness is “not admissible in evidence in civil, criminal or disciplinary proceedings against the witness” except in relation to proceedings for an offence against the Disclosure Act or civil proceedings in which a remedy is sought for an act of reprisal.

[29] The CPID is appointed by the Administrator (s39). The Act does not specify any qualifications for appointment as either necessary or desirable.

[30] Section 40 provides that the Commissioner must act independently and impartially and is not subject to direction concerning the exercise of the powers or performance of the functions of the Commissioner. Similarly, a member of the Commissioner’s staff cannot be subjected to external direction and is subject only to the direction of the Commissioner or another member of the Commissioner’s staff (s45).

[31] In summarising the primary features of the Disclosure Act, I have not endeavoured to canvass all the provisions which support its primary purpose and operation.

Auditor-General

- [32] The Auditor-General audits the public account and other accounts, and carries out audits of Agencies as directed by the Minister. Audits may also be conducted of Agency performance management systems. In addition to reporting to the Minister or Treasurer, the Auditor-General is required to report annually to the Assembly.
- [33] The role of the Auditor-General is a significant but different role from an anti-corruption body with specific investigative powers. It is unnecessary to discuss details of that role.

Ombudsman

- [34] The Ombudsman is a significant arm of the integrity regime operating in the Northern Territory with respect to the administration of public affairs. The position of Ombudsman is created by the *Ombudsman Act* (NT) which has as its objects (s3):
- (a) to give people a timely, effective, efficient, independent, impartial and fair way of investigating, and dealing with complaints about, administrative actions of public authorities and conduct of police officers; and
 - (b) to improve the quality of decision-making and administrative practices in public authorities.
- [35] The functions of the Ombudsman are defined in s10:
- (1) The Ombudsman's functions are:
 - (a) to investigate, and deal with complaints about, administrative actions of public authorities; and
 - (b) to consider the administrative practices and procedures of public authorities whose actions are being investigated, or dealt with on complaint, and to make recommendations to authorities:
 - (i) about appropriate ways of addressing the effects of inappropriate administrative actions; or

- (ii) for the improvement of their practices and procedures; and
 - (c) to consider the administrative practices and procedures of public authorities generally and to make recommendations or provide information or other help to the authorities for the improvement of their practices and procedures; and
 - (d) to investigate, and deal with complaints about, conduct of police officers; and
 - (e) to consider and prepare reports on investigations of the conduct of police officers and to make recommendations about action that should be taken in relation to them; and
 - (f) to perform other functions conferred on the Ombudsman under this or another Act.
- (2) The Ombudsman's functions under subsection (1) do not extend to a matter for which the Children's Commissioner is authorised to conduct an investigation under the *Children's Commissioner Act*.

[36] As can be seen from the objects of the *Ombudsman Act* (NT) and s10(1)(a), the Ombudsman is concerned with the administrative actions of "public authorities". Section 5 defines a public authority as:

- (a) an Agency; or
- (b) the Police Force; or
- (c) a Government owned corporation; or
- (d) a local government council; or
- (e) another entity that is constituted or established for a public purpose by or under a law of the Territory; or
- (f) an entity declared to be a public authority by another Act or prescribed by regulation.

[37] In defining a public authority as including an Agency, s4 takes the meaning of Agency from s3(1) of the *Public Sector Employment and Management Act* (NT).

[38] In substance, an Agency for present purposes includes any Agency established under the *Public Sector Employment Management Act* (NT) and the *Financial Management Act* (NT).

[39] Section 15 of the *Ombudsman Act* (NT) precludes the Ombudsman from investigating deliberations or decisions made by the Administrator, Executive Council, Cabinet, Committee of Executive Council or Cabinet, or personally by a Minister. In addition, investigation of administrative action taken by members of the judiciary, the Coroner, the Parole Board and other public authorities is precluded by s16:

(1) The Ombudsman must not investigate administrative action taken by:

- (a) a person while discharging or purporting to discharge a responsibility of a judicial nature; or
- (b) a tribunal or a member of a tribunal:
 - (i) in the performance or purported performance of the tribunal's deliberative functions; or
 - (ii) in relation to processes, prescribed under an Act, for conciliation or mediation in relation to a complaint, dispute or other matter within the meaning of that Act; or
- (c) a person acting as counsel or legal adviser to the Territory for the Territory or a minister; or
- (d) a coroner under the *Coroners Act*, while discharging or purporting to discharge a responsibility relating to an investigation or inquest under that Act; or
- (e) a magistrate or Justice while discharging or purporting to discharge a responsibility relating to a preliminary examination under Part V of the *Justices Act*; or
- (f) the Director of Public Prosecutions relating to a DPP exempt matter; or

- (g) a public authority in relation to its employment of a person, including action taken in relation to the promotion, transfer, termination of employment, or discipline of the person or the payment of remuneration to the person; or
- (h) the Parole Board of the Northern Territory established by the *Parole Act* or the Chairman of that Board.

(2) The Ombudsman must not investigate administrative action of a public authority not mentioned in subsection (1) for which there is a review right under the law under which the action is taken unless one of the following conditions applies:

- (a) the authority agrees to the investigation;
- (b) on complaint by the person who has the review right, the Ombudsman is satisfied:
 - (i) it would not be reasonable to expect or to have expected the complainant to resort to the review right; or
 - (ii) the matter merits investigation to avoid injustice.

[40] As to the “administrative actions” in respect of which the Ombudsman is empowered to investigate, such actions are defined in s6:

(1) ***Administrative action*** is any action about a matter of administration, and includes:

- (a) a decision or act; and
- (b) a failure to make a decision or do an act; and
- (c) the formulation of a proposal or intention; and
- (d) the making of a recommendation, including a recommendation made to the Administrator or a minister; and
- (e) a decision or act taken in consequence of the making of a recommendation.

(2) Administrative action of a public authority includes:

- (a) administrative action taken by, in or for the authority; and
- (b) administrative action taken by or for an officer of the authority in relation to or incidental to the exercise or purported exercise of a power, or performance or purported performance of a function, of the authority or officer; and

(c) administrative action taken for, or in relation to or incidental to the performance of functions conferred on, the authority, by an entity that is not a public authority, including for example, by an entity under a contract.

(3) Subsection (2)(a) applies even if the action is taken by a public authority wholly or partly for an entity that is not a public authority.

(4) For subsection (2)(c), the action is taken to be administrative action of the public authority.

[41] The Ombudsman is appointed by the Administrator, but only after recommendation of the Assembly (s132). Section 12 provides that the Ombudsman is not subject to direction by any person about the way in which the powers or functions are exercised or performed and subsection (2) directs the Ombudsman to act “independently, impartially and in the public interest”.

[42] Unlike the CPID who cannot instigate an investigation without a public interest disclosure, the Ombudsman may investigate administrative action of a public authority or conduct of a Police Officer either on complaint or on the Ombudsman’s own initiative (s14(1)).

[43] In conducting an investigation, the Ombudsman “may do all things necessary or convenient to be done for, or in relation to, the performance of the Ombudsman’s functions” (s11). Section 49 deals with the procedure of the investigation generally and directs that the investigation “must” be conducted in private. Subject to that restriction, and to the requirement that the Ombudsman must comply with natural justice, the Ombudsman may conduct the investigation in a way the Ombudsman considers it appropriate. The Ombudsman is not bound by the rules of evidence and is not required to hold a hearing.

[44] In conducting an investigation, subject to the privilege against self-incrimination,²¹ the Ombudsman possesses wide powers of

²¹ Section 126(7) of the *Ombudsman Act* (NT) allows a person to claim privilege against self-incrimination.

consultation and compulsory acquisition of documents and oral evidence (ss50-54). Those powers include the power to enter and inspect premises occupied by a public authority, other than premises used as a residence, and to copy documents located at the premises (s54). The Ombudsman does not require a search warrant before exercising this power. However, sanctions for non-compliance with a direction given by the Ombudsman do not include imprisonment (ss123-128).

- [45] The Ombudsman is not able to obtain a search warrant to enter and search residential or private premises.
- [46] During an investigation the Ombudsman may direct a public authority to cease performing an administrative action if the action is likely to prejudice the investigation or the effect or implementation of a recommendation the Ombudsman might make as a result of the investigation (s55).
- [47] On completion of an investigation of an administrative action of a public authority, the Ombudsman is required to inform the complainant and the public authority of the result of the investigation (ss57 and 58). In certain circumstances a copy of the Ombudsman's report must be provided to the Minister responsible for the public authority and, if the authority is a Local Government Council, the presiding member of the Council (s59). In making a report the Ombudsman may also make recommendations (s62).
- [48] Part 7 of the *Ombudsman Act* (NT) relates to the Ombudsman's investigation of police conduct. If a complaint is made to a Police Officer about conduct of another Police Officer, provisions in the Act ensure that the Ombudsman is given written notice of the complaint and its particulars and responsibility passes to the Ombudsman to determine how to deal with the complaint (ss65 and 66). Various options exist for resolution or investigation of complaints including

investigation by a member of Police Standards Command. The Ombudsman is empowered to oversee a resolution process or investigation conducted by the Police.

[49] Section 86 sets out the circumstances in which the Ombudsman may decide that the Ombudsman should investigate a complaint about police conduct:

86 When complaint may be investigated by Ombudsman

(1) The Ombudsman may decide a police complaint should be investigated by the Ombudsman if satisfied it:

- (a) concerns conduct of a police officer holding a rank equal or senior to the rank held by the officer in charge of the Police Standards Command; or
- (b) concerns conduct of a Police Standards Command member; or
- (c) is in substance about the practices, procedures or policies of the Police Force; or
- (d) should for another reason be investigated by the Ombudsman.

(2) In addition, the Ombudsman may decide a police complaint should be investigated by the Ombudsman if:

- (a) under section 107, the Ombudsman:
 - (i) deferred a decision on the complaint pending completion of a proceeding or disciplinary procedures; or
 - (ii) discontinued an investigation of the complaint pending completion of a proceeding or disciplinary procedures; and
- (b) on completion of the proceeding or disciplinary procedures, the Ombudsman considers an aspect of the complaint should be investigated.

(3) Also, the Ombudsman may decide:

- (a) a police complaint should be investigated by the Ombudsman in conjunction with a Police Standards Command member; or

- (b) a police complaint should not be investigated by a Police Standards Command member.

- [50] In substance, when investigating a complaint about police conduct, the Ombudsman possesses the same powers as are conferred when investigating the administrative action of a public authority (s89).
- [51] If Police Standards Command conduct the investigation, a written report must be provided to the Commissioner of Police who must give a copy of that report to the Ombudsman. Section 97 directs the Ombudsman to consider the report and give a written report to the Commissioner of the Ombudsman's assessment of the report by Police Standards Command. If the Ombudsman conducts the investigation, s99 requires the Ombudsman to give a written report of the investigation to the Commissioner.
- [52] Section 101 specifies the matters to which the Ombudsman must direct attention in preparing a report of an investigation. The Ombudsman may recommend that no action be taken or that specified action be taken with respect to the officer concerned, including charging the officer with an offence (s101(3) and (4)). On receipt of the Ombudsman's report, the Commissioner may give effect to the Ombudsman's recommendations or provide written notice to the Ombudsman of reasons for not giving effect to the recommendations (s104). On receipt of such notice, the Ombudsman may provide a copy of the Ombudsman's report and the notice from the Commissioner to the Police Minister, together with a further report for tabling in the Assembly.
- [53] As mentioned, the Ombudsman is appointed by the Administrator, but only after receiving a recommendation of the Assembly. The Act does not provide for any particular qualifications as being either necessary or desirable. The appointment is for seven years and the person is not eligible for re-appointment (ss132-134).

[54] In addition to the bodies to which I have referred, other bodies play a role in specialised areas, including:

- Children's Commissioner
- Anti-Discrimination Commission
- Health and Community Services Complaints Commission
- Electoral Commission
- Consumer Affairs.

[55] It is unnecessary for me to discuss the roles of these bodies, other than to observe that their specialised roles should continue if an NT Anti-Corruption Commission is established.



Submissions

- [56] In the context of the existing integrity regime I turn to the submissions. With the exception of those who requested confidentiality, the submissions and other correspondence received in response to invitations to make submissions are *Annexure 4*. Following discussion of the submissions, I address the integrity regimes of other Australian jurisdictions.
- [57] All of the submissions supported the establishment of some form of Anti-Corruption, Integrity and Misconduct Commission. A number of submissions referred to matters which were said to support the need for a Commission. It is unnecessary and inappropriate for me to comment on those examples, but they highlight the perception of those making the submissions that there is good cause and a need for the establishment of a Commission.
- [58] A strong theme that emerges from the submissions is the need for an independent Commission. Repeated reference is made to the relatively small population and the problems of friendships, conflict of interest and government influence which the authors perceive compromise independence and lead to a lack of public confidence in the effectiveness of the current regime.
- [59] Notwithstanding a perceived need for an independent Commission, a number of submissions acknowledged that the volume of work might not justify the establishment of a fully self-contained Commission. Similarly, a number of authors recognised that the size of the population and budgetary constraints necessarily mean that the structure and resources of larger Commissions such as those that exist in Queensland, New South Wales and Western Australia are not appropriate models for the Northern Territory. The Member for Araluen, the Hon Robyn Lambley MLA, sensibly observed that consideration of an appropriate model entails reviewing the existing

mechanisms within the integrity regime and, potentially, rationalising the allocation of resources.

[60] A very helpful joint submission (joint submission) was made by the Ombudsman, the Auditor General, the Commissioner of Police, the Commissioner for Public Employment and the CPID (Extended Integrity Group). The submission did not give unqualified support for the establishment of a new NT Anti-Corruption Commission. Having made the observation that there are “extensive and adequate independent mechanisms” in place for investigation of allegations of corrupt conduct on the part of public servants and Police, including Heads of Public Sector Agencies, and having referred to “significant practical limits” with respect to investigation of allegations relating to MLAs, Ministers and staff of politicians, the joint submission identified the basis on which it proceeded in the following terms:

(5) This submission does not proceed on the basis that it is essential for a new body to be created. It discusses the need for new functions and powers and identifies a number of potential models for change, one of which is creation of a new body.

[61] The joint submission encouraged consideration of a “broad range of measures” that could be implemented to “limit the potential for corrupt conduct by enhancing awareness, commitment, accountability and transparency in government.” The submission continued:

(10) Ensuring that there is a robust, independent mechanism for investigating potentially corrupt activity is one such measure but it does not provide an answer in isolation.

(11) Creating a new body or extending the powers of an existing body should not be seen as a panacea. The approach to minimising corruption must be multi-faceted and driven by strident commitment at the most senior levels.

(12) This multi-faceted approach should include:

- increasing transparency regarding the actions and decision-making of an extended group of public officers and public bodies. This should include

public reporting in areas of particular sensitivity from an integrity perspective, for instance areas related to travel, allowances, related party transactions and appointments, the use of certificates of exemption and detailed findings from probity reports;

- regular statements and exemplary conduct at the most senior levels of government that displays strong commitment to ethical behaviour;
- extending and improving documented guidance on the rights and wrongs of particular conduct in sensitive areas;
- increasing the scope for independent appeal or review of important decisions;
- education and engagement of public sector officers to ensure they are firmly committed to maintaining the highest levels of integrity and well-equipped to identify and appropriately address potential integrity and corruption issues.

[62] The primary points made in the joint submission can be summarised as follows:

- The Ombudsman, Auditor-General, Commissioner for Public Employment and CPID “share information on relevant integrity issues and developments, foster collaboration between public sector integrity bodies and inspire operational co-operation and consistency in communication, education and support in public sector organisations.”
- There are a number of independent bodies, primarily the Ombudsman and CPID who investigate allegations of corrupt conduct of public servants, including Police, but these bodies do not have power with respect to MLAs, Ministers and political staff. Investigations by these bodies are conducted in private.

- The Ombudsman and CPID operate efficiently and work closely together to ensure there is no unnecessary delay or duplication in dealing with complaints. The challenge of apprehended bias is managed if it arises. Options, including delegation of powers and engaging appropriate resources from outside the jurisdiction, have proved effective.
- “There is nothing to suggest that a new anti-corruption body would be better placed to address this [apprehended bias] issue than existing bodies.”
- The CPID has similar jurisdiction and powers under the *Public Interest Disclosure Act* (NT) “to many other anti-corruption bodies interstate in so far as allegations of improper conduct by public bodies or public officers are concerned.”
- The CPID can only investigate matters on complaint and the investigation must be undertaken confidentially.
- The CPID possesses “significant powers to obtain information and to question people.”
- “Whistle-blower protection and support is considered of paramount importance to the CPID.”
- The Ombudsman is able to initiate an investigation on complaint or on own motion and is required to conduct investigations in private.
- The Ombudsman possesses extensive powers for the production of evidence and the giving of evidence, but there is no “specified power” enabling the Ombudsman to require answers of witnesses that might tend to incriminate the witnesses²².

²² Note that s126(7) of the *Ombudsman Act* (NT) allows a person to claim privilege against self-incrimination.

- Coupled with other bodies, including the Auditor-General, speaking “generally” the existing mechanisms “cover the field in relation to the conduct of public sector officers, including Police and heads of department”. However, there is limited coverage in terms of scrutiny of the conduct of politicians and their staff and a small number of senior independent office holders.
- While existing mechanisms function effectively to investigate the vast majority of corruption allegations against public servants and Police, the current system is limited in that there is “currently no dedicated anti-corruption body with the power to initiate investigation of the conduct of politicians or political staffers based on public complaint or on own motion.” In addition, existing bodies do not possess “high level investigative powers” such as surveillance devices and telecommunications interceptions.
- An anti-corruption body should possess the power to investigate allegations of corrupt conduct against MLAs, Ministers, ministerial staffers, electorate officers or associated administrative staff. Similarly, while there may be significant resourcing implications, there are benefits to extending the powers of an anti-corruption body to scrutinise the conduct of those persons currently excluded by s7(2) of the *Public Interest Disclosure Act* (NT) such as judicial and quasi-judicial officers and their personal staff and other independent officers.
- In an era of “increasing outsourcing of government functions”, such as the running of a hospital or prison or a fines recovery scheme²³, it is arguable that an anti-corruption body should be

²³ The Fines Recovery Unit is established as a registry of the Local Court under the *Fines and Penalties Act* (NT) and is administered by a Government Department.

able to investigate integrity allegations involving “private sector operators who are carrying out functions on behalf of the Northern Territory Government”.

- In order to “get to the source of corrupt conduct and attempted corrupt conduct, it is essential that the anti-corruption body be able to investigate the conduct of anyone who attempts to corrupt a public official.”
- As to complaints concerning police misconduct, the Ombudsman considers that the current system “works effectively” and “has not identified any material failings or flaws in the system.” While the powers relating to investigation of police conduct could be “enhanced”, there is “no compelling reason to transfer this [police complaints] function to another body.” However, if the function is not transferred, “it would be appropriate for the anti-corruption body to have power to investigate allegations of police conduct that amounts to corrupt conduct or misconduct.”
- “The great majority of Ombudsman complaints are investigated or dealt with by the Professional Standards Command within NT Police, with oversight maintained by the Ombudsman.” The vast majority of complaints about police conduct are “routine” and in other jurisdictions are treated as part of Police “day-to-day managerial and disciplinary processes.” The Ombudsman maintains “rigorous overview of more serious matters and retains the power to investigate separately if that is considered necessary” and this system should continue.
- As to the conduct which should be covered, consideration should be given to defining three levels of inappropriate conduct as has been done in South Australia: maladministration,

misconduct and corruption. Maladministration is chiefly focussed on poor decision-making and faulty processes, while misconduct fills the gap between maladministration and corrupt conduct “catching instances that involve a degree of moral turpitude rather than mere poor decision-making.” It is important to define “corrupt conduct” separately which would be the “predominant” role of an anti-corruption body.

- While not expressing a strong view, the joint submission considers that the “application of investigative powers to Ministers, MLAs and their staff should be limited to corrupt conduct and misconduct.”
- Similarly, if investigative powers are extended to judicial and independent officers who are currently excluded, the application of those powers, “would have to be limited to allegations of corrupt conduct or misconduct.” Numerous issues would need to be considered including the issues of “independence” and “whether additional scrutiny would usefully add to the mechanisms already available.”
- An anti-corruption body should possess all the existing powers of the CPID (submission para 208) and additional powers identified in paragraph 209 of the submission, including the power to override the privilege against self-incrimination. If wider powers were conferred, additional resources would be required because “the engagement of staff or external support with a range of different skill sets” from the skills currently possessed by the CPID would be necessary.
- The current “whistle-blower encouragement and protection” which sits at the “core of the current PID Act [*Public Interest Disclosure Act* (NT)] and the role of the CPID... must be

emphatically maintained and emphasised as an essential function in any new model.” As these protection functions have been in place for a number of years, it would be appropriate to “review” this function in the course of developing legislative amendments to implement changes.

- None of the Australian models commends itself “entirely” as a suitable vehicle for adoption by the Northern Territory. The Territory is a “significantly smaller jurisdiction” with limited resources and it is of “little benefit to develop an ‘ideal’ model in isolation from likely resource costs.” The development of a model must take into account the likely demands and in the Territory the potential number of instances of corrupt or other improper conduct “is likely to be more limited in absolute terms”. Bearing in mind the number of existing integrity bodies, and the resource base, there will be competition between integrity and complaints bodies for limited funding.
- In these circumstances, “careful consideration should be undertaken before merely adding an entirely new body to the mix.” Potential models that might be considered include:
 - “A new stand-alone body;
 - Expanding and enhancing the role of an existing body/bodies;
 - Outsourcing anti-corruption functions to a larger body in another jurisdiction;
 - Establishing a special purpose body with extensive powers that only investigates the most serious or complex corruption allegations, on reference from an independent officer or group of independent officers.”

- A “reasonable approach” would be to extend and enhance the powers of the CPID to more broadly respond to corruption issues.
- Alternatively, a new anti-corruption body could be established which subsumes the existing functions of the CPID.
- A further option involves establishing a new anti-corruption body that only investigates the most serious or complex allegations of corruption, leaving the bulk of matters to be dealt with by the CPID and other existing independent bodies. In this model, existing avenues for reporting an investigation for the great majority of matters would be maintained, while providing the option for referral to an “eminent anti-corruption Commissioner with access to comprehensive investigative powers in the most serious or most challenging of cases”. In this way a very senior legal officer could be engaged on a retainer and be “called into action only occasionally when a serious or complex matter arises that cannot be dealt with effectively by existing mechanisms.” Such a Commissioner would possess a “full array of investigative powers including surveillance devices and telecommunications interception powers.” Investigative, logistical and administrative support would be provided by the CPID.
- The jurisdiction of a Commissioner engaged on retainer would be enlivened by reference from an existing independent officer such as the CPID or Ombudsman, or alternatively from a group comprised of some or all of the members of the Extended Integrity Group. Hence complaints would not initially be made to the anti-corruption body and referral to the anti-corruption body could be based on the specified criteria.

- In this model the anti-corruption body “would be a standing appointment and could even be constituted by someone from the Northern Territory or elsewhere or even, by prior arrangement, by an existing anti-corruption Commissioner from interstate.”
- In order to “increase independence and the public perception of independence,” the head of an anti-corruption body (the Commissioner) should:
 - “be regarded as an Officer of the Legislative Assembly;
 - report for oversight purposes to a committee of the Legislative Assembly, although this should not extend to discussing the detail of cases;
 - have a broad discretionary power to provide reports to Parliament and make comments about investigations and matters arising out of investigations, when the Commissioner takes the view that it is in the public interest to do so;
 - have a broad discretion to speak to the public, bodies and individuals about the Commissioner’s activities when the Commissioner takes the view it is in the public interest to do so;
 - be given own motion investigation powers;
 - be appointed for a term of at least seven years and that there be a statutory role for the Legislative Assembly in appointment and dismissal;
 - have conditions of appointment protected for the duration of that term;

- be a separate Agency within the Chief Minister's portfolio;
 - report on budgetary matters to the Estimates Committee of the Legislative Assembly, in the same manner as other Officers of Parliament;
 - have a discretion to expend resources to pursue an investigation above and beyond the Commissioner's annual budgetary allocation, where the public interest justifies the expenditure;
 - have the power to publish reports even when Parliament is not sitting.”
- There should not be a “one stop shop” through which to make complaints.
 - An anti-corruption body should possess a “broad power to decline less-serious or unsubstantiated matters” and power to refer complaints to an appropriate body.
 - Careful consideration should be given to procedures and legislation necessary for proving “continuity” of exhibits in court proceedings subsequent to an investigation by an anti-corruption body and to the problem that, potentially, could arise in connection with the derivative use of evidence obtained compulsorily in the face of a claim for privilege.
 - Bearing in mind that in the past the DPP has only accepted prosecution briefs from the NT Police, there is merit in providing “a clear legislative basis for the anti-corruption body to appoint a special prosecutor either generally or if the demands of a particular case require it.”

- There “may be merit in establishing an advisory board comprising integrity officers who could provide a level of broad advice and support to the Commissioner”. The Board would not become closely involved in the work or decision-making of the anti-corruption body, but would provide a “high level mechanism for discussion, advice and support” and would be a “valuable forum” to consider and discuss issues and trends in the Northern Territory.
- Consideration should be given to appointment of an ethical adviser or Integrity Commissioner who can provide “integrity advice to individual politicians and senior executives within government.”
- “In addition to detecting and dealing with corrupt conduct, it is vital that there be an emphasis on promoting ethical conduct.” Substantial resources “must be committed” by all public sector agencies to ongoing education about integrity issues and systems and participation in appropriate forums that promote awareness and discussion of integrity issues.
- Historical complaints can create “significant issues for agencies with new or expanded investigative powers”. Consideration should be given to “some temporal limitation on when an allegation can be raised”, but an anti-corruption body “should have the power to investigate older matters if it considers it is in the public interest to do so.”

[63] An issue addressed in the joint submission, and in other submissions to which I have not referred, is the difficult question as to whether investigations should be undertaken in private or in public. The joint submission observed that the CPID processes “are highly confidential

and public awareness of the CPID's activities is limited". The submission continued:

One reason for this is the importance of protecting the identity of the disclosure and other witnesses. Another is limiting the potential for a disclosure to prejudice an investigation. It also recognises the fact that publication of the mere fact of an investigation or providing only part of the story may severely impact on the privacy or reputation of a person or an organisation in situations where an allegation is ultimately not sustained.

[64] The joint submission commented that these factors favour investigations and hearings being undertaken in private, but added that there may be cases "where allegations are already subject to public notoriety and it is in the public interest to conduct hearings in public." The joint submission concluded:

It is submitted that investigations should ordinarily take place in private but that the anti-corruption body should have a discretion to hold a public hearing if it is in the public interest to do so.

[65] The Criminal Lawyers Association of the Northern Territory (CLANT) submitted that there has been "widespread and sustained criticism of the South Australian, Western Australian and Queensland agencies for their lack of transparency". However, the submission pointed out that the "public hearings model favoured by the NSW ICAC has been blamed for causing serious reputational damage to individuals who have been the subject of ICAC investigations leading to adverse findings that have been discounted or even dismissed in subsequent legal proceedings". The submission continued:

CLANT submits that a balance should be struck between the protection of the privacy and reputation of individuals (particularly those accused of serious impropriety), and the integrity and the effectiveness of sensitive investigations regarding serious allegations. Anti-Corruption Commission hearings should be conducted in public unless there are cogent reasons not to do so. Where the discretion to conduct a hearing in-camera is exercised, reasons should be given.

By their nature, investigations (as distinct from inquiry hearings) are less public, and should generally be carried out behind closed doors.

[66] The Law Society of the Northern Territory (Law Society) made the following submission:

The Society also supports careful consideration as to whether inquiries would be open to the public or held *in camera*. The Society notes that the ICAC (NSW) public inquiry process has been called into question. The Society submits that the publication of information before ICAC has added a greater level of public scrutiny, arguably increasing awareness of what may be questionable conduct has the potential to impact future conduct – achieving effect for the expense of the investigation.

[67] The Northern Territory Bar Association (Bar Association) also favoured public hearings “as far as possible”, coupled with the power to conduct a private inquiry if such a procedure was required in the public interest.

[68] Mr John Lawrence SC advanced an alternative view:

My view is public hearings risk the fairness of subsequent trials and can inflate the public expectation which can then undermine their faith in the traditional legal system, especially in our small jurisdiction. Hearings therefore should be held *in camera* but with discretion to have public hearings if it can be established that they would be in the interests of administration of justice.

[69] The Honourable Jane Aagaard, former Minister and Speaker of the Legislative Assembly, made the following submission concerning public and private investigations:

It is clear that there is considerable public interest in matters to do with corruption in public office. The public would demand at the very least that Members of Parliament and all senior public servants, including Police, would need to give evidence in public. In my opinion, in-camera evidence should be the exception rather than the rule.

[70] Territory Labor made the following submission:

Investigations should be undertaken in a confidential manner and ... methods of investigation, whether covert or overt, public or private are determined on a case by case basis as determined by the entity, keeping in mind the population size and demographics of the NT.

[71] As to the appropriate model:

- Ms Lambley submitted the inquiry should explore whether it is possible for legislation to be crafted that would permit the NT to use the services of other jurisdictions on a contractual basis. Ms Lambley made the observation that this would be “highly political and possibly fraught with all sorts of other potential conflicts and perceptual problems”, but she submitted it is a model that makes both “practical and economic sense”. Alternatively, a partly out-sourced model should be considered such as the anti-corruption body accepting and initiating referrals, but out-sourcing the “actual inquiries” to other providers.
- Territory Labor noted that the common feature in all jurisdictions is the existence of a “stand-alone organisation to deal with allegations of corruption” possessing powers to investigate corruption that are “wide-ranging and comprehensive”.

[72] CLANT, the Law Society and the Bar Association all supported the establishment of an NT Anti-Corruption Commission. CLANT pointed out that although the recent amendments to the *Inquiries Act* (NT) were welcome, the fact remains that an inquiry established under that Act is a “creature of either the Executive ... or the Legislature”. Hence, whether such inquiries are established is usually under the control of the government of the day. The Bar Association agreed with this submission.

[73] CLANT submitted that although a new NT Anti-Corruption Commission should be “strong, independent, transparent and adequately resourced to perform its functions, it should not become an unwieldy, oppressive or ruinously expensive institution, or a lawyers’ picnic area”. The submission suggested that a “boutique integrity agency along the Tasmanian lines” might look attractive, but would not solve corruption. However, the cost of a “full-blown” ICAC comparable to those in more populous states would be prohibitive and unjustifiable. CLANT proposed the development of a “hybrid in-house/outsource model” in which “acceptance of complaints and preliminary investigations would be undertaken locally, with matters meriting further investigation and inquiry to be referred to an established interstate ICAC”.

[74] The Law Society did not make a specific submission as to the appropriate model, but emphasised the need for adequate resources in order to ensure that those who might come under the scrutiny of a new anti-corruption body “cannot curtail the performance of its functions through a lack of resources”. The submission urged that this is an important consideration if the body is incorporated within an existing agency and that “long-term funding would need to be secured by legislation”. Careful consideration should be given as to how to provide “sufficient structural freedom so as not to undermine the independence”.

[75] The Bar Association was sceptical that another jurisdiction would be willing to undertake an inquiry on behalf of the Northern Territory and advanced the following submissions:

- 17 An alternate funding solution could be simply to provide the body with sufficient but not extravagant funding such that it would have to be selective in prioritising matters of inquiry and choose only the most egregious breaches for inquiry.

18 Alternatively the new body could have funding for complaints and preliminary inquiries and publish prima facie findings, followed by a public request for further specific funding to conduct a full inquiry into a particular matter. If the government of the day was the subject of that inquiry, the public attention and request for funding would hopefully compel the government to make any necessary grant.

[76] In my view, the proposals in paragraphs 17 and 18 of the Bar Association's submission do not provide a satisfactory approach to the funding of an anti-corruption body. There are numerous impediments from a practical point of view and the independence of the anti-corruption body would be compromised.

[77] As to other matters, CLANT made the following submissions:

- Recent experience in South Australia has highlighted problems of duplication and overlap between the ICAC and the Ombudsman. "In a small jurisdiction such as the Northern Territory, there is a particularly strong case to establish a single portal through which the public can make complaints to and access the services of the Ombudsman, the CPID, the Information Commissioner, the Health and Community Services Complaints Commissioner – and the Anti-Corruption Commissioner. That portal should also be used for the making of complaints against Police."
- "Consideration should be given to incorporating the existing powers and functions of the Public Interest Disclosure Commission into those of the Anti-Corruption Commission. In doing so, the limited whistle-blower protections currently afforded by the *Public Interest Disclosure Act* should be significantly expanded, enhanced and strengthened."

- It should be mandatory for public servants in executive positions to report “reasonably suspected corrupt conduct within or in relation to their own agency”.
- The NT Anti-Corruption Commission should be empowered to commence an investigation, whether preliminary or full, “where it has a reasonable suspicion of corrupt conduct”.
- “The ambit of corrupt conduct should not be too narrowly circumscribed.” The proposals advanced in the 2015 review of the jurisdiction of the NSW ICAC conducted by the Hon Murray Gleeson AC and Mr Bruce McClintock SC (the Independent Panel), should be “adapted and adopted” in the Territory.
- The NT Anti-Corruption Commission should be empowered to investigate complaints of corrupt conduct against MLAs, including Ministers. This power should extend to dealing with complaints of corrupt conduct by ministerial advisers, electorate officers, judicial officers and Police Officers.
- The NT Anti-Corruption Commission should be accountable to an “all-party Parliamentary Committee” and consideration should also be given to appointing an Inspector to provide “oversight” of the Commission.

[78] The Law Society submitted that the new NT Anti-Corruption Commission should “promote respect for the Rule of Law” and must possess adequate powers to tackle corrupt conduct. The definition of corrupt conduct should be “broad and not just based on a breach of the criminal law”. It should cover “serious conflicts of interest and undue influence matters”.

[79] As to the issue of a threshold for investigation, the Society suggested the introduction of “preliminary investigation phase” during which the “more extreme coercive powers” would not be available. Such powers would become available if a matter progressed to the stage of a full investigation.

[80] As to the exercise of the full coercive powers, the Society expressed concern that “these powers must balance the need for robust public scrutiny and the protection of the rights of participating individuals particularly witnesses”. In the view of the Society, such powers should only be available for a “legitimate purpose” and perhaps there should be a “staging of coercive powers to align with the gravity of the matter under investigation”. Whatever powers are conferred, they should be accompanied by “adequate protections to mitigate adverse impacts on individual rights”.

[81] The Society also made the following points:

- The process of appointment and term of appointment of a Commissioner should be “open and transparent” and should not be at the discretion of a Minister or Cabinet. The appointment process should include public advertisements and the involvement of a selection panel, “the majority of whom are independent of Government like independent judicial officers”.
- Consideration should be given to a “compulsory reporting requirement” which would apply to all government employees” and should be accompanied by “adequate guidance about the reporting requirements and protections from any civil or criminal liability”.
- The new NT Anti-Corruption Commission should possess the power to investigate the conduct of MLAs, Ministers and Police Officers.

- The privilege against self-incrimination is a “fundamental human right” and the Society supports ensuring that this right is protected.
- Speaking generally, the principles of procedural fairness and natural justice should apply to an inquiry conducted by an NT Anti-Corruption Commission. This includes knowledge of the evidence upon which allegations are based and being provided with an opportunity to respond to the allegations. It would also include being provided with notice of proposed findings and being provided with an opportunity to respond.

[82] One of the submissions urged that there should be “Indigenous representation” on any future anti-corruption body. It is not appropriate for me to comment upon whether employees of an anti-corruption body should include Indigenous persons, but it is appropriate to observe that careful consideration should be given to ensuring that people in remote and disadvantaged communities are provided with appropriate means by which complaints concerning conduct in public administration can be made.

[83] Mr Michael Tatham, Clerk of the Northern Territory Legislative Assembly, provided a helpful submission concerning parliamentary privilege and the establishment of a Commissioner for Standards. He noted that the New South Wales legislation expressly preserved parliamentary privilege, but experience in New South Wales has shown that where the powers of the ICAC and the privileges of Parliament intersect, there has been “conflict”. Mr Tatham urged that such conflict could be avoided by ensuring “defined boundaries in any enacting legislation make it quite clear the extent of the powers of the ICAC body and the intention of the Assembly to either maintain or waive privilege.” This is an eminently sensible submission.

[84] Mr Tatham discussed relevant factors and noted that, bearing in mind the role of the Assembly in “policing itself”, the Assembly would “wish to err on the side of caution before it significantly eroded parliamentary privilege in enabling legislation to establish an ICAC body in the Northern Territory”. Further:

It is a long-standing principle that courts do not inquire into statements a Member makes or documents a Member relies upon in the Assembly and there are good public interest reasons why this is so. The requirement of finding the correct balance will be a key factor if the establishment of an ICAC body proceeds.

[85] Mr Tatham drew attention to the position in the Australian Capital Territory (ACT) of Commissioner for Standards which provides an alternative to an ICAC to “fill the gap on matters which are important and serious to be addressed but do not require the so-called ‘nuclear option’ of an ICAC Inquiry”. This position is different from an Ethics and Integrity Adviser who has a different role. The function of the Commissioner for Standards in the ACT is to investigate matters referred by the Speaker in relation to complaints against members or by the Deputy Speaker in relation to complaints against the Speaker. This Commissioner reports to the Standing Committee on Administration and Procedure. The reference of the complaint is for investigation and report and provides the ACT with an effective low-cost option suitable for a small jurisdiction. A retired Judge is engaged on a retainer of approximately \$15 000 per annum to provide ad-hoc advice and to be remunerated at a negotiated rate for longer periods of inquiry and advice. The Clerk of the ACT Assembly has advised that this system has created an “impartial and independent mechanism to deal with any breaches of the code of conduct that may arise.”

[86] The NT Police, Fire and Emergency Services (Police) provided a submission which raised issues not addressed in other submissions. In summary, the principal points made by the submission are as follows:

- An NT Anti-Corruption Commission (referred to as an “Integrity Commission” in the submission) would require wide-ranging powers to conduct investigations both on the referral of a complaint and its own motion.
- A key role of a new Commission should be a focus on prevention and education.
- Given the establishment in 2015 of the Special References Unit (SRU), an investigative division of the Police managed by a Detective Superintendent which sits within the Professional Standards Command (PSC), the new NT Anti-Corruption Commission should use the SRU as its investigative arm. Although the SRU would remain within the Police organisational structure, it would report independently to the Commission on investigations. In that situation the Commission could accept the investigation report, refer the matter back to Police for further examination or undertake its own additional investigations.
- Another option would involve the SRU being fully integrated and relocated to the Commission office location. This option is similar to other models interstate, but the submission suggests there would be significant funding implications.
- A third alternative is the existence of a Commission with its own investigation arm employing government investigators with the option of an agreement with the Police Commissioner to second Police Officers if appropriate.

- The Police support the continued “use and allocation of funding for the expansion of the SRU whilst remaining within the organisational structure of the [Police]” with oversight by the NT Anti-Corruption Commission. The Police perceive a number of advantages to this proposal including:

- (i) qualified, experienced and professional investigators within Police, including the capability required to investigate complex corruption matters;
- (ii) availability and use of police indices, human resources and managerial structures and services;
- (iii) use of specific assets including surveillance and covert technologies; and
- (iv) use and availability of interception legislation afforded of Law Enforcement Agencies.

A fully funded SRU will enable sufficient investigators, intelligence analysts and legal practitioners to be employed to investigate allegations of corruption and serious misconduct. The unit will maintain its current chain of command however include investigative oversight and independent reporting to the Independent Commissioner similar to that of the Ombudsman’s Office and current internal and legislative arrangements with the NT Police.

- In the model proposed, the Ombudsman’s office would still maintain jurisdiction to examine complaints concerning “decisions, recommendations, actions or inactions by government officials (excluding those matters that amount to corrupt [conduct])”.
- In the model proposed the CPID could maintain its jurisdiction with respect to confidential disclosures on minor misconduct complaints. Alternatively the CPID could be merged into the new NT Anti-Corruption Commission to cover “misconduct and corrupt conduct” thereby reducing bureaucracy in a small jurisdiction.

- Consideration should be given to endowing a new Commission with “forfeiture powers for matters both criminal and internal that may not reach the threshold for criminal prosecution, where however there is on the balance of probability sufficient evidence to support the conduct to enable recovery of costs associated with corrupt conduct or misconduct.”
- The Police submit that in any investigation into allegations of corruption, “where elements of criminality are established or expected to be established during the investigation”, the primary focus should be on the “collection of evidence in an admissible form”. The submission continued:

This leads to the conclusion that any coercive powers to produce or provide information should be reserved for a later process. The role of the investigation arm should be primarily focussed on the potential progress of the matter through the justice system.

The role and function of coercive aspects should be applied to the matter once it is finalised in the justice system or not prosecuted for other reasons. In this case the subjects should be examined where appropriate in relation to the recovery of assets, costs or the forfeiture of property.

- As to the model of a new NT Anti-Corruption Commission, the Police submitted as follows:

In considering the physical look and make-up of the Integrity Commission [the NT Anti-Corruption Commission] it would most likely involve NT Police, Ombudsman, Public Interest Disclosures working in partnership to conduct investigations. This team would remain under the umbrella of Police and operate as a law enforcement agency. At the conclusion of any investigation, a report would be prepared for the Integrity Commission (however that is constructed) to recommend either criminal proceedings or coercive measures.

- As to the use of coercive powers, the submission suggests the introduction of a form of “judicial proceedings” where investigators could “present evidence to a judicial structure that would authorise coercive interviews, production and any other

evidence-gathering regime that would be admissible for use in a forfeiture proceeding.”

- An exhaustive memorandum with NT Police would be needed to cover matters such as intelligence, data base, information-sharing and use of resources (surveillance etc). The memorandum would also need to consider the issue of costs (eg user pays).
- Feedback from the SA ICAC is that the initial allocation of funds and estimates were insufficient.
- Experience in other jurisdictions suggests that issues can arise between investigative commissions and Directors of Prosecution with respect to potential prosecutions.

[87] The Local Government Association supported the establishment of an anti-corruption body provided there is “some rationalisation” of the functions of the new body, the CPID and the Ombudsman. The Association suggested the South Australian model should be considered and emphasised the need to avoid public confusion about the role of each body.

[88] The East Arnhem Regional Council provided a submission which emphasised the “significant levels of disadvantage that exist within [the Council’s] Local Government Area and how this impacts on [the Council’s] ability to raise own source revenue”. In addition, the submission pointed out the difficulties associated with service delivery across large and remote areas.

[89] In this context the Council drew attention to financial and other problems that would exist for the Council if an investigatory body referred a matter to the Council for investigation. The Council recommended that financial assistance be provided if Councils in

disadvantaged areas are required to undertake investigations and that employees and Councillors be protected from intentional and malicious and defamatory action “by not allowing the complainant any privilege of protection” under the legislation.



Other Australian Jurisdictions – Overview

- [90] There is no uniform model of public integrity or anti-corruption bodies across Australia. Every State and Territory has an Ombudsman and Auditor-General. However, only the States have anti-corruption or integrity commissions. The roles and powers of these commissions vary significantly.
- [91] In discussing other Australian jurisdictions I do not refer to the general criminal law of each jurisdiction. It is obvious that the general criminal law in each jurisdiction, and its enforcement by Police Officers, is an important element of each regime.
- [92] In reviewing the anti-corruption bodies in other Australian jurisdictions, important questions include the type of conduct those bodies are empowered to investigate and whether any persons or bodies are exempt from investigation by those bodies. It is also important to address the nature and extent of investigatory powers possessed by those bodies and whether investigations are conducted in public or private.
- [93] Overviews of each Australian jurisdiction are *Annexures 5-12*.
- [94] The ACT does not have an Anti-Corruption Commission. The integrity regime of the ACT relies primarily on the Ombudsman, the Auditor-General and the operation of the *Public Interest Disclosure Act 2012* (ACT). The Commissioner for Standards also has a role in relation to MLAs.
- [95] I set out below a brief summary of the key features which emerge from an examination of the State jurisdictions. The overview of the Commonwealth regime is *Annexure 6*, but as the Commonwealth circumstances are well-removed from those of the Territory, I have not included the Commonwealth in the summary of key features.

Other Jurisdictions – Summary – Key Features

(1) Position of Commissioner

[96] Generally speaking, the Anti-Corruption Commissions are bodies corporate. In Victoria the Commissioner is an Officer of Parliament. In the other States the Commissioner is an independent statutory officer appointed by the Governor.²⁴

[97] The qualifications, remuneration and term of appointment of the Commissioners are summarised in *Annexure 13*. Commonly, the Commissioner must either have served as a Judge of a Supreme Court, the Federal Court or High Court or be qualified to be appointed as a Judge of those courts. In Tasmania and South Australia a person is qualified to be appointed as Chief Commissioner if that person is an Australian Lawyer of at least seven years' standing.

(2) Conduct Investigated

[98] The anti-corruption bodies across Australia are, speaking broadly, primarily concerned with corrupt conduct in the context of the administration of public affairs. Tasmania and Western Australia have preferred the terms “misconduct” and “serious misconduct”, but the underlying concept of dishonesty remains applicable. In South Australia, the legislation distinguishes between levels of conduct falling short of the standard of conduct required in public administration, commencing with the most serious conduct amounting to corruption and descending through “misconduct” to “maladministration”. The primary focus of the South Australian Commissioner is upon corruption in public administration that could be the subject of prosecution. If a matter is assessed as raising a potential issue of only misconduct or maladministration, the Commissioner may refer the matter to an inquiry agency or the public authority concerned

²⁴ In the Northern Territory, the equivalent to the ‘Governor’ is the ‘Administrator’.

or may exercise the powers of an inquiry agency in respect of the matter.

[99] In South Australia the concept of corrupt conduct or corruption is limited to conduct that amounts to specified offences. In New South Wales, conduct is incapable of amounting to corrupt conduct unless it could constitute or involve a criminal offence or a disciplinary offence or reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official (similar wording is used in Queensland). In the case of conduct of a Minister of the Crown or a Member of a House of Parliament, the conduct must constitute or involve a substantial breach of an “applicable code of conduct”.

(3) Who Can Be Investigated?

[100] Speaking generally, there are very few categories of persons who cannot be investigated by the various anti-corruption bodies. While the conduct of Police Officers in New South Wales is investigated by the Police Integrity Commission, and the legislation in Tasmania excludes investigation of the Governor²⁵ and judicial officers, other jurisdictions include those persons and a wide range of other persons or entities including local government employees and bodies. Members of Parliament are not excluded in any jurisdiction from investigation by the primary anti-corruption body.

(4) On Complaint/Own Motion

[101] Every State anti-corruption body possesses the power to undertake investigations on its own motion, as well as on complaint.

²⁵ In the Northern Territory, the equivalent to the ‘Governor’ is the ‘Administrator’.

(5) Powers of Investigation

[102] Speaking generally, all anti-corruption bodies possess wide coercive powers when investigating matters of corruption. Although the precise powers vary, power exists to compel the production of documents or other things and to require attendance at a hearing and the giving of evidence under oath or affirmation. It is not uncommon for power to exist to enter and search premises of a public authority or official and to take copies of documents without a warrant. Entry into and searching of private premises requires a warrant, issued by a judicial officer or, in New South Wales, issued by the Commissioner or an authorised officer. Warrants may be obtained under relevant surveillance devices legislation and, with the exception of the Tasmanian Integrity Commission, under the relevant telecommunications interception legislation. A summary of search warrant and surveillance powers is *Annexure 14*. Tasmania is the only State jurisdiction without provisions enabling the use of false identities.

[103] All Commissioners are able to second staff from other agencies and to delegate their powers.

(6) Witness Privileges

[104] In some jurisdictions witnesses are entitled to legal representation, but in others the Commission may authorise such representation. The approach to legal professional privilege varies, but parliamentary privilege is maintained in all jurisdictions. Privilege against self-incrimination is abrogated in all jurisdictions except Tasmania, but the use of answers where such privilege is claimed is, generally speaking, prohibited in subsequent criminal proceedings.

(7) Public v Private Inquiries

[105] All jurisdictions, other than South Australia, are able to hold public hearings. In New South Wales the Commission may conduct a public inquiry “if it is satisfied that it is in the public interest to do so” (s31)²⁶. In other jurisdictions, the default position is a private hearing. The South Australian Commissioner must conduct investigations in private.

(8) Reporting/Findings

[106] All jurisdictions require Commissions to report to various bodies. The NSW legislation specifically confers power to make findings of corruption. A similar effect is achieved in Victoria and Western Australia where opinions and recommendations can be included in reports to Parliament, but in Victoria the Independent Broad-Based Anti-Corruption Commission (IBAC) is specifically prohibited from including in a report to Parliament a finding or an opinion that a person is guilty of or has committed any criminal or disciplinary offence. In Tasmania the Integrity Tribunal may make a finding of misconduct or serious misconduct.

(9) Other Common Features

[107] Other features that are common to all or most of the anti-corruption bodies across Australia are as follows:

- Sanctions for non-compliance with directions or obstructing investigations;
- Power to delegate;
- Protection of witnesses/whistle-blowers from reprisals;

²⁶ *Independent Commission Against Corruption Act 1988* (NSW).

- Power to refer complaints to other agencies for investigation;
- Power to decline to investigate a complaint;
- Penalties for making a false complaint; and
- An educative role.

(10) Public Disclosure of Information

[108] In South Australia, while investigations must be conducted in private, the Commissioner may make a public statement “in connection with a particular matter” if, having regard to a number of specified matters, “in the Commissioner’s opinion, it is appropriate to do so in the public interest ...”.²⁷

(11) Accountability

[109] Every jurisdiction provides for some form of accountability either to a Parliamentary Committee or an Inspector or both.

(12) Mandatory Reporting

[110] Three jurisdictions²⁸ contain provisions requiring reporting by public officers of suspected corrupt conduct. In South Australia, the Commissioner has given directions that, in substance, require Police and other public officers to report to the Office for Public Integrity any matter reasonably suspected of involving corruption in public administration or serious or systemic misconduct or maladministration in public administration.

²⁷ *Independent Commissioner Against Corruption Act 2012 (SA)*

²⁸ New South Wales, Queensland and Western Australia.

(13) Resourcing

[111] The resourcing of the various anti-corruption bodies varies significantly. Given the sizes of the jurisdictions and the larger roles of the Commissions in Queensland and Western Australia, the variation is not surprising. Staffing (full-time equivalent) (FTE) and expenditure in the 2014-2015 financial year was as follows:

Jurisdiction	FTE	Expenditure (2014-2015)
Queensland	336.6	\$54.643m
NSW	122.3	\$25.709m
South Australia	40.4	\$8.279m
Tasmania	14.8	\$2.544m
Victoria	106.43	\$31.228m
Western Australia	143.62	\$31.811m



Discussion

Introduction

[112] Consideration of an appropriate model for an NT Anti-Corruption Commission must necessarily commence with an identification of the need that the Assembly perceived should be addressed. In other words, it is necessary to identify the problem and, therefore, the purpose for which the NT Anti-Corruption Commission is to be established.

[113] In addition, having identified the problem to be tackled by the Commission, it is appropriate to address the following issues:

- Type of conduct to be investigated;
- The persons whose conduct is to be investigated;
- Powers of investigation necessary to achieve the objectives;
- Whether the investigations should be conducted in private or in public hearings (or both);
- Whether the investigatory body should make findings; and
- Reporting requirements upon completion of investigations.

[114] Once these issues are settled, the foundation for the development of an appropriate model is established.

Public Administration

[115] As I have said, in supporting the establishment of an NT Anti-Corruption Commission, the Assembly was not directing its attention to the general administration of the criminal law. In my view the Assembly had in mind the broader concept of the integrity in the administration of public affairs. Hence the direction to consider the principles and provisions of Commissions in other Australian jurisdictions.

[116] Similarly, in my view the Assembly was not contemplating a Commission which would address corruption in general. Rather, the Assembly was concerned with corruption in the administration of public affairs. While the Commissions in Queensland and Western Australia also have a role in investigating serious and organised crime, I do not understand the Assembly to be suggesting that a Commission in the Territory should be concerned with serious or organised crime outside the appropriate boundary of corruption in the administration of public affairs.

[117] One of the first Australian Anti-Corruption Commissions was established in New South Wales in 1989. It is clear from the remarks of the then Premier when introducing the Bill²⁹ for the establishment of the ICAC that the government was concerned about the reputation of New South Wales in respect of a lack of integrity in “public administration and public institutions” in New South Wales. While other jurisdictions do not appear to have suggested that Commissions were needed because of existing poor reputations, nevertheless other jurisdictions perceived the need for investigatory bodies with special powers to detect and deter corruption in the administration of public affairs in those jurisdictions.

[118] In supporting the establishment of an NT Anti-Corruption Commission, I do not understand the Assembly to have been suggesting that widespread corruption in the administration of public affairs exists in the Northern Territory. Rather, the Assembly recognised public disquiet about integrity in the administration of public affairs, just as Parliaments in State jurisdictions following the New South Wales lead recognised the existence of such a disquiet in their communities. In addition, it is well known that a lack of integrity in the administration of public affairs can grow insidiously and flourish in the absence of

²⁹ Independent Commission Against Corruption Bill 1988 (No. 2) (NSW).

investigatory bodies possessing appropriate powers. The lack of integrity is difficult to detect and not easy to discourage. A lack of integrity, or the perception of it, can easily arise in a small community where personal relationships between those making the decisions and those affected by the decisions inevitably arise.

[119] It is in this context, therefore, that the need for the establishment of an NT Anti-Corruption Commission has been recognised and in which the appropriate model for such a Commission is to be determined. It is the particular need that exists in the Territory which provides the setting for the establishment of a Commission, bearing in mind particularly the size of the community to be served and the resources reasonably available to provide the necessary service. Careful regard must also be paid to the existing Territory mechanisms for investigating corruption in the administration of public affairs and their adequacy or otherwise in this regard.

Type of Conduct

[120] The concept of “corruption” is capable of bearing different meanings, according to the context in which that concept is used. Speaking generally, corruption brings to mind thoughts of dishonesty and personal gain or advantage, but as the recent experience of New South Wales vividly demonstrates, it is important to define the concept carefully for the purposes of identifying with precision the role and powers of an anti-corruption investigator. Further, in the context of public administration, it is necessary to distinguish between corruption and other lesser forms of conduct which fall below the appropriate standard for public administration. As will be seen later in the discussion, in my view the investigatory work of an NT Anti-Corruption Commission should primarily be limited to investigation of corruption as that concept is commonly understood.

[121] A 2009-2010 review of Victoria's Integrity and Anti-Corruption system (the Proust Review),³⁰ conducted by the Public Sector Standards Commissioner and a Special Commissioner, examined the concepts of integrity, maladministration, misconduct and corruption in the context of public administration. The Proust Review spoke of integrity as "acting with honesty and transparency, using powers responsibly and striving to earn and sustain public trust" (para 2.1). Reference was also made to "using powers responsibly".

[122] The Review then spoke of three levels of undesirable behaviour, using the terms which are used in the South Australian legislation:

2.1.1 **maladministration**

Maladministration refers to administrative tasks that are not performed properly or appropriately. It can encompass inefficiency, incompetence and poorly reasoned decision making. Remedies for cases of maladministration are likely to be administrative, with warnings or admonitions the likely sanctions.

2.1.2 **misconduct**

Misconduct is more serious than maladministration. There is an additional level of recklessness or intent beyond maladministration – misconduct is more than not paying attention or exercising due diligence. It can involve breaches of codes of conduct and there may be an element of dishonesty involved. Sanctions can include demotion, removal of privileges or removal of the person from the position. In Victoria, misconduct in public office is a common law offence. ...

2.1.3 **corruption**

Corruption goes beyond misconduct and involves different forms of the "misuse of power or the misuse of office". In its widely-used definition, the World Bank also adds the element of personal gain, describing corruption as "the abuse of public power for private benefit". The precise boundaries of corruption are difficult to define but the term is usually used to describe serious wrong doing such as bribery, embezzlement, fraud and extortion. Typically, corruption undermines public trust, has a major impact on an

³⁰ Victorian State Services Authority, *Review of Victoria's Integrity and Anti-Corruption System (the Proust Review)*, (Victorian Government, 2010)

organisation's reputation and has serious implications for an individual's future employability or electability. Sanctions for corruption generally involve termination of employment and possible penalties arising from a successful criminal prosecution.

(footnotes omitted)

[123] In their 2015 review of the jurisdiction of the New South Wales ICAC,³¹ the Independent Panel discussed the nature of corruption:

4.1 The nature of corruption

4.1.1 Corruption takes its meaning from its context. In one context it refers to a physical process. In another it refers to the meaning of a text. The context of present relevance is the characterisation of the conduct of an individual.

4.1.2 When used to characterise the conduct of an individual in one context, the concept of corruption may be wide enough to embrace any act or omission that constitutes a serious transgression of a moral precept. However, in a legal context it usually has a narrower meaning. The law does not seek to enforce all the requirements of morality; and not all breaches of the law involve moral turpitude. In a legal context the word corruption is often used as a general or summary description, or rubric, applied to a category of criminal offences, such as bribery, abuse of office, extortion and others, each of which has its own established elements which include a requisite state of mind, such as knowledge or intention. It is sometimes a convenient classification of crimes which have their own individual definitions.

4.1.3 The unifying element of the kinds of corrupt conduct referred to in s8(1) of the [ICAC] Act is **deliberate misuse of power, authority or responsibility, which is given for the public benefit and is, instead, used for some extraneous and wrongful purpose, such as private advantage**. This accords generally, although not completely, with Transparency International's view of corruption as the abuse of entrusted power for private gain. *(footnote omitted) (my emphasis)*.

³¹ The Hon. M Gleeson AC and Mr B McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*, (NSW Department of Premier and Cabinet, 2015).

[124] The definition of corruption by Transparency International to which the Independent Panel referred is as follows:

How do you define corruption?

Generally speaking as “the abuse of entrusted power for private gain”. Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs.

Grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good.

Petty corruption refers to everyday abuse of entrusted power by low-and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.

Political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision-makers, who abuse their position to sustain their power, status and wealth.

[125] In South Australia the definition of “corruption in public administration” is based entirely upon offences committed by public officers or offences committed by other persons in relation to public officers such as aiding and abetting or inducing public officers to commit an offence. The type of offence capable of amounting to corruption is broadly defined, and includes offences under the *Public Sector (Honesty and Accountability) Act 1995 (SA)*, which is an Act that imposes duties of honesty and accountability on “public sector office-holders, employees and contractors”.

[126] Unlike other State jurisdictions, the South Australian legislation does not include in the definition of corruption the broad concept of conduct which “adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by

any public official ...” (s8(1) NSW)³². In addition, the South Australian definition of corruption does not extend to conduct which could constitute or involve a disciplinary offence or reasonable grounds for dismissal or, in the case of a Minister of the Crown or a Member of a House of Parliament, a substantial breach of an applicable code of conduct.

[127] The concept of conduct that “adversely affects, or could adversely affect”, either directly or indirectly the exercise of official functions by a public official has led to difficulties in New South Wales. Was it sufficient for the conduct to adversely affect the “efficacy” of the exercise of an official functions? Or must it affect the honest exercise of that function?

[128] Ultimately the issue was determined by the High Court in *Independent Commission Against Corruption v Margaret Cunneen & Ors*³³. The majority of four justices held that the expression “adversely affect” should be read as confined to “having an injurious effect upon or otherwise detracting from the probity of the exercise of the official function in any of the senses defined by s8(1)(b)-(d)” of the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act (NSW)).

[129] The decision of the High Court cast doubt upon the validity of previous and ongoing ICAC investigations. The NSW Parliament amended the ICAC legislation³⁴ to validate investigations undertaken before the High Court decision in the mistaken belief that it was sufficient if the conduct adversely affected the “efficacy” of the exercise of an official function.

³² *Independent Commission Against Corruption Act 1988* (NSW).

³³ [2015] HCA 14.

³⁴ By way of the *Independent Commission Against Corruption (Validation) Act 2015* (NSW).

[130] The NSW Government also commissioned the Independent Panel to review the jurisdiction of the ICAC. Rather than amend the definition with reference to adverse effects, the Panel recommended an amendment to include the concept of conduct impairing or which could impair public confidence in public administration:

7.4.13 The Panel recommends that the Act be amended to include within the definition of corrupt conduct in section 8, conduct of any person (whether or not a public official) that impairs or could impair public confidence in public administration and which could involve any of the following matters:

- (a) collusive tendering;
- (b) fraud in or in relation to applications for licences, permits or clearances under statutes designed to protect health and safety or designed to facilitate management and commercial exploitation of resources;
- (c) dishonestly obtaining or assisting or benefiting from the payment or application of public funds or the disposition of public assets for private advantage;
- (d) defrauding the revenue;
- (e) fraudulently obtaining or retaining employment as a public official.

The nature of the matters covered in (a) to (e) should be sufficient to indicate that the confidence referred to is not confined to faith in the probity of individual public officials.

7.4.14

7.4.15 The expression “could impair public confidence” is intended as a reference to the tendency of the conduct arising from its nature or the circumstances in which it occurs, and not as a factual prediction of its likely consequence. The Panel takes this to be consistent with the use of the expression “could adversely affect” in section 8(1)(a). There, for example, an offer of a bribe to a public official would be something that has the tendency to adversely affect the honest or impartial

exercise of official functions even though the public official in a particular case is a person of unimpeachable honesty and is in fact unlikely to accept the bribe.

[131] These recommendations were accepted and were enacted through the Independent Commission Against Corruption Amendment Bill 2015 (NSW) (assent 28 September 2015). Clause 3 of Schedule 1 of the Bill provided:

[3]Section 8 General nature of corrupt conduct

Insert after section 8(2):

- (2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:
- (a) collusive tendering,
 - (b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,
 - (c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
 - (d) defrauding the public revenue,
 - (e) fraudulently obtaining or retaining employment or appointment as a public official.

[132] As mentioned, the concept of conduct adversely affecting the exercise of official functions by a public official exists in all States except South Australia. In those States, it is one of a number of ways in which corrupt conduct can occur. For example, in New South Wales the concept of corrupt conduct also includes conduct of a public official that involves the dishonest or partial exercise of official functions or constitutes or involves a breach of public trust or involves

the misuse of information or material acquired in the course of official functions.

[133] In South Australia corruption in public administration is tied exclusively either to offences in relation to public officers, such as bribery or threats, or to offences committed by a public officer. Aiding, inducing or being knowingly concerned in the commission of the specified offences, or conspiring with others to effect the commission of such offences, also fall within the definition of corruption in public administration. The definition does not include conduct that adversely affects the performance of official functions by a public official.

[134] In Western Australia, where the terms “misconduct” and “serious misconduct” are used rather than corruption, “serious misconduct” occurs if:

- (a) a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer’s office or employment; or
- (b) a public officer corruptly takes advantage of the public officer’s office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person; or
- (c) a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by two or more years’ imprisonment ...³⁵

[135] As to the requirement in South Australia that the conduct amount to specified offences, the former Tasmanian Integrity Chief Commissioner, the Hon Murray Kellam QC, has publicly stated that in his experience in Tasmania “serious misconduct could arise in circumstances whereby there was no breach of criminal law”.

Mr Kellam said:

Non-disclosure of serious conflicts of interest or of close relationships with a contractor, or providing preferential treatment to friends or relatives in employment by the provision

³⁵ Section 4, *Corruption, Crime and Misconduct Act 2003* (WA).

of questions to be asked at an interview, which questions are not provided to other applicants, are examples of serious misconduct by senior members of a department which may not be in breach of the criminal law, but which on any view are clear examples of misconduct deserving of the description of being corrupt.³⁶

[136] Against this background it is necessary, therefore, to decide whether the definition of corrupt conduct should be confined to conduct that amounts to specified offences, or attempts to commit specified offences, or whether it should include broader concepts such as the recent New South Wales addition of “conduct that impairs or could impair public confidence in public administration” and which could involve the matters of collusion or fraud identified in s8(2A)³⁷.

[137] As to the position in New South Wales that corrupt conduct includes conduct which could constitute or involve a disciplinary offence or reasonable grounds for dismissing, dispensing with or otherwise terminating the services of a public official, such conduct would not necessarily align with the common understanding of corruption associated with dishonesty and personal gain or advantage. However, as Mr Kellam pointed out, in his experience serious misconduct can arise in circumstances where there is no breach of the criminal law.

[138] In New South Wales conduct of a Minister of the Crown or a Member of a House of Parliament could be corrupt if it could constitute or involve “a substantial breach of an applicable code of conduct”. I have reservations about extending the definition of corrupt conduct this far.

[139] All members of the NT Legislative Assembly are bound by the code of conduct and ethical standards set out in the *Legislative Assembly (Members’ Code of Conduct and Ethical Standards) Act* (NT). In addition, Ministers are expected to comply with the Ministerial Code of Conduct (*Annexure 15*). A quick examination of these codes reveals

³⁶ Jason Dowling, ‘VIC corruption body IBAC needs more teeth’, *The Age* (online), 10 February 2016 <<http://www.theage.com.au/victoria/vic-corruption-body-needs-more-teeth-20160210-gmqj3c.html>>

³⁷ *Independent Commission Against Corruption Act 1988* (NSW).

the existence of very broad concepts. Significant difficulties are attached to endeavouring to identify the meaning of a “ministerial breach” of such broad concepts. In the content of the codes of conduct, the expression “substantial breach” is vague and uncertain in its reach.

[140] In addition, given the width of the primary definition of corrupt conduct, I doubt that conduct which does not fit within that primary definition, and only amounts to corrupt conduct because it is a “substantial breach of an applicable code of conduct”, should be classified as corrupt. Such conduct, falling outside the primary definition, is unlikely to accord with the common understanding of the concept of corruption.

[141] These are issues that require resolution. Consideration must also be given to whether the use of the word “corrupt” should be avoided in favour of a more general description such as “misconduct”, accompanied by a distinction between “misconduct” and “serious misconduct”. In my view, however, the preferable approach is to distinguish between levels of seriousness of conduct through the terms used in the South Australian legislation: maladministration, misconduct and corruption. This approach provides a clear distinction between corruption, as commonly understood involving dishonesty and personal gain or advantage, and less serious forms of conduct falling below the appropriate standard. Distinguishing between levels of seriousness in this way provides a clear basis for an assessment of the gravity of the conduct and the consequences that should follow. This approach would enhance the understanding of the public with respect to the conduct of the individual or body concerned.

[142] As will be apparent later in this discussion, in my view, in the absence of good reason, the investigatory role of the NT Anti-Corruption Commissioner should ordinarily be reserved for investigating corrupt conduct.

Type of Conduct - Conclusion

[143] As I have indicated, in my view it is appropriate to adopt the South Australian approach of distinguishing between the levels of seriousness of conduct through the use of the terms maladministration, misconduct and corrupt conduct. However, it is not a simple exercise to settle upon an appropriate definition at each level of seriousness, particularly with respect to “corrupt” conduct. It is a finding of “corrupt” conduct that attracts the most condemnation and has the greatest effect upon a person’s reputation and life generally.

Corrupt Conduct

[144] Each State has adopted a different definition of corrupt conduct but, with the exception of South Australia, each includes reference to conduct that “adversely affects” the exercise of official functions. Yet this expression was regarded by the Independent Panel as “confusing” (para 5.3.5).

[145] An alternative is to list offences, the commission of which while acting in the official capacity amounts to corrupt conduct.

[146] Early in the discussion I referred to the notions of dishonesty and personal gain or advantage as underlying the common understanding of corruption. But it extends to abuse of power, regardless of motivation, and to dishonest performance of official functions, regardless of personal gain. Further, dishonest conduct which affects the efficacy of the performance of official functions is also in the morally reprehensible category of conduct that should be classified as corrupt.

[147] Finally, bearing in mind that one of the essential aims is to ensure public confidence in public administration, conduct which impairs such confidence, and involves fraudulent or dishonest conduct, should fall

within the definition of corrupt conduct (as is now the position in New South Wales).

[148] Returning to the expression “adversely affects”, as this discussion demonstrates, one of the important features of corrupt conduct is its effect upon the exercise of official powers. I recommend this feature should be reflected in the definition. Notwithstanding the view of the Independent Panel, bearing in mind the use of this expression in every State other than South Australia, in my view it should be included as part of the definition in the NT Commission legislation.

[149] I recommend the adoption of the following definition:

1. Corrupt Conduct

- (1) For the purposes of this Act, corrupt conduct means conduct –
- (a) of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial or effective exercise of official functions by any public officer, any group or body of public officers, or any public body; or
 - (b) of a public officer or public body that constitutes or involves the dishonest or partial exercise of any of his or her or its functions as a public officer or public body; or
 - (c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust in relation to the duties of the office held by the public officer or public body; or
 - (d) of a public officer or public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person; or
 - (e) that could constitute a conspiracy or an attempt to engage in any conduct referred to in para (a),(b),(c) or (d); or

- (f) that could constitute or involve aiding, abetting, counselling or procuring engagement in any conduct referred to in para (a), (b), (c), or (d); or
- (g) could constitute or involve, whether by threats or promises or otherwise, engagement in any conduct referred to in para (a), (b), (c) or (d); or
- (h) that could constitute or involve being in any way, directly or indirectly, knowingly concerned in, or party to, engagement in any conduct referred to in para (a), (b), (c) or (d) –

being conduct that would constitute or involve reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official or would, if the facts were found proved beyond reasonable doubt at a trial, constitute an offence punishable by two or more years' imprisonment.

- (2) Corrupt conduct for the purposes of this Act is also any conduct of any person (whether or not a public official) that impairs, or could impair, public confidence in public administration and which could involve any of the following matters:

- (a) collusive tendering;
- (b) fraud in relation to application for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources;
- (c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage for the disposition of public assets for private advantage;
- (d) defrauding the public revenue;
- (e) fraudulently obtaining or retaining employment or appointment as a public official.

Other Conduct Discovered

[150] There is a further aspect relating to the powers of investigation which should be linked to the definition of corrupt conduct. It is not uncommon for investigations commenced in connection with corrupt conduct to disclose the commission of other conduct which, although connected with corrupt conduct, does not in itself amount to corrupt conduct. By reason of its connection with the investigation into corrupt conduct, the power of investigation should extend to the other conduct and legislation is required in this regard to avoid any doubt about the extent of the investigative power. For example, in South Australia s5(2) of the *Independent Commissioner Against Corruption Act 2012* (SA) (ICAC Act (SA)) is in the following terms:

- (2) If the Commissioner suspects that an offence that is not corruption in public administration (an *incidental offence*) may be directly or indirectly connected with, or may be part of, a course of activity involving the commission of corruption in public administration (whether or not the Commissioner has identified the nature of that corruption), then the incidental offence is, for so long only as the Commissioner so suspects, taken for the purposes of this Act to be corruption in public administration.

[151] In my view, this provision is eminently sensible and I recommend enactment of the following:

If the Commissioner suspects that conduct that is not corrupt conduct may be directly or indirectly connected with, or may be part of, a course of activity involving corrupt conduct (whether or not the Commissioner has identified the nature of that corrupt conduct), then such conduct is, for so long only as the Commissioner so suspects, taken for the purposes of this Act to be corrupt conduct.

Electoral and Lobbying Matters

[152] In the context of the definition of corrupt conduct, consideration should be given to electoral and lobbying matters. In New South Wales this issue arose following the decisions of the Court of Appeal

and High Court in *Cunneen*³⁸. The ICAC had been investigating allegations that Members of Parliament had solicited and received political donations from prohibited donors and whether false or inaccurate electoral funding disclosures had been made. Following the decisions in *Cunneen*, the ICAC announced it would not complete a report concerning that investigation and the Independent Panel considered whether the ICAC Act (NSW) should be amended to specifically confer jurisdiction upon the ICAC to investigate and make findings about breaches of the electoral laws.

[153] After examining the relevant legislation, which included criminal offences and provisions prohibiting specified political donations, the Independent Panel observed that the legislative schemes were “intended to maintain and enhance the integrity and transparency of the electoral process and the activities of lobbyists” and that “the activities which are prohibited or regulated are central to the democratic system.” The Panel noted that “much of the proscribed conduct does not fall within the definition of ‘corrupt conduct’” and that while the Electoral Commission possessed “some compulsory investigative powers”, such powers were “not as extensive, nor as likely to be effective in revealing electoral or lobbying misconduct, as the powers which the ICAC possesses”.

[154] The Independent Panel considered whether the ICAC should possess jurisdiction over electoral and lobbying matters and it is helpful to set out the Panel’s discussion in this regard:

8.5 Should the ICAC have jurisdiction over electoral and lobbying matters?

8.5.1 The Panel consulted with the Hon. Keith Mason AC QC, the Chairperson of the Electoral Commission who, in a submission to the Panel, supported amendment of the Act. He said:

³⁸ *Cunneen v Independent Commission Against Corruption* [2014] NSW CA 421 and *Independent Commission Against Corruption v Margaret Cunneen & Ors* [2015] HCA 14

I can confirm that the Commission would propose the insertion of a new subsection into section 8 of the *Independent Commission Against Corruption Act 1988* to the effect that ICAC has authority to investigate alleged breaches of the three statutes for which the Electoral Commission has regulatory oversight. These are the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* and the *Lobbying of Government Officials Act 2011*.

... The Electoral Commission's interest is that there will be a standing body possessed of royal commission powers and adequate resources to investigate types of misconduct that have the capacity to [wreak] direct evil upon our democratic system and the capacity for it to function openly and fairly. Investigating isolated, let alone systemic, issues touching electoral probity has proved entirely beyond the resources or interest of the police force; and, to date, the Electoral Commission has not been given the resources to do this either.

8.5.2 The ICAC responded to Mr Mason's submission in the following terms:

The Commission agrees with Mr Mason's submission that it should have jurisdiction to investigate conduct involving alleged breaches of election funding laws and conduct breaching the *Parliamentary Electorates and Elections Act 1912* and the *Lobbying of Government Officials Act 2011*. Conduct that breaches these laws may have serious consequences not only for public administration but also for public confidence in our system of government. As Mr Mason has pointed out, conduct involving breaches of these Acts has '... the capacity to [wreak] direct evil upon our democratic system and the capacity for it to function openly and fairly'.

There are offences under the *Parliamentary Electorates and Elections Act 1912* (see Part 5, Division 17), Part 5 of the *Lobbying of Government Officials Act 2011* and under the *Election Funding, Expenditure and Disclosures Act 1981* (see Division 4 and 4A of Part 6) that do not constitute conduct that affects the exercise of official functions, either by misleading a public official or by involving a public official in any wrong-doing. Mr Mason's proposal represents an extension to the Commission's jurisdiction which is a matter of policy. The Commission is of the view that the extension of its jurisdiction in this way is only justified if all of the breaches to which Mr Mason refers are brought within the ambit of corrupt conduct.

Otherwise, the Electoral Commission itself is better placed to investigate such breaches.

Given the direct and serious consequences of offences against election funding laws, it is difficult to understand why the Commission ought not be able to label that conduct ‘corrupt’, particularly in circumstances where the legislature regards some breaches as so serious that they warrant penalties of imprisonment.

For the reasons given in the Commission’s submission, the Commission submits that any legislative change to enable the Commission to make corrupt conduct findings with respect to conduct involving election funding offences should be given retrospective operation so that the Commission can complete its Operation Spicer public report.

The Commission notes Mr Mason’s concern that any changes to the ICAC Act preserve and maintain the Commission’s capacity to keep the Electoral Commission informed of relevant matters in a timely manner. The Commission considers that current provisions of the ICAC Act enable the Commission to meet this concern and no additional provision is required.

8.5.3 The issues which arise are:

- Whether the ICAC should be given power to investigate, and make findings as to, breaches of the *EFED Act*, the *PE&E Act* and the *LOGO Act*.
- If so, what form that grant of power should take and, specifically, whether (as the ICAC suggests) such breaches should be brought within the ambit of corrupt conduct.

8.5.4 The Act is premised on a distinction between corruption in or around public administration and other corruption. Thus, both subsections (1) and (2) of section 8 (whichever of the competing constructions under consideration in *Cunneen* had been adopted) require an impact on public administration, whether the impact be on probity or efficacy. A policy choice was made in 1988 that the Act would not deal with corruption generally, but only with corruption connected to public administration.

8.5.5 While the Panel does not take a final position on this matter – it is uniquely one for Parliament – there is a case to be made that the ICAC should be given jurisdiction to investigate and make findings in such matters. Many but not all breaches of the legislation referred to above strike at the heart of the democratic process and for that

reason have a connection with public administration that may be regarded as warranting special treatment. The Panel suggests a method of investing the ICAC with such power that is different both from that suggested by the Electoral Commission and from that suggested by the ICAC. However, while the Panel has had the benefit of the views of the ICAC and the Electoral Commission, there are other important stakeholders whose views would also need to be taken into account. This issue only arose because the *Cunneen* decision came down at a time when the ICAC was in the course of a particular investigation and was not addressed by most of those with whom the Panel consulted.

- 8.5.6 An apparently strong reason for giving the ICAC power to investigate electoral and lobbying misconduct is that, as Mr Mason points out, it presently has both the resources and the willingness to undertake this task. To that may be added the ICAC's operational experience.
- 8.5.7 In addition, as is noted above, the powers the ICAC already has to carry out investigations exceed those of the Electoral Commission. The alternative appears to be to increase the resources of the Electoral Commission and to give it more extensive powers to investigate.
- 8.5.8 The question would then become whether, if such power is granted, it should, as the ICAC suggests, be brought within the ambit of section 8 as corrupt conduct. In the Panel's view, it should not. Many electoral offences may well constitute corrupt conduct within the present meaning of section 8 of the Act. An obvious example would be a Minister who solicits a donation to his campaign for an upcoming election in return for favourable consideration of some application made by a prospective donor. On the other hand, many types of conduct amounting to breaches of the electoral and lobbying laws are very far away from what would ordinarily be regarded as corrupt conduct and which do not involve any moral turpitude. There are, for example, offences where it is unnecessary to prove a mental element to establish breach. Between the two extremes there is a range of conduct.
- 8.5.9 The Panel has already indicated that it does not accept that any misleading of an official in filling in a form, failing to make a return or failing to keep records ought automatically be regarded as corrupt conduct. In addition, findings of corrupt conduct which are distant from the ordinary conception of corruption would ultimately have the effect of damaging public confidence in the ICAC.

- 8.5.10 The Panel does not consider that the ICAC’s position on this issue, that is, to include these matters within the definition of “corrupt conduct” is one which should commend itself to Parliament. The idea that the ICAC should only investigate matters which will or may conclude with a finding of corrupt conduct is one which the Panel rejects. Labelling conduct as corrupt ought not to be regarded as the definitive function of the ICAC, especially when the label is artificial. The Act confers important powers of investigation which can be exercised in the public interest without the need for the investigation to culminate in a public denunciation. The Panel does not support the ICAC’s suggested inclusion of all these matters within the definition of corrupt conduct.
- 8.5.11 If Parliament wishes to give the ICAC jurisdiction, it could do so by inserting a subsection in section 13(1) to the following effect:
- (ba) to investigate any allegation or complaint that, or any circumstances which in the Commission’s opinion imply that there has been a breach of the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* or the *Lobbying of Government Officials Act 2011*.
- 8.5.12 The effect of adopting this mechanism would be to enable the ICAC to investigate allegations or complaints about breach of the legislation referred to, make findings of fact under subsections (2) and (3) of section 13 of the Act, and formulate recommendations for appropriate action, including consideration of prosecution. It would not, of itself, enable a finding of corrupt conduct to be made unless the conduct in question otherwise came within subsection (1), (2) or the proposed (2A) of section 8. This in turn would mean that the reporting obligations imposed by section 11 of the Act would not apply. Those obligations would be very onerous because they would require every breach of the electoral laws, no matter how trivial, to be reported to the ICAC. The Panel sees no reason why this is either necessary or desirable.
- 8.5.13 The Panel makes no recommendation about whether this amendment, if Parliament sees fit to make it, should be retrospective.
- 8.5.14 An amendment of the kind proposed would require a consequential amendment to section 12A to reflect the fact that the ICAC would have a function not tied to the concept of corrupt conduct.

[155] Having regard to the issues raised in the report of the Independent Panel, I sought submissions from the Northern Territory Electoral Commissioner, Mr Iain Loganathan. The Commissioner identified “substantial differences and complexities when comparing NSW electoral legislation with that of the NT” including the following:

- The NT Electoral Commission is “funded and structured as an electoral body” and is a “relatively small organisation” which does not possess investigatory resources, nor a “dedicated funding and disclosure section” such as those which exist in other electoral jurisdictions.
- The majority of breaches of the *Electoral Act* (NT) “are likely to be criminal offences and therefore it is the role of the NT Police to investigate breaches ...”. An exception to this relates to breaches of disclosure provisions.
- Under Part 10 of the *Electoral Act* (NT) the Commission is responsible for conducting a preliminary investigation and is required to refer the matter to the Police if it forms the view that a breach of the disclosure provisions has occurred.
- The *Electoral Act* (NT) does not provide public funding to political parties or candidates and does not prescribe caps on political donations. Nor does it prohibit donations from any particular class of person or entity.
- Unlike the New South Wales Electoral Commission which is responsible for monitoring compliance with and enforcement of the New South Wales *Lobbying of Government Officials Act 2011*, there is no such role performed by the NT Commission.

- It is important that “clear definitions are in place regarding which entity has jurisdiction over electoral and lobbying matters, including alleged breaches of political disclosure laws.”

[156] As the Independent Panel observed, the activities which are, in New South Wales, prohibited or regulated “are central to the democratic system”. In the passage earlier cited, the Panel made the significant point that many breaches of the New South Wales legislative scheme “strike at the heart of the democratic process and for that reason have a connection with the public administration that may be regarded as warranting special treatment.” I respectfully agree.

[157] The Independent Panel noted that many electoral offences in New South Wales would fall within the definition of corrupt conduct in that State, but many types of conduct amounting to breaches of electoral and lobbying laws “are very far away from what would ordinarily be regarded as corrupt conduct and which do not involve any moral turpitude”. In these circumstances, the Panel rejected the submission of the ICAC that all offences against the electoral laws should be defined as corrupt conduct. The Panel also rejected the idea that the ICAC should only investigate matters “which will or may conclude with a finding of corrupt conduct”.

[158] Again, I respectfully agree. I recommend that regardless of whether corruption might be involved, the NT Anti-Corruption Commission be empowered to investigate any complaint, allegation or report, or any circumstances which in the Commission’s opinion imply that there has been a breach of the *Electoral Act* (NT). As in complaints and reports concerning administration of public affairs, the Commission should possess the discretion to investigate or refer a matter concerning a breach of the *Electoral Act* (NT) to a relevant agency for appropriate action.

Misconduct and Maladministration

[159] As previously discussed, in South Australia the scale of seriousness below corrupt conduct steps down through misconduct to maladministration. For ease of reference, I set out those definitions:

Misconduct in public administration means –

- (a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or
- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.³⁹

Maladministration in public administration –

- (a) means –
 - (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or
 - (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
- (b) includes conduct resulting from impropriety, incompetence or negligence; and
- (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.⁴⁰

[160] In Tasmania, the legislation draws a distinction between “misconduct” and “serious misconduct”. The definitions are set out in paras [4] and [5] of *Annexure 10*. Broadly speaking, misconduct encompasses breaches of codes of conduct, dishonest or improper performance of

³⁹ Section 5(3), *Independent Commissioner Against Corruption Act 2012* (SA).

⁴⁰ *Ibid* section 5(4).

functions, misuse of information and misuse of public resources. It also includes conduct by a public officer that adversely affects, or could adversely affect, the honest and proper performance of functions by another public officer. In order to amount to “serious misconduct”, the misconduct must also constitute a crime or an offence of a serious nature or provide reasonable grounds for terminating the appointment of the public officer.

[161] In Western Australia the concept of misconduct is linked to corrupt actions of public officers and conduct that adversely affects the honest or impartial performance of official functions. The Western Australian definition cannot be applied to misconduct which is a step down from corrupt conduct in the way in which I have proposed.

[162] The South Australian definition of misconduct is very broad. In addition to contravention of a code of conduct that constitutes grounds for disciplinary action, it includes “other misconduct” of a public officer while acting in their capacity as a public officer. There is no definition of “other misconduct”. Initially I was minded to think that this part of the definition is too broad, but bearing in mind the restrictive definition of corrupt conduct and the steps down in seriousness to maladministration, I have reached the view that it is necessary to maintain a broad definition because the infinite variety of circumstances in which misconduct can occur cannot be predicted.

[163] I recommend, therefore, that the South Australian definition of misconduct be adopted in the Northern Territory. Further, I recommend that the Territory adopt the South Australian definition of maladministration.

Timing

[164] In connection with all three forms of conduct, it is necessary to include a provision which encompasses the acts of public officers before or after commencement of legislation and before and after employment as a public officer. I recommend adoption of the following provision found in s5(5) of the South Australian ICAC Act:

Without limiting or extending the conduct that may comprise corruption, misconduct or maladministration in public administration, this Act applies to conduct that –

- (a) occurred before the commencement of this Act; or
- (b) occurs outside this [Territory]; or
- (c) comprises a failure to act; or
- (d) is conduct of a person who was a public officer at the time of its occurrence but who has since ceased to be a public officer; or
- (e) is conduct of a person who was not a public officer at the time of its occurrence but who has since become a public officer.

Whose Conduct?

[165] As previously discussed, in the Northern Territory a number of persons are excluded from the reach of the CPID, including judicial officers. Investigation of an MLA can only occur if the matter is referred to the CPID by the Speaker.

[166] While the legislation in Tasmania excludes investigations of the Governor⁴¹ and judicial officers, other jurisdictions include those persons and Members of Parliament within the reach of the anti-corruption bodies. Speaking broadly, in my view no person or body should be exempt from investigation of an allegation of corruption relating to the administration of public affairs.

[167] In New South Wales and South Australia, the legislation appears to permit the conduct of judicial officers and Members of Parliament to be investigated in the same manner as investigations into the conduct

⁴¹ In the Northern Territory, the equivalent to the 'Governor' is the 'Administrator'.

of other persons. However, in other States, attention is given to preserving the independence of judicial officers and restricting investigations to serious cases of misconduct.

[168] In Queensland, s58(1) of the *Crime and Corruption Act 2001* directs that when performing its functions or exercising its powers in relation to “the procedures and operations of State Courts or in relation to the conduct of a judicial officer”, the Commission “must” proceed having “proper regard for, and proper regard for the importance of preserving, the independence of judicial officers”. An investigation in relation to the conduct of a judicial officer must be conducted “in accordance with appropriate conditions and procedures agreed by the Chairman and the Chief Justice from time to time”, and a hearing in relation to the conduct of a judicial officer “must” be conducted by the Chairman (s58(4),(5)⁴²). The authority of the Commission to investigate the conduct of a judicial officer is limited to investigating “corrupt conduct of a kind that, if established, would warrant the judicial officer’s removal from office” (s58(2)). For the purposes of s58, a judicial officer is defined as a Judge or other person holding judicial office in a State Court or a member of a tribunal that is a court of record (s58(8)).

[169] If the Commission is to report about the procedures and operations of a State Court, s65 directs that the report may only be given to the Chief Judicial Officer of the particular court and such a report need not be tabled in Parliament (s69(2)). There does not appear to be any special provision if the report is confined to the conduct of a judicial officer.

[170] In Victoria the *Independent Broad-Based Anti-Corruption Commission Act 2011* (IBAC Act) contains special provisions governing who may investigate the conduct of a judicial officer and directing that in conducting such an investigation the IBAC “must have proper regard for the preservation of the independence of judicial officers” (s61).

⁴² *Crime and Corruption Act 2001* (Qld).

Adverse findings in relation to judicial officers must not be included in a special report or annual report (s62). Further, if a complaint about the conduct of a judicial officer “directly relates to the merits of a decision made, an order made or a judgement given by the judicial officer”, s63 directs the IBAC to dismiss the complaint.

[171] The Western Australian *Corruption, Crime and Misconduct Act 2003* directs that the Commissioner must not receive an allegation about a person in their capacity as the holder of a judicial office unless the allegation relates to the commission, attempted commission or incitement of the commission of an offence under s121 of the Criminal Code (WA), or conspiracy to commit such an offence, or is an allegation of a kind that if, established, would constitute grounds for removal from judicial office (s27)⁴³. Section 121 of the Criminal Code relates to an offence conveniently identified as judicial corruption.

[172] Section 27⁴⁴ also provides that when investigating the conduct of the holder of a judicial office, the Commission “must proceed having proper regard for preserving the independence of judicial officers” and must act in accordance with conditions and procedures formulated in continuing consultation with the Chief Justice.

[173] The Western Australian legislation does not appear to contain any special provisions concerning reporting the results of an investigation with respect to the conduct of a judicial officer. Reports pursuant to s84 may include statements as to the Commission’s “assessments, opinions and recommendations” and statements as to reasons for those assessments, opinions and recommendations. Section 84(4) provides that the Commission may cause a report to be laid before each House of Parliament, but the Commission may also report to the Minister or

⁴³ *Corruption, Crime and Misconduct Act 2003* (WA).

⁴⁴ *Ibid.*

the Standing Committee without laying the report before each House of Parliament (s89).

[174] As to Members of Parliament, including Ministers, the legislation in each of the States does not appear to contain any special provisions governing the conduct of investigations or the reporting of results of such investigations.

[175] In my view, no person should be exempt from investigation of an allegation of corruption in relation to the administration of public affairs. However, as has been done in the majority of State jurisdictions, the NT Commission legislation should specifically recognise the importance of judicial independence and should give direction as to who may conduct an investigation relating to the conduct of a judicial officer. Judicial independence and parliamentary privilege should be maintained. The boundaries in relation to Parliamentary Privilege should be clearly defined.

[176] As I have said, in the absence of good reason, the investigatory role of the NT Anti-Corruption Commissioner should be limited to investigating allegations of corruption as that concept is commonly understood. Further, in relation to judicial officers and MLAs, if an allegation is made of conduct falling short of corruption such as maladministration or misconduct as those terms are defined in the South Australian legislation, ordinarily the NT Anti-Corruption Commission should not conduct such investigations. Such allegations concerning judicial officers should be referred to the Chief Justice or Chief Judge⁴⁵ as appropriate or, in the case of an allegation concerning the Chief Justice, to the Attorney-General. Less serious matters relating to MLAs should be referred to the Speaker or to a Parliamentary Integrity Commissioner should such a position be created. This last question is discussed later.

⁴⁵ From 1 May 2016, the title of 'Chief Magistrate' was replaced with 'Chief Judge'.

[177] As I have said, in my view no person should be exempt from investigation of an allegation of corruption in respect of public administration. The NT Commission legislation should be worded to ensure that “any person” may be investigated. The persons who are involved in public administration for these purposes should specifically include persons such as ministerial advisors, electoral officers or other ministerial staff and contractors to whom government services are outsourced. In substance such contractors are an integral part of the administration of public affairs. Contractors, electoral officers and ministerial advisors and staff are often in positions which provide opportunities for influencing political decisions and the use of public resources. It is particularly important that persons in these positions should be subject to the jurisdiction of an anti-corruption body.

[178] The reach of the NT Anti-Corruption Commission should also extend to Local Government bodies, staff of such bodies and Councillors. Local Government bodies are heavily involved in the administration of public affairs.

[179] It is appropriate to mention Aboriginal Land Councils established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and bodies established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and operating in the Territory. The Legislative Assembly of the Northern Territory does not possess the power to make laws inconsistent with Commonwealth laws. The Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* contains provisions governing the operation of Land Councils and it is likely that any attempt to apply the jurisdiction of an NT Anti-Corruption Commission to the Land Councils would meet objection on the basis that the provisions of the legislation are inconsistent with Commonwealth law which covers the field with respect to Land Councils.

[180] It is unnecessary to discuss this aspect in detail. I simply draw attention to the fact that there are difficulties associated with endeavouring to apply Territory law to bodies established under Commonwealth law to manage Aboriginal land.

[181] Contractors who provide services for public bodies, including Local Government entities, should also be subject to the NT Anti-Corruption Commission's regime. Outsourcing of government practices is common and when persons are retained to perform functions that are properly regarded as falling within the category of public affairs, they should be treated as public officials for the purposes of the Commission.

[182] In the context of whose conduct the NT Anti-Corruption Commission should be able to investigate, special consideration must be given to the investigation of the conduct of Police Officers.

[183] The joint submission of the Extended Integrity Group made the following points:

- Very few of the complaints about police conduct relate to allegations of corruption.
- In practical terms, routine complaints are handled by Police Forces of respective jurisdictions as part of their day-to-day managerial and disciplinary processes.
- The great majority of Ombudsman complaints are investigated or dealt with by the Professional Standards Command within NT Police, with oversight maintained by the Ombudsman.
- There will always be concerns raised about "police investigating police" but, with that in mind, the Ombudsman maintains "rigorous overview of more serious matters and retains the power to investigate separately if that is considered necessary."

- The Ombudsman considers that the current system of dealing with Police complaints works effectively and has not identified “any material failings or flaws in the system.”
- There is no compelling reason to transfer this function to another body. If the function is not transferred it would be appropriate for the NT Anti-Corruption Commission to have the power to investigate allegations of Police conduct that amounts to corrupt conduct or misconduct.

[184] The CPID also possesses the power to investigate improper conduct by Police Officers. The joint submission states that a “small number of such complaints are received and, where required, investigated by CPID each year.”

[185] In my view, allegations of corrupt conduct by Police Officers should be investigated by an anti-corruption body possessing appropriate qualifications, experience, independence and powers. Police Officers are an integral part of public affairs, and if judicial officers and MLAs are to be subject to the jurisdiction of the NT Anti-Corruption Commission when allegations of corruption are involved, there does not appear to be any sound reason why Police Officers should not be subjected to the same regime. For obvious reasons, there are potential difficulties associated with Police investigating corruption within their own ranks and, in the relatively small jurisdiction of the Territory, perceptions are important. Public confidence in the integrity of the system could be damaged if Police investigate allegations of corruption by other Police Officers rather than an independent investigator possessing appropriate powers.

[186] Whether the NT Anti-Corruption Commission utilises the services of the Police Special References Unit as its investigative arm for such investigations, as suggested by the Police submission, is a matter for

determination by the NT Anti-Corruption Commissioner in the circumstances of the particular investigation.

[187] As to investigation of police conduct falling short of corrupt conduct, both the CPID and Ombudsman are currently capable of investigating such matters, but it appears that the Ombudsman has established a system of either conducting the investigation or maintaining oversight of investigations conducted by the Professional Standards Command within the NT Police. Subject to providing that the NT Anti-Corruption Commissioner deal with matters involving corrupt conduct, and to the power of the Commissioner to give directions with respect to a particular matter, in my view there is no reason to interfere with the existing regime established by the Ombudsman. If this approach is adopted, resources within the CPID previously applied to complaints concerning police conduct, could be utilised by the new Office for Public Integrity within a structure headed by an NT Anti-Corruption Commissioner.

On Complaint/Own Motion

[188] As mentioned, every State anti-corruption body possesses the power to undertake investigations on its own motion, as well as on complaint. None of the submissions suggested that the Northern Territory body should not possess the same power and I see no reason why such a body should not be able to undertake investigations on its own motion. In my view it is important that such a power exists.

Powers of Investigation

[189] Having regard to the purpose of an anti-corruption body and its role in investigating corruption at the highest level, being conduct which is likely to be difficult to detect and to involve the adoption of methods designed to avoid detection, and bearing in mind the intention that such a body complement and improve upon investigatory powers of other

existing agencies, in my view there is no reason not to confer the wide coercive powers of the type possessed by anti-corruption bodies in other Australian jurisdictions. These include:

- Entry, search and seizure powers without warrant with respect to public premises or premises used by public persons or entities other than residential premises;
- Power to require productions of statements, documents or other things;
- Power to obtain search warrants in respect of private or residential premises or motor vehicles or ships or other forms of conveyance;
- Power to seek warrants under surveillance and telecommunications legislation;
- Power to seek authorisation to conduct unlawful activities and assume false identities;
- Power to require attendance at a hearing and the giving of evidence under oath or affirmation; and
- Power to second staff from other agencies or to employ investigators or to delegate powers.

[190] In all jurisdictions safeguards exist to ensure that search warrant powers can be exercised only in appropriate circumstances. Similar safeguards should apply in the Territory.

[191] In respect of powers to obtain search warrants or warrants under surveillance and telecommunications legislation, in my view no one employed in the NT Anti-Corruption Commission should possess the power to issue such warrants. The exercise of such a power should be reserved to a judicial officer. Some might argue that the power should

be reserved to a Supreme Court Judge, but in my view there is no reason why a Judge of the Local Court⁴⁶ should not also possess that power.

[192] The capacity to seek warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth) would require an amendment to that Act to include the NT Commissioner as an “eligible authority” for the purposes of the Act (as has occurred for the State Commissioners). For this purpose it will be necessary for the NT Commission legislation to satisfy the preconditions specified in s35 of the Commonwealth Act⁴⁷.

Public v Private Inquiries

[193] As discussed previously, only the South Australian Commissioner must conduct investigations in private.

[194] In a newsletter issued in January 2015 on the website of the Independent Commissioner Against Corruption (SA) and the Office for Public Integrity, the distinction between public and private investigations was canvassed in the following terms:

South Australia’s Independent Commission Against Corruption is a law enforcement agency and the role of the Commissioner is that of an Investigator. Commissioner Lander’s role is focussed on gathering evidence on corrupt conduct, which under the *ICAC Act*, is conduct that is a criminal offence, and referring those matters for prosecution.

The New South Wales Independent Commission Against Corruption includes in its definition of corruption, conduct that is not a criminal offence. Hence, the identification and gathering of admissible evidence for a prosecution is not a primary function of their model.

⁴⁶ From 1 May 2016, the title of ‘Magistrate’ in the Northern Territory was replaced with ‘Judge of the Local Court’.

⁴⁷ *Telecommunications (Interception and Access) Act 1979* (Cth).

The New South Wales model is more akin to a rolling Royal Commission.

Commissioner Megan Latham can make a decision about conduct under investigation that South Australia's Commissioner, Bruce Lander, cannot. Commissioner Latham is empowered to inform and publish an opinion as to whether or not someone has acted corruptly. This power does not exist under the South Australian legislation as the role of Commissioner Lander is not to form any public opinion about matters, but to gather enough evidence for a successful prosecution through the courts.

Despite South Australia's Commissioner enjoying a long career as a judge, he is no longer a judge and a South Australian ICAC examination is not a court proceeding. An examination is simply an investigative tool. It is used to gather information and evidence not unlike that of a police officer conducting an interrogation. Although there is understandable curiosity about exactly what happens at an ICAC examination, it is counter-intuitive that evidence-gathering for a potential prosecution occur in public. It is rarely suggested that police officers conduct public interrogations for there is an innate understanding that to do so would most likely undermine the investigation.

The public gathering of evidence would provide great headlines and sound bites, but real consequences and punishment would be at risk.

As for the argument that public examinations act as deterrents due to the pressure of the public spotlight, the evidence simply does not support this claim. New South Wales has been conducting public examinations for over 25 years and they have yet to be idle.

[195] In the 2014-2015 annual report of the Independent Commissioner Against Corruption (SA), the Commissioner made the following observations:

The Secret ICAC

In the last 12 months there has been continued debate about what is said to be the secretive nature by which I go about my functions. Comparisons are often made with other anti-corruption agencies whose model of operation extends to holding public hearings.

I must conduct my investigations in private.

When I investigate corruption in this State, because of the definition of corruption on the ICAC Act, I am necessarily investigating criminal conduct. Corruption in this State is confined to criminal conduct. Investigations into criminal conduct are almost always conducted in private, so as not to jeopardise or impede the investigation. Indeed, many of the

investigations I conduct would be undermined if those subject to investigation were prematurely made aware of the investigation.

The ICAC Act provides the range of powers to investigate corruption. One is the power to summons a person to appear for examination into corruption. SAPOL [SA Police] does not have such a power. When I hold an examination, I am obliged by the ICAC Act to conduct it in private. The powers of examination given to me are almost identical to the powers of examination given to the Australian Crime Commission, an agency that also conducts all of its investigations, and its examinations, in private.

[196] In November 2015 the SA Commissioner reiterated his view concerning private inquiries in relation to corruption. The Commissioner is reported to have said that where corruption is identified, the time for the public to be informed is when the courts hear criminal charges. However, as to matters involving misconduct and maladministration, in a report concerning the sale of State-owned land at Gillman dated 14 October 2015⁴⁸, the Commissioner made the following observations:

In contrast, unlike a corruption investigation, an investigation into maladministration in public administration will require me to make findings in respect of the conduct of a public officer or the practices, policies or procedures of a public authority.

Secondly, there will be occasion where, as in this case, there is a significant public interest in the subject matter of the inquiry. In those circumstances, there is a strong argument in support of permitting public scrutiny of the evidence given, the submissions made and the procedure undertaken. In a corruption matter, such scrutiny would routinely occur when the matter is prosecuted in a court.

For these reasons I intend to write to the South Australian Parliament Crime and Public Integrity Policy Committee recommending that consideration be given to amending the ICAC Act to permit the holding of public hearings in respect of inquiries into potential maladministration in public administration, when it is considered that it is in the public interest to do so.

⁴⁸ The Hon B Lander QC, *Sale of State Owned Land At Gillman*, (Independent Commissioner Against Corruption, 2015).

[197] There is considerable force in the views expressed by the SA Commissioner, but not surprisingly it is a position which has attracted significant opposition in South Australia. A blanket requirement that investigations “must” be conducted in private, including the hearing of evidence, has been opposed by sections of the media. As a consequence, the concept of private hearings has attracted negative publicity which can possess a tendency to undermine public confidence in the transparency of the processes undertaken by the SA Commission. On the other hand, public inquiries have the potential to cause irremediable damage to the reputation of persons caught up in the inquiries, regardless of any subsequent report.

[198] This issue of damage was the subject of discussion by the NSW Independent Panel⁴⁹. It was a discussion conducted in the context of the power of the ICAC to make findings of corrupt conduct, a power which the Panel recommended be limited to cases of “serious corrupt conduct” (para 9.6.6). In that regard the Panel concluded;

9.6.7 If the conduct investigated ultimately is found to be other than serious it should not be stigmatised as corrupt. A power which has such obvious capacity to harm individuals should be reserved only for cases where the misconduct in question is serious.

[199] This recommendation was adopted in subsequent amendments to the ICAC Act (NSW) (s74BA)⁵⁰.

[200] In 2005 an independent review of the New South Wales legislation was undertaken by Mr Bruce McClintock SC who provided a report⁵¹ during which he expressed views concerning the terms “public hearing” and

⁴⁹ The Hon. M Gleeson AC and Mr B McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*, (NSW Department of Premier and Cabinet, 2015).

⁵⁰ *Independent Commission Against Corruption Act 1988* (NSW).

⁵¹ Bruce McClintock SC, *Independent Review of the Independent Commission Against Corruption Act 1988 – Final Report*, (NSW Government, 2005).

“public inquiry”. Mr McClintock discussed the circumstances which should guide a decision as to whether an inquiry should be held in public. The following views expressed by Mr McClintock were subsequently supported by the Independent Panel⁵²:

- 6.5.25 I do not agree, as some have argued, that public hearings are unnecessary or that the power to hold them should be removed. Quite the contrary, in my opinion, public investigations are indispensable to the proper functioning of ICAC. This is not only for the purpose of exposing reasons why findings are made, but also to vindicate the reputations of people, if that is appropriate, who have been damaged by allegations of corruption that have not been substantiated. Moreover, if issues of credibility arise, it is, generally speaking, preferable that those issues are publicly determined.
- 6.5.26 Rather than the power to hold a public hearing, it may be more accurate to empower ICAC to hold a ‘public inquiry’. At one level this is merely a change of nomenclature to reflect more accurately the role and nature of ICAC’s hearing function.
- 6.5.27 It is hoped, however, that the change will achieve more than that. The change in nomenclature emphasises the inquisitorial nature of the investigation. It may, over time, encourage those involved in such inquiries, such as counsel assisting and other legal practitioners, to discard inappropriate adversarial tactics and techniques.
- 6.5.28 The hearing is the culmination of the investigation. The presiding Commissioner is the chief investigator. The point being to determine whether corrupt conduct has occurred and, if so, what needs to be done about it, not whether ICAC can prove beyond reasonable doubt that a person is guilty of a corruption offence.
- 6.5.29 If it is accepted that ICAC’s powers to conduct public and private hearings should be replaced with the power to conduct public inquiries and private examinations, consideration needs to be given to the circumstances in which these powers may be exercised.

⁵² In their 2015 review of the jurisdiction of the New South Wales ICAC: The Hon. M Gleeson AC and Mr B McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*, (NSW Department of Premier and Cabinet, 2015).

- 6.5.30 Consistent with the provisions applying to private hearings, ICAC might be empowered to hold a private examination for the purposes of an investigation and when it is in the public interest to do so.
- 6.5.31 I have given careful consideration to whether the Act should define the circumstances in which a public inquiry might be held. Undoubtedly, this is one of the most controversial decisions that ICAC may make. Once ICAC holds its investigation in public, it must prepare a report to Parliament on the matter.
- 6.5.32 Once the power to conduct a private interview is separated from the power to hold a public inquiry, it may be appropriate for the Act to provide guidance on when a public inquiry may be held. This will avoid creating a return to the presumption that all investigations should be conducted in public.
- 6.5.33 I do not recommend that an exhaustive list of considerations be included in the Act on the basis that this would be an unnecessary fetter on ICAC's discretion. Such a prescriptive list may prove inadequate and may invite litigation (which would be undesirable given the purpose and role of the hearings).
- 6.5.34 In my view, public inquiries should only be held for the purpose of an investigation where ICAC is satisfied that it would be in the public interest to do so, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements. This is in general agreement with what I understand to be ICAC's current practice in holding public hearings, and reflects similar provisions that apply to the Corruption and Crime Commission in Western Australia.

(Citation omitted)

[201] In explicitly adopting the views expressed in the 2005 Report, the Independent Panel emphasised the importance of public inquiries (para 9.4.6):

In particular, the Panel accepts that public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes. The Panel is not attracted to the idea that the powers of the ICAC should all be exercised in private.

[202] Following the 2005 Report, the New South Wales legislation was amended⁵³ and the following provision was inserted which guides the exercise of the discretion to hold a public inquiry:

31 Public inquiries

- (1) For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry.
- (2) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:
 - (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
 - (b) the seriousness of the allegation or complaint being investigated,
 - (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
 - (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

[203] After rejecting a submission that an “oversight body” should be empowered to review decisions to hold a public inquiry, and stating that it did not consider “any change to or further restriction upon the ICAC’s powers to hold a public inquiry should be introduced” (para 9.4.10), the Independent Panel referred to a number of complaints it had received about the conduct of both private examinations and public inquiries. Those complaints included the ICAC’s regular practice of suppressing written submissions, the failure on the part of the ICAC (and counsel assisting) “to deal fairly with exculpatory material” and the failure to give fair notice of allegations to be put to witnesses (para 9.4.12). The Panel noted that the merits of those

⁵³ By way of the *Independent Commission Against Corruption Amendment Act 2005* (NSW).

complaints were being investigated by the Inspector and that the concern of the Panel was the adequacy of the legislation.

[204] The Independent Panel then referred to the practice of the ICAC in public inquiries to permit counsel assisting the ICAC to open and state publicly the allegations that were the subject of the investigation, but responses in written submissions on behalf of persons whose conduct was in question were suppressed and their counsel did not “ordinarily” have an opportunity to respond. While the Panel did not consider these matters should be dealt with by legislation, it observed that the result of this practice was “an imbalance which may be both unfair and inconsistent with the public nature of the hearings” (para 9.4.15). The Panel spoke of the competing interests (para 9.4.17):

The very fact that inquiries are held in public with the obvious potential for reputational damage arising not only from considered findings at the end of an inquiry, but also from publicity associated with the course of the inquiry, creates a risk of serious unfairness.

At the same time, publicity itself is a source of protection against administrative excess.

[205] In this context, it is appropriate to bear in mind the words of Peter McClellan QC (as he then was) in a paper presented in 1990 at a seminar entitled “ICAC: Lessons from the First Twelve Months”⁵⁴ (cited by the Hon David Levine, Inspector of the ICAC, in a report dated 18 June 2015⁵⁵):

The ICAC will ultimately be effective only if its performance justifies its extraordinary powers. If the Commission is to justify those powers it must be scrupulously fair, value the rights of individuals and accept that persons should only be convicted after due process in the relevant court. The experience of the first twelve months is that as a result of the ICAC’s actions, some of which are a direct result of the legislation, great harm has been done to many innocent people.

⁵⁴ Peter McCellan QC, ‘ICAC – A Barrister’s Perspective’, (Paper presented at a public seminar, entitled ‘ICAC: Lessons from the First Twelve Months, Institute of Criminology, Sydney University, 29 August 1990).

⁵⁵ Inspector of the Independent Commission Against Corruption, *Report Pursuant to the Premier’s Reference: Section 77A Independent Commission Against Corruption Act 1988*, (Office of the Inspector, June 2015).

[206] It is also appropriate to bear in mind the observation of the Inspector in the Report of June 2015 concerning the damage that is caused by publicity of involvement in an ICAC matter:

It is clear to me as Inspector that for those involved in ICAC proceedings, publicity is the most damaging feature irrespective of whether any ultimate criminal sanction is imposed and the more so when no criminal prosecution is in fact instituted, or if commenced, fails. The finding of “corruption” once made and published, sticks. The damage to reputation (and, is often the case, health, family relationships, business relationships and cognate matters) occurs, so it is perceived, as soon as there is reference in the instruments of mass and social communication of a person’s mere involvement in an ICAC matter.

[207] In a recent report to the NSW Premier⁵⁶, the Inspector recommended that the proceedings of the NSW ICAC be conducted in private “except in the exceptional circumstances referred to in the cognate legislation of the State of South Australia”.

[208] A further issue concerning public inquiries had apparently been raised with the Independent Panel in a number of submissions. It concerned the perception that in exercising its power the ICAC appears to be a court. The Panel recognised there was a danger that public hearings by the ICAC could be “misunderstood and misrepresented as if they were in the nature of judicial proceedings” (para 9.5.2) and observed that the ICAC is an arm of the Executive, “created to investigate certain kinds of conduct”. The Panel pointed out that the findings of the ICAC, “although capable of doing enormous harm, have no effect on the legal rights and liberties of any person” (para 9.5.3). The Panel emphasised that proceedings before the ICAC are not “court proceedings of any kind” and that it is “fundamentally wrong to think of them as some kind of abnormal judicial process”.

[209] Notwithstanding these concerns, the Independent Panel did not believe that the situation was “amenable to further legislative change”. That

⁵⁶ Inspector of the Independent Commission Against Corruption, *Report to the Premier: The Inspector’s Review of the ICAC*, (Office of the Inspector, May 2016).

was a view expressed with respect to the New South Wales legislation in the context of the history of the legislation and the practices of the ICAC.

[210] In my view, if the NT Anti-Corruption Commission is given power to hold public inquiries, the NT Commission legislation should plainly state that such inquiries are part of the investigative process and are not in the nature of court proceedings. Further, the NT Commission legislation should contain directions that require the Commissioner to permit witnesses and other persons affected by a public inquiry to be legally represented, to respond publicly in the hearing to opening allegations made publicly by counsel assisting and to defend public allegations through the calling of evidence. If allegations of corrupt conduct are publicly aired, persons who are directly and indirectly affected by such public allegations should be entitled to respond publicly to such allegations.

[211] Returning to the question whether the NT Anti-Corruption Commission should have the power to conduct public inquiries, in Queensland s177(1)⁵⁷ states that “generally”, a hearing is “not open to the public”, but the Queensland Commission may open the hearing if it considers that “closing the hearing to the public would be unfair to a person or contrary to the public interest”. In Tasmania Schedule 6⁵⁸ provides that hearings of Integrity Tribunal are to be open to the public, but the Tribunal may order that the hearing be closed to the public if it considers that there are “reasonable grounds for doing so”.

[212] As in Queensland, the default position in Victoria requires a hearing to be held in private, but stronger reasons are required in Victoria to justify permitting a hearing to be conducted in public. Section 117⁵⁹

⁵⁷ *Crime and Corruption Act 2001* (Qld).

⁵⁸ *Integrity Commission Act 2009* (Tas).

⁵⁹ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

directs that the hearing not be open to the public unless the IBAC considers “on reasonable grounds” that:

- (a) there are exceptional circumstances; and
- (b) it is in the public interest to hold a public examination; and
- (c) a public examination can be held without causing unreasonable damage to a person’s reputation, safety or wellbeing.

[213] In determining whether it is in the public interest to hold a public examination, s117(4) identifies a number of factors that may be taken into account:

- (a) whether the corrupt conduct or the police personnel conduct being investigated is related to an individual and was an isolated incident or systemic in nature;
- (b) the benefit of exposing to the public, and making it aware of, corrupt conduct or police personnel misconduct;
- (c) in the case of police personnel conduct investigations, the seriousness of the matter being investigated.

[214] In Western Australia, ss139 and 140⁶⁰ combine to provide that an examination is not open to the public unless the WA Commission, “having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements”, considers that it is “in the public interest” to open an examination to the public.

[215] This is an issue in respect of which reasonable persons, properly informed of the competing issues, might reasonably reach different views. The submissions, differing positions across the Australian jurisdictions and debate in NSW reflect this position.

[216] Later in the Report I discuss the importance of the Assembly deciding, as a matter of policy, whether role of the NT Anti-Corruption Commission should primarily be centred on gathering evidence for

⁶⁰ *Corruption, Crime and Misconduct Act 2003* (WA)

presentation to the DPP, as in SA, or whether it should perform a wider function as occurs in NSW. A conclusion with respect to this issue will be relevant to the issue of public versus private hearings, and will be important to a determination as to the nature and content of the reporting power (as discussed by the SA Commissioner). If the role is limited to gathering evidence only, and no reporting of views is involved, there will be less occasion for conducting a public hearing.

[217] Notwithstanding the dangers of damage caused by prejudicial publicity, and regardless of whether the NT Anti-Corruption Commission is empowered to make a finding of corruption or otherwise, in my view it is not appropriate to place a blanket ban on conducting inquiries in public. The public airing of allegations and the public conduct of investigations can be important tools in the fight against corruption in public administration. Transparency in this way enhances public confidence in public administration and in the processes of investigation.

[218] In my view, the default position should be private inquiry unless, broadly speaking, it is in the public interest to conduct a public inquiry. I do not favour the Victorian position which requires the existence of “exceptional circumstances” before a public inquiry can be held. I recommend that the NT Commission legislation should state that inquiries are to be held in private unless the NT Anti-Corruption Commission is satisfied that it is in the public interest to conduct a public inquiry.

[219] The test of “public interest” should be accompanied by a requirement to take into account whether a public inquiry might cause undue hardship to any person and a legislative direction that possible prejudice to a future prosecution is a factor tending against the holding of a public hearing. Guidance could also be taken from s31(2) of the

New South Wales legislation⁶¹, which provides that without limiting the factors that the NSW Commission may take into account in determining whether or not it is in the public interest to conduct the public inquiry, the Commission is to consider the following matters:

- (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
- (b) the seriousness of the allegation or complaint being investigated,
- (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
- (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

Reporting/Findings

[220] As previously discussed, only the New South Wales legislation confers a specific power upon their anti-corruption body to make findings of corrupt conduct. However, Commissioners in Victoria and Western Australia are able to include opinions in reports tabled in Parliament with the general proviso in Victoria that the IBAC “must not” include in a report to Parliament a finding or opinion that a specified person is guilty of or has committed any criminal or disciplinary offence. In addition, the IBAC in those circumstances is prohibited from including an opinion or recommendation that a specified person should be prosecuted for a criminal or disciplinary offence. Special provision is also made in Victoria to prohibit public reporting of an adverse finding concerning the conduct of a judicial officer.

[221] A further restriction is imposed upon the Victorian IBAC. Section 162(5) provides that if the IBAC is aware of a criminal investigation or any criminal proceedings or “other legal proceedings” in relation to a matter or a person to be included in a report to Parliament, the IBAC “must not include in the report any information which would prejudice

⁶¹ *Independent Commission Against Corruption Act 1988* (NSW).

the criminal investigation, criminal proceedings or other legal proceedings.”

[222] This is a particularly difficult issue. If the public is aware of an investigation into alleged corrupt conduct being conducted by an anti-corruption body, whether through a public inquiry or otherwise, the public will want to know the outcome. Some would reasonably argue that the public is entitled to know the outcome. On the other hand, an anti-corruption body is not a court of law and its conclusions or findings are not “binding decisions made in the course of the administration of civil or criminal justice” (Independent Panel para 3.1.6). As the Panel emphasised, such conclusions or findings are “statements by an investigator of conclusions formed at the end of his or her investigation” and they do not affect legal rights or obligations although “they may have far-reaching practical consequences” (para 3.1.6).

[223] Findings adverse to persons made public have the obvious capacity to ruin reputations and livelihoods. If a criminal prosecution is to follow, public findings adverse to an accused person possess the potential to seriously damage the fairness of a subsequent trial. On the other hand, publicity concerning adverse findings can act as a deterrent to corruption. Perceptions of transparency are important. The right of the community to know of an investigation and its result is, potentially, a powerful factor in endeavouring to ensure the community has confidence that public affairs are being administered with integrity.

[224] Consideration must also be given to public reporting when an investigation finds that an allegation is without merit.

[225] In addressing this issue, it will be necessary for the Assembly first to make a decision as to the essential role and purpose of the NT Anti-Corruption Commission. If the role is limited to gathering evidence for presentation to the DPP (as in SA), the occasions for

reporting an opinion would be limited. On the other hand, if the NSW approach is adopted, a primary function of the NT Commissioner will be to report an opinion as to whether corrupt conduct has occurred and the gathering of evidence for a prosecution will be a “secondary” purpose.

[226] In my view, on the assumption that investigations by the NT Anti-Corruption Commissioner are ordinarily reserved for investigating corruption as that concept is commonly understood, the Commissioner should possess the power to report to the Assembly and the Standing Committee concerning its investigations and opinions. However, the NT Commissioner should also be able to report to the relevant Minister or Head of a Public Sector Agency on a confidential basis if public disclosure of the report would prejudice a criminal prosecution or further investigation. I also recommend restrictions such as those that exist in Victoria should be applied (see para [220] of this Report).

[227] In addition to formal reporting as discussed, at any time the NT Commissioner should be able to make a special report to the Standing Committee or the Assembly concerning policy and administrative matters in connection with the functions of the Commissioner (NSW s75⁶², VIC s62⁶³ and WA s88⁶⁴).

Position of Commissioner

[228] In this discussion I have endeavoured to identify the fundamental features that I consider should attach to a new NT Anti-Corruption Commission in order to achieve the purpose for which the new body is created. There are many other aspects to be addressed, but these underlying features provide the foundation for a determination as to the

⁶² *Independent Commission Against Corruption Act 1988* (NSW).

⁶³ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

⁶⁴ *Corruption, Crime and Misconduct Act 2003* (WA).

position of Commissioner and the appropriate model which would meet the particular needs of the Northern Territory.

[229] The discussion that follows assumes that the new NT Anti-Corruption Commissioner will possess the powers discussed and that the Commissioner will be able to investigate any person in connection with corruption in the administration of public affairs.

[230] A grave responsibility will be placed on a Commissioner. Extraordinary coercive powers will rest with the Commissioner who will possess the capacity to conduct public inquiries and to make findings. The conduct of public inquiries itself will have the potential to ruin the reputations and lives of persons mentioned in the inquiries. The impacts of adverse findings are obvious.

[231] Against this background, it is readily apparent that there is a need for an independent Commissioner who possesses appropriate qualifications, experience, knowledge and competence to carry out the task.

[232] Independence is a critical element in ensuring public confidence in the Commissioner. It is also directly relevant to competence because it reflects the feature of objectivity required to carry out the duties of the Commissioner.

[233] The importance of independence does not mean that the Commissioner cannot be a resident of the Northern Territory. It means that the person must possess the necessary qualifications and experience that demonstrate independence, such as experience as an independent judicial officer. If conflicts of interest arise because persons involved are known to the Commissioner, appropriate powers would exist enabling the Commissioner to delegate responsibility for the particular matter to an appropriately qualified independent person.

[234] Independence also necessitates including specific directions in the NT Commission legislation that the Commissioner is independent of any other person and cannot be subject to direction by any other person in respect of carrying out the functions of the office.

[235] Importantly, the Commissioner must not be a public servant. Independence can only truly be achieved if the Commissioner is either an Officer of Parliament or a statutory officer appointed by the Administrator. In Victoria the Commissioner is an Officer of Parliament. In other State jurisdictions the Commissioner is an independent statutory officer appointed by the Governor⁶⁵.

[236] In Victoria s19 of the IBAC Act provides that the Victorian Commissioner is an Independent Officer of the Parliament and that the functions, powers, immunities and obligations of the Commissioner are as specified in that Act and other laws of the State. Section 19(3) specifies that there are “no implied functions, powers, rights, immunities or obligations arising from the Commissioner being an independent officer of the Parliament” and this is complemented by sub-section (5) which provides that there are no implied powers of the Parliament arising from the Victorian Commissioner being an independent officer of the Parliament.

[237] The Victorian Commissioner is appointed by the Governor in Council on the recommendation of the relevant Minister (s20).

[238] The IBAC Act does not define the term “officer of the Parliament”. For the purposes of that Act, the definition of “public officer” includes “a Parliamentary Officer within the meaning of the *Parliamentary Administration Act 2005*” (s6(1)). Section 4 of the *Parliamentary Administration Act 2005* (Vic) defines “Parliamentary officer” as meaning a person employed under Part 3 “in any capacity and includes

⁶⁵ In the Northern Territory, the equivalent to the ‘Governor’ is the ‘Administrator’.

a Department Head”. Part 3 of the Act is primarily concerned with terms of employment of various Parliamentary Officers.

[239] I must confess to a frisson of concern about the interaction between the two pieces of legislation.

[240] In the joint submission, the Extended Integrity Group submitted that the NT Commissioner “should be recognised as an Officer of Parliament with ‘own motion’ powers to initiate and pursue investigations”. The submission continued:

152 The Victorian Parliament has identified a number of key characteristics of an Officer of the Parliament:

- an Officer of the Parliament provides a check on the use of power by the Executive;
- an Officer of the Parliament contributes to Parliament’s core functions by scrutinising the operations of government and enhancing the accountability of the executive government to the Parliament;
- an Officer of the Parliament discharges functions which the Parliament could itself, if it so wished, carry out – and so should not carry out a judicial function;
- Parliament is involved in the Officer’s appointment and dismissal;
- a statutory parliamentary committee is responsible for budget approval and oversight of Officers of Parliament (citing *Report on a Legislative Framework for Independent Officers of Parliament* (Public Accounts and Estimates Committee of the Parliament of Victoria, February 2006)).

153 The extent to which making the Commissioner an “Officer of the Parliament” will improve the functioning and independence of the anti-corruption body depends more on the practical powers given than the title itself. For example:

- Whether the Commissioner has the power to produce a report for tabling in Parliament and a discretion to report and comment on matters of public interest relating to the Commissioner’s Act;

- Whether the Commissioner has a discretionary power to expend resources on investigating a matter as appropriate, including expenditure above and beyond the regular allocated budgets;
- Whether the Commissioner has own motion investigation powers; and
- The security and length of the term of the Commissioner.

[241] Later in the joint submission the Extended Integrity Group made the following observations:

171 There are several common features relating to the appointment of an Officer of the Parliament including:

- Parliamentary involvement in appointment processes. For example, the NT Ombudsman can only be appointed following a recommendation of the Legislative Assembly (section 132 of the *Ombudsman Act*).
- A lengthy term of appointment. In Victoria, the Auditor-General is appointed for seven years and the Ombudsman for ten years. In the Northern Territory, the Auditor-General is appointed for five years and the Ombudsman is appointed for a non-renewable term of seven years. The CPID is currently appointed for five years.
- Parliamentary involvement in termination of appointment. For example, a two-thirds majority resolution of Parliament is required to dismiss the Ombudsman (section 141 of the *Ombudsman Act*).
- A guarantee that conditions will not be altered to detriment during the term of the officer (section 135 of the *Ombudsman Act*).

[242] The joint submission pointed out that all three Officers of the Northern Territory Parliament (the Auditor-General, the Ombudsman and the Electoral Commissioner) sit within the portfolio of the Chief Minister, but are separate Agencies which report on budgetary matters to the Estimates Committee of the Assembly. In this way they are more directly accountable to the Assembly for their budget and expenditure. The submission compares this to the CPID which is not a separate Agency but is provided with a separate annual budget allocation channelled through the Department of the Attorney-General and

Justice. This latter arrangement exists for other independent statutory bodies such as the offices of the Anti-Discrimination Commissioner, the Children's Commissioner and the Health and Community Services Complaints Commissioner. The submission continued:

174 The difference in financial reporting between the two types of independent bodies is one of degree as there are extra accountabilities and workload in being an Agency. The former group [Officers of Parliament] is also more financially independent than the latter although all are subject to the same budgetary process. It would be appropriate for the Commissioner to be a separate Agency subject to the same arrangements as the current Officers of Parliament.

175 The Extended Integrity Group submits that to increase independence and the public perception of independence, the Commissioner should:

- be regarded as an Officer of the Legislative Assembly;
- report for oversight purposes to a committee of the Legislative Assembly, although this should not extend to discussing the detail of cases;
- have a broad discretionary power to provide reports to Parliament and make comments about investigations and matters arising out of investigations, when the Commissioner takes the view that it is in the public interest to do so;
- have a broad discretion to speak to the public, bodies and individuals about the Commissioner's activities when the Commissioner takes the view it is in the public interest to do so;
- be given own motion investigation powers;
- be appointed for a term of at least seven years and that there be a statutory role for the Legislative Assembly in appointment and dismissal;
- have conditions of appointment protected for the duration of that term;
- be a separate Agency within the Chief Minister's portfolio;

- report on budgetary matters to the Estimates Committee of the Legislative Assembly, in the same manner as other Officers of Parliament;
- have a discretion to expend resources to pursue an investigation above and beyond the Commissioner's annual budgetary allocation, where the public interest justifies the expenditure;
- have the power to publish reports even when Parliament is not sitting.

(footnote omitted)

[243] In New South Wales, the Independent Commission Against Corruption is constituted by s4 of the ICAC Act (NSW) as a corporation whose functions are exercisable by the Commissioner. Section 5 provides that the Governor may appoint a Commissioner, but a person is not to be appointed as Commissioner until a proposal for that appointment has been referred to the Joint Committee of Parliament (Committee on the Independent Commission Against Corruption) which has the power to veto the proposed appointment (s64A⁶⁶).

[244] The NSW Commissioner is an independent statutory officer and not an Officer of Parliament. The Inspector of the ICAC is also an independent statutory officer appointed by the Governor (s57A).

[245] The South Australian ICAC Act provides that the SA Commissioner is to be appointed by the Governor for a term not exceeding seven years (s8(1)⁶⁷). A person may only be appointed to the position following referral by the Attorney-General of the proposed appointment to the Statutory Officers Committee established under the *Parliamentary Committees Act 1991* (SA) and if the appointment is either approved by the Committee or the Committee has not notified the Attorney-General that it does not approve of the appointment (s8(5)).

⁶⁶ *Independent Commissioner Against Corruption Act 1988* (NSW).

⁶⁷ *Independent Commissioner Against Corruption Act 2012* (SA).

[246] In South Australia, therefore, the Commissioner is an independent statutory officer and not a Parliamentary Officer. Independence in South Australia is further ensured by s7(2):

The Commissioner is not subject to the direction of any person in relation to any matter, including –

(a) the manner in which functions are carried out or powers exercised under this or any other Act; and

(b) the priority that the Commissioner gives to a particular matter in carrying out functions under this or any other Act.

[247] In Western Australia s8 of the *Corruption, Crime and Misconduct Act 2003* (WA) established the Corruption and Crime Commission as a body corporate (s8). The position of Commissioner is created by s9 which provides that the Commissioner is to be appointed by the Governor on the recommendation of the Premier. Section 9(3a) provides that the Premier is to recommend the appointment of a person whose name is on the list of three persons eligible for appointment submitted by a nominating committee and who, if there is a Standing Committee, has the support of the majority of the Standing Committee and bipartisan support. The Premier is required to consult with the Standing Committee or, in the absence of a Standing Committee, the Leader of the Opposition and the Leader of any other political party with at least five members in either House (s9(4)).

[248] Section 9(5) and (6) provide that the WA Commissioner is to hold office in accordance with the *Corruption, Crime and Misconduct Act 2003* (WA) and that the Office of Commissioner is “not an office in the public service”.

[249] In contrast to the WA Commissioner who is an independent statutory officer and not an Officer of Parliament, s188(4) provides that the WA Parliamentary Inspector is an Officer of Parliament and is responsible

for assisting the Standing Committee in the performance of its functions.

[250] The Tasmanian structure is different from other States. Although it has a Chief Commissioner who is appointed by the Governor, unlike other jurisdictions the Chief Commissioner does not exercise the powers of the Integrity Commission. Following an investigation, the Integrity Commission reports to the Chief Executive Officer who is required to submit a report to the Board of the Integrity Commission which is chaired by the Chief Commissioner.

[251] I favour the view that the NT Anti-Corruption Commission should be an agency for the purposes of the *Administrative Arrangements Order* (NT), the *Public Sector Employment and Management Act* (NT) and the *Financial Management Act* (NT) (as is the position of the Auditor-General, Ombudsman and Electoral Commissioner). The Commissioner should be an independent statutory officer appointed by the Administrator rather than a Parliamentary Officer. As mentioned I have concerns about the constitutional position of a Parliamentary Officer and the interaction of various relevant pieces of legislation. If the position of Commissioner is created by the legislation and the Commissioner is appointed by the Administrator pursuant to that legislation, the terms of appointment and duties should rest entirely within that legislation unless specifically stated otherwise. A section in the same terms as s7(2) of the South Australian legislation⁶⁸ ensures that the Commissioner is not subject to direction by any other person and an appropriately-worded provision can be included to ensure that the conditions attached to the appointment cannot be altered to the detriment of the Commissioner during the term of appointment.

[252] Leaving aside the question of funding, the issues raised by the joint submission can satisfactorily be dealt with in the NT Commission

⁶⁸ *Independent Commissioner Against Corruption Act 2012* (SA).

legislation. An independent statutory officer, who is not subject to direction by any person in carrying out the functions of the office, provides a check on the power of the Executive with respect to matters that fall within the role of the office. The NT Commission legislation can provide for involvement of the Assembly in the appointment and dismissal of the NT Commissioner, and for reporting to the Assembly.

Budget

[253] As to the point made in the joint submission that Officers of Parliament are separate Agencies which report on budgetary matters to the Estimates Committee of the Assembly, and, in this way, are more directly accountable to the Assembly for their budget and expenditure, in my view it should not be difficult to provide in the NT Commission legislation that the new Commissioner is directly accountable to the Assembly for budget and expenditure. Ultimately, of course, Cabinet determines the financial allocation, regardless of whether it is dealing with an Officer of Parliament or an independent statutory officer. Provided that the NT Commissioner is given unfettered discretion as to expenditure of the annual financial allocation, and reports on budgetary matters to the Estimates Committee of the Assembly, the Commissioner will possess the same limited financial independence as Officers of Parliament.

[254] There is a further aspect of funding that requires careful consideration for the initial period of operation. It is particularly difficult to estimate the volume of work which will face the new NT Anti-Corruption Commission in the first 12 months – two years. Bearing in mind the likely publicity that will accompany the commencement of operation, and the power of the NT Anti-Corruption Commission to investigate allegations of corruption in the administration of public affairs by any person, including MLAs, it can reasonably be anticipated that there will be an initial spike in the

number of reports. How many of those reports will result in investigations, and whether any investigations will demand the provision of large resources, remains unknown.

[255] In these circumstances, for the first two years the NT Anti-Corruption Commission should be given a discretion to exceed its budget if the circumstances require that it do so in order to carry out its role and to respond adequately to reports made to it. It might be appropriate to give the bipartisan committee which possesses oversight of the Commission a role in this regard.

Qualifications of Commissioner

[256] It is obvious from this discussion that the qualifications of the Commissioner are important to both independence and competence to carry out the role.

[257] In Queensland, the Commissioner must have served as, or be qualified for appointment as a Judge of a Supreme Court, the Federal Court or the High Court (s224⁶⁹). The same qualifications are required for appointment as Commissioner in New South Wales, Victoria and Western Australia. In South Australia s8(3)⁷⁰ provides that a person is only eligible for appointment as Commissioner if the person is a legal practitioner of at least seven years standing, including periods of judicial service, or is a former Judge of a Supreme Court, the Federal Court or the High Court.

[258] In the ACT, Queensland, Tasmania and Victoria, the minimum qualification for appointment to the Supreme Court is five years' experience as a legal practitioner (or, in Victoria, previous judicial appointment). The same period of experience as a legal practitioner, or

⁶⁹ *Crime and Corruption Act 2001* (QLD).

⁷⁰ *Independent Commissioner Against Corruption Act 2012* (SA).

previous judicial appointment, qualifies a person for appointment as a Judge of the Federal Court or the High Court.

[259] In New South Wales seven years' experience as a legal practitioner is required for appointment as a Supreme Court Judge and, in Western Australia, eight years' experience. In the Northern Territory and South Australia, ten years' experience as a legal practitioner is required (or in South Australia fifteen years or previous judicial appointment to qualify for appointment as Chief Justice).

[260] It is interesting to note that the South Australian ICAC legislation requires seven years' experience as a legal practitioner for appointment as Commissioner, but qualification for appointment as a Supreme Court Judge requires ten years' experience. The qualifications in Queensland, New South Wales, Victoria and Western Australia, which include qualification for appointment to the Federal Court or the High Court, mean that the person could be qualified on the basis of five years' experience as a legal practitioner.

[261] In my view five years' experience as a legal practitioner is insufficient for appointment to a position carrying such heavy responsibilities and duties. In arriving at that view I have not overlooked that those years of experience as a legal practitioner might be accompanied by many years of relevant experience in other walks of life.

[262] I recommend that subject to removing the age limit that applies to judicial officers, to be qualified for appointment a person must be a former Judge of a Supreme Court or the Federal or High Court, or be a legal practitioner of not less than ten years' standing.

[263] As to the issue of age, in almost all jurisdictions judicial officers must retire at 70. In my view this restriction is outdated. Regardless of that issue, as the NT Commissioner would be appointed for a fixed term there is no reason to include any age restrictions in the qualifications.

[264] The NT Commissioner should not hold a commission as a judicial officer. Nor should the Commissioner be a sitting MLA. As to how this restriction is expressed, other jurisdictions provide either for retirement from judicial office upon appointment or that the holder of judicial office (or an MLA) is not eligible for appointment.

[265] Each jurisdiction contains provisions governing the term of a Commissioner's tenure ranging from five to seven years. Eligibility for re-appointment varies from zero to a maximum total of 10 years (including the first period).

[266] There are sound reasons for limiting the term of appointment and the maximum period if re-appointment is permitted. I recommend:

- The initial appointment should be limited to a maximum of five years.
- A Commissioner should be eligible for re-appointment once only for an additional term of up to five years.

[267] In the context of appointment, in my view it would be appropriate to give a bipartisan Standing Committee of the Assembly a role. As mentioned, in Queensland the appointment is by the Speaker, but may only be made with the bipartisan support of the Parliamentary Committee. In Victoria, the appointment is made on the recommendation of the Minister, but s21 of the IBAC Act directs that the Minister must not make a recommendation unless the Minister has submitted details of the proposed recommendation to the IBAC Committee and either the Committee has informed the Minister that it has decided not to veto the recommendation or the time within which the Committee can veto the recommendation (30 days) has expired. In respect of the appointment of the first Commissioner, s21(4) provides that the veto provisions do not apply and that the Minister may make

the recommendation after the Premier has consulted with the Leader of the Opposition in the Legislative Assembly.

[268] In New South Wales the Joint Committee of Parliament has the power of veto and a similar power rests with the Statutory Officers Committee in South Australia. In Western Australia the support of the majority of the Standing Committee and bipartisan support is required.

[269] In my view, the importance of the position warrants giving the Assembly a role in the appointment by providing that the appointment be made by the Administrator on the recommendation of a bipartisan Standing Committee. This is the committee I later recommend should oversee the operation of the NT Anti-Corruption Commission.

[270] I also suggest consideration be given to creating a panel such as the Judicial Appointments Panel which makes recommendations to the Attorney-General in respect of appointments of Judges of the Supreme Court and other judicial officers. The protocol requires that the panel be chaired by a former Judge of the Supreme Court of the Northern Territory or another Supreme Court or the Federal Court, and that other members of the panel be the Solicitor-General and the Chief Executive Officer of the Department of the Attorney-General and Justice. If the Solicitor-General is unable to participate, that position should be filled by the DPP.

[271] The Judicial Appointments Panel is required to recommend to the Attorney-General not less than two persons suitable for appointment as a Supreme Court Judge. In my view, that requirement is not appropriate in respect of the appointment of an NT Commissioner.

[272] Rather than making a recommendation to the Attorney-General, in respect of an NT Commissioner an Advisory Panel would make a recommendation to a bipartisan Standing Committee of the Assembly which would have the power of veto, but only if the Committee

unanimously supports a veto. In that event the Committee would be required to table a report in the Assembly explaining why the recommendation had not been accepted.

[273] I suggest that in the event of a stand-off between the Advisory Panel and the Committee, one possible solution would be to provide for the Panel to report to the Assembly and that, in this deadlock situation, the person recommended by the Panel could only be appointed if the appointment is approved by the Assembly. Alternatively if the Committee rejects a nomination, the Panel could be required to identify another suitable candidate (and so on until the deadlock is broken).



Model

[274] As is apparent from the preceding discussion, there is no “standard” model for an Anti-Corruption Commission. It is the particular needs of the Territory that must be met as far as is reasonably possible within the constraints of a relatively small jurisdiction with limited resources. Regard must also be had to the existing integrity regime and the extent to which that regime, as currently constituted, is capable of meeting the needs of the Territory. In that regard the resolution of the Assembly carries with it the implication that, in the view of the Assembly, the current regime is not capable of satisfactorily meeting the needs of the Territory. Further, it is apparent from an examination of the regimes in the States that the current regime in the Territory lacks the extensive jurisdiction and powers which have been conferred on the State Anti-Corruption Commissions.

[275] Speaking broadly, the submissions expressed the view that an entirely new stand-alone body, superimposed on existing bodies and possessing sufficient staff to conduct its own investigations, is both unnecessary and beyond the resources of the Territory. The resource implications are obvious from consideration of the expenditure by State Commissions. Bearing in mind those resource implications and the existence of bodies currently involved in the current integrity regime, I agree with that broad view.

[276] In its joint submission, the Extended Integrity Group discussed expanding and enhancing the roles of existing bodies. After pointing out that the prime focus of the CPID is to “investigate disclosures of improper conduct”, the joint submission continued:

108 The Extended Integrity Group considers that extending and enhancing the powers of the CPID to more broadly respond to corruption issues would be a reasonable approach. This could involve renaming the CPID’s position to place greater emphasis on anti-corruption aspects of its functions.

[277] In theory it would be possible to revamp the CPID in this manner. The substantial effect of this approach would be to establish a new stand-alone body through the process of increasing the powers and jurisdiction of the CPID. If the expanded CPID also retained jurisdiction to investigate matters less serious than corruption, it would become a very large and resource-intensive body. Even if functions involving conduct less than corruption were directed to other organisations, the entire process would be resource-intensive.

[278] In addition, in my view revamping the CPID would be perceived as an unsatisfactory compromise producing a body lacking the independence, standing and authority of a new NT Anti-Corruption Commission. The importance of perceptions in this regard should not be underestimated.

[279] The Police submission supported the establishment of an Integrity Commission as an “oversight, supervision and referring body”, with legislation allowing for “the integration of existing capabilities” including Police, Public Interest Disclosure and Ombudsman, as “part of the establishment of a whole-of-government integrity framework”. Reference was made to assistance from the DPP where applicable. There can be no doubt that an NT Anti-Corruption Commission should work with and complement the existing regime in order to establish a “whole-of-government integrity framework”.

[280] One of the alternatives discussed by the joint submission was the establishment of a new anti-corruption body “which subsumes the existing functions of CPID”. The submission then suggested a further option of establishing a new anti-corruption body “that only investigates the most serious or complex allegations of corruption, leaving the bulk of the matters to be dealt with by the CPID and other

existing independent bodies”. The submission continued with the following propositions as to how the new regime would operate:

111. The intention would be to maintain existing avenues for reporting and investigation for the great majority of matters while providing the option for referral to an eminent anti-corruption commissioner with access to comprehensive investigative powers in the most serious or challenging of cases. It can be seen as an alternative to a permanent standing anti-corruption body.
112. This body could be headed by a very senior legal officer (such as a retired judge or former anti-corruption commissioner) engaged on a retainer.
113. It might be called into action only occasionally when a serious or complex matter arises that cannot be dealt with effectively by existing mechanisms. It would have a full array of investigative powers including surveillance devices and telecommunications interception powers.
114. Given the specialist knowledge and resources required to utilise such powers, it is likely the body would conduct those operations under an arrangement with a police force (NT Police where possible) or another anti-corruption commission.
115. The body, when called into action, could be provided with investigative, logistical and administrative support by CPID.
116. The jurisdiction of the body could be enlivened by a reference from an existing independent officer (for example, the CPID or the Ombudsman) or alternatively from a group comprised of some or all members of the Extended Integrity Group.
117. Allocating the decision on whether to refer a matter for investigation to a group rather than an individual officer might give some added assurance that no single officer is making a decision that is likely to give rise to substantial commitment of public resources or to the potential for major public discussion and controversy.
118. Complaints would not initially be made to the anti-corruption body. Any member of the group who receives a complaint or becomes aware of a matter could raise the matter for consideration by the group. It could then, following consultation with the anti-corruption body, refer the matter to the anti-corruption body or decide that it is better dealt with by another body.

119. Referral to the anti-corruption body could be based on a specific criteria, for example, that:
- the allegation would, if proven, amount to ‘very serious’ or ‘major’ corruption;
 - there is, on its face, some substance to the allegation and it is in the public interest to pursue the allegation (for example, it is not fanciful, trivial or vexatious or the age or nature of the allegation means investigation is likely to be futile);
 - no other independent body is in a position to effectively investigate the allegation or the anti-corruption body is best placed to investigate it.
120. This approach would mean that matters that are now routinely handled by CPID or another independent body could continue down the normal path. However, when a matter of major significance or requiring high level investigative powers arose, it could, after due consideration, be referred to the anti-corruption body.
121. The anti-corruption body would be a standing appointment and could be constituted by someone from the Northern Territory or elsewhere or even, by prior arrangement, by an existing anti-corruption commissioner from interstate.
122. Given the intermittent but vitally important nature of the investigations of such a body, it would be important for there to be assurances of sufficient levels of funding for the body to conduct its functions. Ideally, there would be legislative recognition that adequate resources must be made available to enable the body to fully carry out its functions and that the appropriately incurred expenditure of the body will be met from Consolidated Revenue.
123. This option would still mean that the jurisdiction and resources of the CPID would need to be extended to cover any additional categories of public officers, for example, politicians and political staffers, but that there would be a clear option to refer the most serious or complex matters to a body with comprehensive investigative powers.

[281] This submission possesses merit in reserving the most serious cases for the NT Anti-Corruption Commission and providing a mechanism through which appropriate matters reach the Commission. It ensures that appropriate use is made of existing bodies thereby avoiding duplication and making best use of existing resources.

[282] However, although this proposal is, in a number of respects, similar to the regime that exists in South Australia, a significant area in which it differs relates to the role of the NT Commissioner. In this proposal the Commissioner would be engaged on a retainer and, in a practical operational sense, would not be involved in the day-to-day operation of the NT Anti-Corruption Commission. Paragraph 113 of the joint submission envisages that the Commissioner would only be engaged to investigate serious or complex matters referred to the Commissioner by the CPID or Extended Integrity Group and would have no role in deciding what matters should be investigated by the Commissioner. In this structure the Commissioner would not have any administrative role. Nor would the Commissioner possess a supervisory role with respect to investigations undertaken by other bodies.

[283] In my view, it is important that the Commissioner sit at the head of the NT Anti-Corruption Commission and provide supervision and oversight of the entire operation. Not only should the Commissioner carry out this function, but the Commissioner should be seen to do so. Decisions as to which matters should be investigated by the Commission should, ultimately, rest with the Commissioner. No doubt many of the day-to-day decisions would not be made by the Commissioner, but other than cases in which it is obvious that the Commissioner should not conduct the investigation, the decision should rest with the Commissioner.

[284] At the heart of this view are two essential features. First, critical decisions should rest with the Commissioner who is appointed to the position because the Commissioner possesses appropriate independence, qualifications, experience and competence. Secondly, public confidence in the operation of the integrity system will not be achieved by anything less than knowledge that the entire system is under the practical day-to-day control of the Commissioner.

[285] As discussed in *Annexure 9*, in South Australia the ICAC Act established both the position of the Independent Commissioner Against Corruption and the Office for Public Integrity. It is the role of the Office for Public Integrity to receive and assess complaints and reports about public administration, and to make recommendations as to whether and by whom such complaints and reports should be investigated. It is also the role of the Office to perform other functions assigned by the Commissioner. Significantly, the Office is responsible to the Commissioner for the performance of its functions.

[286] Speaking broadly, and bearing in mind the fundamental position that the Commissioner should sit at the head of the NT Anti-Corruption Commission and exercise supervision and control both in principle and in practice, in my view the South Australian model is the model best-suited to meet the needs of the Northern Territory. The CPID has been in existence for some years and has built an expertise in receiving, assessing and investigating complaints related to the administration of public affairs. That expertise, and the administrative structure that underpins it, should not be lost. Utilisation of the CPID in the role undertaken by the Office for Public Integrity in South Australia would ensure that best use is made of the resources and expertise of the CPID.

[287] Bearing in mind the essential features attached to the role of the NT Commissioner and an Office for Public Integrity, if the issues of workload and resources could be ignored, the preferred option would be to appoint an appropriately-qualified Commissioner to head the new NT Anti-Corruption Commission on a full-time basis. However, those issues cannot be ignored. Even if full use is made of the existing CPID resources and the permanent employment of additional staff is kept to a bare minimum on the basis that additional personnel such as investigators and legal officers would be employed on a temporary basis as needed, this model would create a significant drain on the limited resources of the Territory. In addition, regard must be had to

the future needs of the Territory and whether those needs will support the position of a Commissioner on a full-time basis.

[288] As I have said, obviously it is impossible to predict the future needs of the Territory with any degree of confidence. However, it is reasonable to assume that the introduction of an NT Anti-Corruption Commission, with powers to investigate any person including MLAs, will initially attract a significant number of complaints and referrals. It is also reasonable to predict that within the first two years, the number of new complaints will drop markedly.

[289] Given the size of the Territory population, and the experience in other jurisdictions, I doubt that after approximately two years of operation the ongoing number of complaints and referrals will justify the employment of a Commissioner on a full-time basis. In expressing that view, I am mindful of my recommendation that unless good reason exists, the Commissioner should investigate only allegations of corrupt conduct in the administration of public affairs.

[290] In these circumstances, bearing in mind the essential features of the proposed model which include utilisation of the CPID in the role undertaken by the Office for Public Integrity in South Australia, and having regard to the role of the Commissioner in retaining supervision and control both in principle and in practice, is there a reasonable alternative to the appointment of a Commissioner on a full-time basis? In this context, I consulted with the South Australian Commissioner, the Hon Bruce Lander QC.

[291] Mr Lander graduated in law from the University of Adelaide in 1968. He was admitted to practice in South Australia in 1969 and in 1986 was appointed Queen's Counsel. Mr Lander was also admitted as a practitioner in the NT and, from time to time, appeared as a barrister in the NT. In November 1994 Mr Lander was appointed a Judge of the Supreme Court of South Australia and he remained in that position

until he was appointed a Judge of the Federal Court of Australia on 14 July 2003. In order to take up his role as the first South Australian Independent Commissioner Against Corruption, Mr Lander resigned from the Federal Court, and from other appointments, and commenced work as the Commissioner on 2 September 2013.

[292] This overview is a brief and inadequate reflection of Mr Lander's career in the law, but it is sufficient to demonstrate both his independence and his qualification for the appointment as South Australia's first Commissioner. Mr Lander has indicated that subject to obtaining the consent and approval of the South Australian Government, he is willing to assist in the establishment of the new NT Anti-Corruption Commission by accepting appointment as the NT Commissioner on a part-time basis. Obviously, Mr Lander's willingness to assist is subject to acceptance by the Assembly of the essential features of my recommendations and to satisfactory arrangements being reached between the two governments with respect to various administrative matters and issues concerning costs.

[293] There are a number of advantages to the Territory in securing the services of Mr Lander on a part-time basis. First, although the NT would be required to compensate the SA Government, it would not be necessary to pay an annual salary to Mr Lander and the Territory would not incur other immediate and long-term costs associated with the employment of a Commissioner on a full-time basis. As a guide to the cost saving in this regard, the Department of the Attorney-General and Justice estimates the annual cost of a Commissioner based on the salary of a Judge to be almost \$529 000.

[294] Secondly, the appointment of Mr Lander would assure both independence, and appearance of independence, from the influence of familial and personal connections that often arise in the Territory. This issue is a matter of concern that has been emphasised in a number of submissions.

[295] Thirdly, bearing in mind the similarity between the South Australian structure and the structure I propose for the Northern Territory, having shepherded the South Australian regime through its commencement and the early period of its operation, Mr Lander possesses invaluable experience which could be applied in the early days of the operation of the new NT Anti-Corruption Commission. Details of the appropriate structure, and of the methodology in dealing with complaints, are well-known to Mr Lander. He possesses experience in conducting investigations. Overall, Mr Lander possesses experience in the practical operations and the administration of an anti-corruption body comprised of the type of structure I recommend for the NT Anti-Corruption Commission.

[296] In addition, Mr Lander has personally undertaken an extensive educative role concerning the SA ICAC and issues relating to integrity in public administration both within the SA public service and across the wider SA community.

[297] The importance and advantage of appointing a person possessing Mr Lander's qualifications, independence, experience and expertise should not be underestimated.

[298] If the services of Mr Lander were retained on a part-time basis, obviously his time to fulfil the responsibilities of an NT Commissioner would be limited. However, provided a Chief Executive Officer with appropriate seniority is in place, and provided the Commissioner possesses appropriate powers to delegate and co-opt personnel, any difficulties in this regard could readily be overcome. Whether an NT

Commissioner is appointed on a full-time or part-time basis, it must be accepted that the Commissioner will need power to delegate and co-opt and that, in the early stages of the operation of the NT Anti-Corruption Commission, flexibility will be required with respect to the budget to cope adequately with the initial spike in complaints.

[299] As to the educative role, Mr Lander is confident that he would be able to maintain an appropriate public presence in the Territory and would be in a position to fulfil the educative role and gain the confidence of the public in the efficiency and effectiveness of the new regime. In addition, the senior officer of the Office for Public Integrity would play an important role in this regard.

[300] A further advantage of this proposal is the gaining of knowledge over time of the particular needs of the Territory with a view to determining, within the first two years, whether the operating structure is appropriate and whether there is a need for the employment of an NT Commissioner on a full-time basis. If this proposal is implemented, I would recommend that the Mr Lander be required to report to the Assembly within two years in order to fully inform the Assembly of the operations in that period and to provide recommendations for the future operation of the NT Anti-Corruption Commission. This would provide an opportunity to review the operations of the NT Anti-Corruption Commission and to ensure that it effectively and efficiently meets the needs of the Territory into the future. The Assembly would be in an informed position and able to determine whether the employment of an NT Commissioner on a full-time basis was appropriate or otherwise.

[301] In putting forward this proposal, I recognise the importance of not undermining the vision of the Territory as an independent and self-contained community which is capable of administering its own affairs. Speaking generally, the days are past when it was necessary

for services in the Territory to be provided by other jurisdictions. The population may be relatively small, and resources relatively limited but, in matters such as the administration of public affairs and the administration of the law, the Territory is capable of carrying out those functions and being self-contained.

[302] Notwithstanding those matters, for the reasons I have endeavoured to explain, there are a number of advantages associated with the appointment of Mr Lander on a part-time basis for a definitive initial period in the operation of the new NT Anti-Corruption Commission. “Getting it right” from the outset is of critical importance and the experience of Mr Lander with respect to the commencement and ongoing operations of a structure in South Australia would be of great benefit. Further, for the reasons I have explained, in my view the employment of Mr Lander on a part-time basis would not present any significant disadvantages which could not be overcome relatively easily. Of course, these views are expressed on the basis that appropriate arrangements can be reached between governments.

[303] Mr Lander would need the consent of the SA Attorney-General. The Hon John Rau, Deputy Premier and Attorney-General has indicated that although the decision will rest with Cabinet, he is not averse to the broad proposal.

[304] As I said earlier in this discussion, if workload and resources were not significant issues, ideally a full-time Commissioner resident in Darwin would be appointed. However, they are significant issues. In particular, as I have said, there is a real risk that within a relatively short time the workload would not keep a full-time Commissioner fully occupied.

[305] In all the circumstances, the particular advantages possessed by Mr Lander make his appointment on a part-time basis for an initial period of two years the preferred option.

[306] For the reasons discussed, therefore, I recommend that the structure of the new NT Anti-Corruption Commission follow the structure established in South Australia, headed by Mr Lander appointed on a part-time basis for two years. In this structure the *Public Interest Disclosure Act* (NT) would be repealed and, to the extent appropriate and with necessary amendments, its provisions subsumed into the anti-corruption legislation. The current Office of Public Interest Disclosures would become the Northern Territory Office for Public Integrity which would operate in the way in which that office operates in South Australia under the overall supervision and direction of the Commissioner.

[307] One of the advantages of the structure I propose is the retention of the administrative structure within the current Office of Public Interest Disclosures which would become the foundation of the administrative structure of the new NT Anti-Corruption Commission. To the extent the NT Commissioner determines it would be both appropriate and desirable, the investigatory experience within the Office of Public Interest Disclosures could also be retained. In this structure no reports or complaints would be made directly to the Commissioner. They would be made to the new Office for Public Integrity which, under the overall supervision and control of the Commissioner, would determine how to deal with the report or complaint. The Office would not be the only body which is able to receive complaints, but it would perform a filtering role for the NT Anti-Corruption Commission.⁷¹

[308] The CPID is also the Information Commissioner and is responsible for administering the Freedom of Information and Privacy provisions of the *Information Act* (NT). If the structure I propose for the new NT Anti-Corruption Commission is adopted, it would not be appropriate for the new Office for Public Integrity to retain a role with respect to

⁷¹ For example the Police and Ombudsman's roles in receiving complaints would not be altered.

Freedom of Information and Privacy issues arising under the
Information Act.

- [309] In my view responsibility in this area should be transferred to the Ombudsman. Freedom of Information and Privacy issues fit naturally within the administrative review functions of the Ombudsman. The offices of Ombudsman in South Australia and Tasmania undertake this role. The resource implications are far less than those involved in establishing a stand-alone Freedom of Information Office which the volume of work in this area would not justify.
- [310] The CPID and Ombudsman agree that if the model I propose is adopted, it would be appropriate to transfer the Freedom of Information and Privacy functions to the Ombudsman.
- [311] Returning to the structure I propose for the new NT Anti-Corruption Commission, the South Australian model is discussed in some detail in *Annexure 9*. I recommend adoption of the primary objects as expressed in the South Australian legislation (*Annexure 9*, para [2]), which include the legislative direction that while a Commissioner may perform functions in relation to any potential issue of corruption, misconduct or maladministration in public administration, it is intended that the primary object of the Commissioner be investigating serious or systemic corruption in public administration and referring serious or systemic misconduct or maladministration in public administration to the relevant public sector agency. In addition it is a primary object of the Commissioner to give directions or guidance to the relevant agency or, as appropriate, to exercise the powers of the relevant agency.

[312] The functions of the SA Commissioner are set out in s7⁷² (*Annexure 9*, para [4]) and, with one exception, I recommend adoption of that provision. The exception relates to s7(4) which requires the Commissioner to conduct examinations in private. As discussed, in my view, while hearings should ordinarily be conducted in private, the Commissioner should possess the discretion to conduct public hearings if it is in the public interest to do so.

[313] Section 7(2) of the ICAC Act (SA) provides that the SA Commissioner is not subject to the direction of any person in relation to any matter, including the manner in which functions are carried out or powers are exercised and the priority the Commissioner gives to a particular matter. This is an essential provision.

[314] The functions and objectives of the Office for Public Integrity in South Australia are set out in s17 of that legislation (*Annexure 9*, para [5]). I recommend the adoption of s17 which makes clear that the function of the Office for Public Integrity is to receive and assess complaints and reports about public administration and to make recommendations as to whether and by whom such complaints and reports should be investigated. In addition, s17 provides that the Office is to perform other functions assigned by the Commissioner.

[315] The functions and objectives described in s17 of the South Australian legislation are followed by directions in ss23 and 24 concerning assessment of complaints and reports, and how such matters are to progress or otherwise (*Annexure 9*, para [7] and [8]). I recommend adoption of those provisions.

[316] Speaking broadly, therefore, this is the structure I recommend be adopted in the Northern Territory. Whatever structure is created for the new NT Anti-Corruption Commission, there will be resource

⁷² *Independent Commissioner Against Corruption Act 2012 (SA)*.

implications. The structure I propose possesses the advantage of absorbing an existing administrative and investigative regime with the ensuing cost saving. Further, although under the supervision and direction of the new NT Commissioner, that administrative regime will act as a filter of complaints and reports with the capacity to ensure that only matters appropriate for the attention of the Commissioner reach the Commissioner and that other matters are referred to relevant agencies for appropriate action. From my discussions with Mr Lander, it is apparent that the structure works efficiently and that, over time and with guidance and direction from the SA Commissioner, relevant agencies have developed appropriate investigatory and disciplinary regimes.



Other Issues

[317] Bearing in mind the broad structure which I have recommended, there are many other issues that require consideration. I now seek to address a number of those issues.

Role of Commissioner

[318] In framing legislation to create an NT Anti-Corruption Commission, it is essential that the Legislature first identify the purpose for which the Commission is established. This purpose provides the foundation for identification of the role of the NT Commissioner and the conferring of powers necessary to carry out that role.

[319] In this regard, I commend to the Legislature s3 of the ICAC Act (SA) (*Annexure 9*, para [2]). In summary, s3 identifies the following essential purposes for the establishment of the SA ICAC:

- The identification and investigation of corruption, misconduct and maladministration in public administration; and
- Ensuring that complaints about public administration are dealt with by the most appropriate person or body; and
- The prevention or minimisation of corruption, misconduct and maladministration in public administration by means which include education and evaluation of practices, policies and procedures; and
- Achieving an appropriate balance between “the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person’s reputation”.

[320] If the Legislature approves these fundamental objectives, then appropriate provisions must be included to empower the NT Commissioner to exercise the powers necessary to achieve these objectives. For example, almost every jurisdiction has included a

specific provision identifying education as a function conferred upon the Commissioner (eg NSW s13(1)(h)⁷³, Vic s15(5)⁷⁴ and SA s7(1)(e)⁷⁵). Education is, rightly, universally regarded as an essential tool in endeavouring to prevent corruption, misconduct and maladministration.

[321] Similarly, supervision and evaluation of public sector agencies practices is an essential feature of the educative and prevention role.

[322] In the context of the NT Commissioner's role in educating public service officers and the wider community, the Office for Public Integrity would play an important role, particularly if Mr Lander is appointed as a part-time Commissioner. Currently the CPID undertakes an active educative role and the experience of that office can readily be absorbed when that office becomes the Office for Public Integrity.

[323] There is a further aspect of the role of the NT Commissioner which requires careful attention and to which I referred earlier in this Report. It is highlighted by consideration of the distinction between the primary purposes of the NSW and SA Anti-Corruption Commissions.

[324] The NSW ICAC made a submission to the Independent Panel which identified ICAC's view of its primary purposes:

Advocating the use of prosecutions and conviction rates to measure the effectiveness of the Commission demonstrates a failure to understand the role of the Commission. In this

⁷³ *Independent Commission Against Corruption Act 1988* (NSW).

⁷⁴ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

⁷⁵ *Independent Commissioner Against Corruption Act 2012* (SA).

respect, it is relevant to have regard to the principal objects of the ICAC Act, which are set out in s2A as being:

(a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:

- (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and
- (ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and

(b) to confer on the Commission special powers to inquire into allegations of corruption.

The gathering of admissible evidence for the prosecution of criminal offences is, rightly, a secondary function of the Commission.

[325] For present purposes, the important issue is ICAC’s identification of “gathering admissible evidence for the prosecution of criminal offences” as a “secondary function”. By way of contrast, as previously mentioned, Mr Lander has explained that the role of the SA Commissioner is that of an investigator focussed on gathering evidence (this Report para [194]).

[326] The Legislature should determine the nature of the role to be undertaken by the new NT Anti-Corruption Commission and that role should be clearly identified in the legislation. Once that decision has been made, the Legislature will be in a position to determine whether the NT Commissioner should possess the power to make a finding of corrupt conduct and to report that finding. This issue is a matter of fundamental policy upon which it is inappropriate for me to comment.

Deputy Commissioner

[327] A number of jurisdictions include provisions relating to the appointment of a Deputy Commissioner or Assistant Commissioners. In South Australia specific provision is made for the appointment of a Deputy Commissioner to act as Commissioner during any period for which there is no person appointed as Commissioner or the Commissioner is absent from, or unable to discharge, official duties (s9 of the SA ICAC Act). In my view this is a sensible provision which should be adopted in the Territory.

[328] A number of jurisdictions authorise the appointment of Assistant Commissioners to carry out functions in accordance with directions of the Commissioner. As I have said, it is essential that the NT Commissioner be able to enlist the assistance of suitably qualified persons from within or outside the Territory for the purposes of discharging the functions conferred by the legislation. This includes conducting investigations through public and private hearings and other functions such as education and prevention. In this context the Commissioner must be able to delegate the Commissioner's powers to enable others to carry out these functions.

[329] In my view it is not necessary to provide a specific power to appoint persons identified in the legislation as Assistant Commissioners. Provided a general power to retain the assistance of other persons and to delegate powers exists, the title given to persons retained to provide assistance is irrelevant. For example, if a person is retained to investigate and undertake public or private hearings, such a person could be identified as an Assistant Commissioner or Investigator through an administrative process rather than through legislative prescription.

Budgetary Flexibility

- [330] In the context of discussion concerning the ability of the NT Commissioner to delegate powers and retain personnel to assist, it is appropriate to emphasise the need for budgetary flexibility. The expenses associated with the type of investigations likely to be undertaken should not be underestimated. The initial cost of establishing the NT Anti-Corruption Commission will be substantial. The very nature of the Commission requires that it be a stand-alone operation in all respects. The sharing of facilities, infrastructure or IT resources would be inappropriate. An effective anti-corruption body must be totally independent in theory and in practice.
- [331] As I have emphasised earlier, the workload is impossible to predict with any confidence. However, it is of critical importance that at the outset the NT Anti-Corruption Commission is not hampered by a lack of resources. The Commission must be in a position to respond effectively and efficiently. Anything less will damage public confidence in the Commission at the early and vulnerable stage.
- [332] In addition to the initial outlay, investigations of the type likely to be undertaken by the NT Anti-Corruption Commission will be expensive. Legal and financial investigators are not cheap. Nor are IT-based investigations. Either as permanent employees, or persons retained for specific tasks, the services of persons qualified to investigate electronic storage facilities such as computers, mobile telephones etc will also be expensive. A similar prediction can be made with respect to surveillance and listening device operations.
- [333] I have emphasised this aspect because, as the submissions and general knowledge confirm, the Northern Territory is a relatively small jurisdiction with limited resources. However, adequacy of resources and budgetary flexibility in the initial period of approximately two years are essential.

Staff

- [334] Obviously, every jurisdiction has included provisions for the appointment of staff of the anti-corruption body. The NT Commissioner should be appointed as an independent statutory officer by the Administrator. Other persons will be retained as independent contractors to provide specific services. However, the issue arises as to the position of staff employed within the Office of the NT Anti-Corruption Commission.
- [335] In New South Wales s104 of the ICAC Act provides that staff are taken to be employed by the New South Wales government “in the service of the Crown”. In Queensland s254 of the *Crime and Corruption Act 2001* directs that staff are employed under that Act and not under the Queensland *Public Service Act 2008* (Qld). Section 20 of the Tasmanian legislation allows staff to be appointed subject to and in accordance with the *State Service Act 2000* (Tas).
- [336] The South Australian ICAC Act provides that employees are not public service employees, but are to be taken as public sector employees for the purposes of certain legislation (s12). Section 52 states that the SA Commissioner and members of the staff are, for the purposes of any other Act, to be regarded as a body established for “law enforcement purposes”. In Victoria s35 of the IBAC Act provides that employees may be employed under part 3 of the *Public Administration Act 2004* (Vic), while s179 of the Western Australian legislation⁷⁶ directs that staff are not to be employed under part 3 of the *Public Sector Management Act 1994* (WA).
- [337] In my view, the critical underlying question is one of independence. If legislation governing the employment of public servants could be perceived as compromising independence, then that legislation should

⁷⁶ *Corruption, Crime and Misconduct Act 2003* (WA)

not apply to employees of the Commission. Absent any impact on independence, in my view it is not of particular importance to the operation of the Commission whether employees are regarded as public servants or otherwise. There is nothing inherently wrong with an anti-corruption body employing persons who are classified as public servants.

[338] The complexities of the legislation in this area need to be addressed by persons with appropriate knowledge which I do not possess.

[339] In the context of staff, in my view the Commission should be empowered to undertake security checks with respect of all staff and others retained to provide services and, with the agreement of Department Heads, to retain the services of persons such as Police Officers and DPP Prosecutors. If such persons are seconded to work for the Commissioner, they should not be disadvantaged with respect to their status and entitlements.

Protection of Commissioner and Staff

[340] Bearing in mind the nature of the functions to be conferred upon the Anti-Corruption Commission, it is important that careful attention be given to providing appropriate immunities to the Commissioner, staff and persons retained to provide services to the Commission. For example, s95 of the Tasmanian *Integrity Commission Act* provides that no civil or criminal proceedings “lie in respect of any action done, or omission made, in good faith in the exercise or intended exercise of, any powers or functions under this act” by nominated persons. With respect to the conduct of hearings, provision is commonly made for the presiding officer to possess the same protection and immunity as a Supreme Court Judge, and for any person appearing for a witness to have the same protection and immunity as a Barrister appearing for a party in a proceeding in the Supreme Court. Similarly, witnesses are

provided with the same protection as witnesses in proceedings in the Supreme Court.

[341] In my view it is obvious that these types of protections are required in the NT Commission legislation.

Accountability

[342] Whenever an independent body is created with powers, the exercise of which is capable of having a significant effect upon the lives of people within the wider community, inevitably the vexed question arises as to how that body is to be held accountable for its actions. Ultimately, such bodies are answerable in one way or another through the operation of the legislation and the judicial system, and are subject to the powers of Parliaments, but in practice experience has demonstrated the need for other means of oversight. The recent controversies in New South Wales and experience in Western Australia vividly reinforce this point.

[343] In every jurisdiction a Parliamentary Committee plays a role and, as I have said, in my opinion a bipartisan committee should be established in the Territory. The question arises as to whether, in addition to a Parliamentary Committee, there is a need to create a permanent position of an Inspector such as the positions that exist in New South Wales and Western Australia.

[344] The alternative to a permanent position as an Inspector is the South Australian position. Section 46 of the SA ICAC Act provides that the Attorney-General must, before the end of each financial year, appoint a person who would be eligible for appointment as the Commissioner “to conduct a review of the operations of the Commissioner and the Office during the financial year”. The Commissioner is required to ensure that the Reviewer “is provided with such information as he or she may

require for the purpose of conducting the review” (s46(3)) and the role of the reviewer is set out in subsection (2) of s46:

- (2) Without limiting the matters that may be the subject of a review, the person conducting a review –
 - (a) must consider –
 - (i) whether the powers under this Act were exercised in an appropriate manner and, in particular, whether undue prejudice to the reputation of any person was caused; and
 - (ii) whether the practices and procedures of the Commissioner and the Office were effective and efficient; and
 - (iii) whether the operations made an appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration in public administration; and
 - (b) may make recommendations as to changes that should be made to the Act or to the practices and procedures of the Commissioner or the Office.

[345] In South Australia the Reviewer must present a report to the Attorney-General on or before 30 September in each year and, within 12 sitting days after receipt, the Attorney-General is required to cause copies of the report to be laid before each House of Parliament.

[346] In my view, it is unnecessary for the new NT Anti-Corruption Commission to be subject to the oversight of an Inspector employed on a permanent basis. The appointment of a person on an annual basis to conduct a review such as that authorised in South Australia would meet the needs in the Territory. In addition, the NT Commissioner should be required to prepare an annual report on the operations of the NT Anti-Corruption Commission, including the Office for Public Integrity, to be tabled in the Assembly and provided to the bipartisan Standing Committee.

[347] As to the bipartisan Standing Committee, in New South Wales the Committee on the Independent Commission Against Corruption is a joint committee of Members of Parliament (Joint Committee) whose functions and procedures set out in part 7 of the ICAC Act. In particular, s64 provides that the Joint Committee is to possess the following functions:

- (a) to monitor and to review the exercise by the Commission and the Inspector of the Commission's and Inspector's functions,
- (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
- (c) to examine each annual and each other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
- (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,
- (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

[348] Section 64 also directs that nothing in part 7 authorises the Joint Committee to investigate a matter relating to particular conduct or to reconsider a decision to investigate, not investigate or discontinue investigation of a particular matter or to reconsider findings, recommendations, determinations or other decisions of the NSW Commission in relation to a particular matter.

[349] It should be noted that the jurisdiction of the New South Wales Committee has been the subject of dispute between the Committee and the Commissioner. This tension demonstrates the need for precision

and clarity in the legislation governing the role and functions of the Standing Committee.

[350] Similar functions are conferred upon Standing Committees in other jurisdictions. Details vary, but monitoring and reviewing the operations of the anti-corruption bodies is a common theme. Either directly or indirectly, each jurisdiction places limits on the powers of the Standing Committee. In particular, the Standing Committees cannot act as a form of review of particular decisions of the Anti-Corruption Commissioners.

[351] In arriving at a decision as to the precise role and function of a Standing Committee, care must be taken to distinguish the Queensland and Western Australian jurisdictions because of the crime function conferred upon those Commissions. It is preferable to obtain guidance in this area from the approach taken in New South Wales, South Australia, Tasmania and Victoria. I recommend that similar provisions be put in place which carefully define the functions of the Standing Committee. Particular attention should be given to the appropriate limits that should be placed on the role of the Committee. For example, the Committee should not be able to interfere with the day to day operations of the NT Anti-Corruption Commission. Nor should it be able to review a particular decision or investigation conducted by the Commission.

[352] In connection with the Standing Committee, provision should be made to cater for the circumstances of elections and changes of government.

[353] In the context of accountability, an area that poses some difficulty concerns complaints about the conduct of the NT Commissioner. In New South Wales the ICAC Inspector deals with such complaints, while in Queensland and Western Australia this role is performed by the Parliamentary Commissioner or Inspector. A Victorian

Inspectorate whose jurisdiction extends beyond the IBAC receives complaints about the conduct of IBAC personnel.

[354] In my view it would not be appropriate to refer all complaints against the NT Commissioner to the Standing Committee. I considered whether the Deputy Commissioner could play a role, but the potential for internal conflict and tension is obvious.

[355] While there is a need to avoid creating another oversight system which is burdensome and expensive, in my view complaints concerning the conduct of the NT Commissioner should be referred to the person appointed to conduct the annual review. The reviewer should possess appropriate power to obtain reports, dismiss a complaint or refer a matter to the Standing Committee or a law enforcement agency.

Complaints/Reports

[356] As in most other jurisdictions, I recommend that the Territory scheme permit the NT Commissioner to instigate investigations on the Commissioner's own motion. However, the vast majority of the NT Anti-Corruption Commission's work will emanate from complaints or reports made by members of the wider public or persons employed in the public service or other organisations covered by the legislation. As I have said, in the structure I recommend these complaints and reports would first be assessed by the Office for Public Integrity, with two additions. I recommend the adoption of ss23 and 24 of the ICAC Act (SA) which direct how a complaint or report is to be dealt with following receipt and confers limited powers required in the assessment process. The additions concern the capacity of the Commissioner to retain and investigate a matter involving conduct less-serious than corrupt conduct and to exercise Commission powers in conducting such an investigation. If good reason exists the Commissioner should be empowered to proceed in such cases.

[357] In connection with complaints, a number of issues arise. First, should there be any restriction as to who can make a complaint? My answer is an emphatic negative. For example, persons serving sentences of imprisonment should be able to make a complaint. The legislation should make this fundamental position clear.

[358] Secondly, should the legislation require that a complaint or report be verified on oath? Every jurisdiction contains provisions which include penalties for making false or misleading statements, or misleading or attempting to mislead a Commission (which should also occur in the Territory). Up until recently, Queensland required a complaint to be made by way of statutory declaration unless the Queensland Commission decided, by reason of exceptional circumstances, that the complaint need not be made by statutory declaration⁷⁷.

[359] In my view, it is not appropriate to require that complaints or reports be verified on oath. Further, although in some jurisdictions the legislation prescribes that a complaint or report must be made in writing, in my view a preferable course is to empower the NT Commissioner to give administrative directions in this regard (and as to the information to be provided in a complaint). Flexibility in this area is likely to be advantageous to the Commission, particularly bearing in mind the possibility that persons from disadvantaged and dysfunctional backgrounds and possessing minimal oral and literary skills in English might be the source of complaints or reports. Further, I note that the Independent Panel did not recommend requiring complaints to be verified on oath by statutory declaration and expressed the view that the legislation provided sufficient power to reject trivial and vexatious complaints.

⁷⁷ Following amendments to the *Crime and Corruption Act 2001* (Qld) on 5 May 2016, complaints about corruption are no longer required to be made by way of statutory declaration in Queensland.

[360] In this context the NT Commission legislation should make it clear that the NT Commissioner/Office for Public Integrity possesses a broad discretion on how to deal with complaints or reports, including dismissal as trivial, of no substance or vexatious.

Protection for Complainants

[361] Every jurisdiction includes specific provisions aimed at protecting complainants and persons who make reports of corruption or misconduct. Currently in the Northern Territory s14 of the *Public Interest Disclosure Act* provides that a person who makes a public interest disclosure “incurs no civil or criminal liability by doing so” and “does not become liable to disciplinary action, or other adverse administrative action, for doing so”. A public interest disclosure is treated as “absolutely privileged” in an action for defamation. These provisions apply even though the public interest disclosure is made in breach of an obligation of confidentiality, but the protection does not apply if the disclosure is an abuse of process or the discloser knows that the information disclosed is “misleading”. In addition, s14(5) provides that when a person makes a public interest disclosure, that person’s liability for their own conduct “is not affected by the disclosure of that conduct”. This is a common provision which prevents persons who know or suspect that their conduct is about to be exposed from “getting in first” in order to avoid responsibility for their conduct.

[362] Section 14 is followed by provisions aimed at protecting persons who make public interest disclosures from acts of reprisal. These are also common provisions.

[363] The joint submission from the Extended Integrity Group emphasised that the importance of protecting complainants:

194 “Whistle-blower” encouragement and protection sits at the core of the current PID Act and the role of the CPID.

195 This must be emphatically maintained and emphasised as an essential function in any new model.

196 Whatever model and definitions are adopted, it will be vital to ensure that an appropriate disclosure in relation to any of the defined categories of improper conduct (including substantial maladministration by public sector officers) continues to qualify the discloser for protection.

[364] The joint submission added that it might be an appropriate time to review the protection provisions to consider whether current reprisal protections are adequate and to consider whether greater guidance should be provided for agencies and agency heads involved in investigations.

[365] The points made by the joint submission are well-founded. Extensive protections are provided in all jurisdictions in respect of immunity from criminal or civil liability, disclosure of identity and victimisation. The protections are found either in the Commission legislation or in a Public Interest Disclosure Act (NSW, TAS and WA), the *Protected Disclosure Act 2012* (Vic) and the *Whistleblowers Protection Act 1993* (SA).

[366] It is unnecessary for me to discuss each piece of legislation. It is sufficient to confirm my recommendation that these protections be included in the NT Commission legislation, together with the qualification that a person who makes a complaint or a report is not relieved from liability for their own conduct.⁷⁸

⁷⁸ See later discussion concerning a power to arrange physical protection.

Duty to Report

[367] As previously discussed, three jurisdictions require reporting by public officers of suspected corrupt conduct (NSW s11⁷⁹, QLD ss37 and 38⁸⁰ and WA s28⁸¹). The question of mandatory reporting was recently considered as part of a wider review of the Victorian IBAC Act.⁸² Pursuant to the powers to give directions, in South Australia the Commissioner has directed that, in substance, Police and other public officers are required to report any matter reasonably suspected of involving corruption in public administration or serious or systemic misconduct or maladministration in public administration. This mandatory requirement relates only to conduct occurring on or after 1 September 2013 or which has come to the attention of the public officer on or after that date.

[368] In my view, senior public officers, Police Officers, MLAs (including Ministers of the Crown), Local Government Councillors and Local Government Chief Executive Officers should be required to report to the new NT Anti-Corruption Commission any matter reasonably suspected of involving corruption in public administration or serious or systemic misconduct or maladministration in public administration. It is inappropriate for me to attempt to define what is meant by a “senior public officer”, but I would exclude judicial officers from that requirement.

[369] In this context it would be appropriate for the NT Commissioner to develop guidelines for the assistance of those to whom the mandatory reporting provisions apply.

⁷⁹ *Independent Commission Against Corruption Act 1988* (NSW).

⁸⁰ *Crime and Corruption Act 2001* (QLD).

⁸¹ *Corruption, Crime and Misconduct Act 2003* (WA).

⁸² On 5 May 2016, the Victorian Parliament passed the Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015, which will make amendment to the mandatory reporting provisions in the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

Historical Complaints

[370] One of the issues to be addressed concerns complaints which have previously been investigated and complaints that might conveniently be described as “historical”. The joint submission noted that although the CPID did not experience a large number of historical complaints when it commenced operation, acceptance of historical complaints can make it more difficult to deal with new complaints efficiently. If my recommendation that MLAs be subject to the new regime, it is not difficult to imagine that they could be the subject of historical complaints.

[371] The CPID possesses a discretion to reject matters where there has been an excessive delay or where the investigation is unlikely to succeed because of the age of the matter or a previous investigation. The *Ombudsman Act* (NT) provides that a complaint must be made within one year of the complainant becoming aware of the relevant action or conduct. However, the Ombudsman possesses a discretion to accept a complaint after that period if the Ombudsman determines that it is in the public interest to do so or there are special circumstances which warrant acceptance of the complaint.

[372] The joint submission of the Extended Integrity Group recommended that “some temporal limitation” exist, but any anti-corruption body should possess a discretion to accept and investigate older matters if it considers it is in the public interest to do so.

[373] In New South Wales, in determining whether or not to conduct, continue or discontinue an investigation, the Commission may have regard to the age of the matter (s20⁸³). Similarly, the Tasmanian legislation provides for dismissal of a complaint if the complainant possessed knowledge of the subject matter of the complaint for more

⁸³ *Independent Commission Against Corruption Act 1988* (NSW).

than a year and fails to give a “satisfactory explanation” for the delay in making the complaint (s36⁸⁴). In addition, a complaint can be dismissed if it is not in the public interest to investigate, and a factor to be considered is the lapse of time between the alleged misconduct and the complaint.

[374] The Victorian IBAC Act specifically provides in s11 that the Act applies in respect of the conduct which occurred before the commencement of the Act. In addition, the Commission possesses a discretion to dismiss a complaint if it relates to conduct that occurred at “too remote a time to justify investigation” (s67(2)(e)).

[375] In my view, it is both unnecessary and inappropriate to impose a limitation period on the making of a complaint or report about corruption or misconduct. Potentially, some matters are so serious that they demand investigation and action notwithstanding the passing of a lengthy period. On the other hand, it might be appropriate to impose a limitation in respect of less-serious matters which are properly classified as maladministration.

[376] Whatever approach is taken, the NT Anti-Corruption Commission should be given a broad discretion to receive and investigate a complaint or report or to reject it. If an investigation is commenced and the NT Commissioner is of the view that it is not in the public interest to continue the investigation, the Commissioner should be able to discontinue the investigation. One of the factors which the Commission should be entitled to take into account in all situations is the age of the matter

[377] On the other hand, if a time limit is imposed, notwithstanding that a matter is outside the time limit, the NT Commissioner should possess a wide discretion to accept the complaint or report and to investigate it if

⁸⁴ *Integrity Commission Act 2009* (Tas).

the Commissioner is of the view that it is in the public interest to do so.

[378] As is apparent from this discussion, in my view the NT Commissioner should possess a wide and unfettered discretion to accept or reject a complaint or report and to undertake an investigation or refer a matter to an agency for that purpose. Similarly, the discretion to cease an investigation and either dismiss the complaint or refer it to an agency should be wide and unfettered.⁸⁵

[379] Finally, the same type of discretion should exist to resume an investigation which had previously been discontinued or to reclaim an investigation from an agency to which it had been referred. At times decisions can be made based solely on information conveyed in a complaint or report. At other times, investigations are required before a decision is made as to an appropriate course of action. As investigations progress, the NT Anti-Corruption Commission should be free to alter a course of action according to information received in order to meet changing circumstances.

[380] At the heart of the need for a broad and unfettered discretion is the public interest. Freedom to respond in this way in the public interest will not only enable the NT Anti-Corruption Commission to ensure that complaints and reports are effectively and efficiently investigated, but it will enhance public confidence in the operation of the Commission because the Commission is able to serve the public interest without undue restriction.

[381] In making these observations, I am referring to all aspects of the NT Anti-Corruption Commission's operations, but I do so with a qualification in respect of the exercise of certain powers, particularly coercive powers. When coercive powers are conferred, there is a need

⁸⁵ See NSW ss23 and 53; QLD ss46; SA ss24(4), 37 and 38; TAS ss36 and 39-45; VIC ss60 and 73(1); WA ss18(3) and 33(1)(c).

to ensure that certain rights of individuals and entities are protected or, where such rights are distinguished or diminished, that appropriate safeguards are put in place to ensure appropriate oversight of the exercise of the powers. This issue is reflected in my view that only judicial officers should be able to issue warrants and is relevant to the later discussion concerning fairness to witnesses.

Confidentiality

[382] As would be expected, each jurisdiction provides for confidentiality of information received by any person in the course of the discharge of their duties under the Commission legislation (NSW s111⁸⁶, QLD ss66 and 213⁸⁷, SA s54⁸⁸, TAS s94⁸⁹, VIC ss38 and 40⁹⁰, and WA ss152 and 183⁹¹). Each jurisdiction provides for exceptions to the rule of confidentiality and, although there is no common form of wording, the exceptions are broadly the same.

[383] The NT Commission legislation should make provision for confidentiality, including exemption from Freedom of Information Laws (VIC s194⁹²).

[384] Section 54 of the South Australian ICAC Act provides a helpful example in this regard:

Confidentiality

(1) A person must not, directly or indirectly, disclose information obtained in the course of the administration of this Act in connection with a matter that forms or is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act except –

⁸⁶ *Independent Commission Against Corruption Act 1988* (NSW).

⁸⁷ *Crime and Corruption Act 2001* (Qld).

⁸⁸ *Independent Commissioner Against Corruption Act 2012* (SA).

⁸⁹ *Integrity Commission Act 2009* (Tas).

⁹⁰ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

⁹¹ *Corruption, Crime and Misconduct Act 2003* (WA).

⁹² *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

- (a) for the purposes of the administration or enforcement of this Act; or
- (ab) for the purposes of referring a matter in accordance with this Act to a law enforcement agency, inquiry agency, public authority or public officer; or
- (b) for the purposes of a criminal proceeding or a proceeding for the imposition of a penalty; or
- (c) for the performance of the functions of the Commissioner under another Act; or
- (ca) in accordance with an authorisation of the Commissioner given in accordance with the regulations; or
- (d) as otherwise required or authorised by this or another Act.

Maximum penalty: \$10 000 or imprisonment for 2 years.

- (2) Any disclosed information connected with a matter that is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act will be taken to be disclosed on the understanding that the information is confidential unless the person to whom the information is disclosed is informed in writing to the contrary by the Commissioner.
- (5) Information obtained by a person present when information or evidence is being given before the Commissioner, the Deputy Commissioner, an examiner or an investigator under this Act will be taken to be provided by the Commissioner to the person on the understanding that the information is confidential unless the person is informed by the Commissioner in writing to the contrary.
- (6) If the Commissioner provides, or authorises the provision of, information to a person on the understanding that the information is confidential, that person, and any person or employee under the control of the person, is subject to the same rights, privileges, obligations and liabilities under this section as if the person obtained the information in the course of the administration of this Act.

[385] I also recommend that the NT Commissioner should be able to share information with other bodies concerned with law enforcement.
Section 41 of the Victorian IBAC Act provides a helpful example.

Consideration should also be given to permitting the NT Commissioner to provide information to the Attorney-General (SA s49⁹³).

[386] Specific provision should be made allowing the NT Commissioner to decline to disclose particular information to a court, Royal Commission, Inquiry under the *Inquiries Act* (NT) or in a report to the Standing Committee or the Assembly if the NT Commissioner considers that strict confidentiality should be maintained with respect to such information. The Queensland legislation deals with this issue and provides that the Queensland Commission must maintain a register of such information which can be inspected by the Parliamentary Commissioner. Sections 66 and 67 of the *Crime and Corruption Act 2001* (Qld) are as follows:

66 Maintaining confidentiality of information

- (1) Despite any other provision of this Act about reporting, if the commission considers that confidentiality should be strictly maintained in relation to information in its possession (**confidential information**) –
 - (a) the commission need not make a report on the matter to which the information is relevant; or
 - (b) if the commission makes a report on the matter, it need not disclose the confidential information or refer to it in the report.
- (2) If the commission decides not to make a report to which confidential information is relevant or, in a report, decides not to disclose or refer to confidential information, the commission –
 - (a) may disclose the confidential information in a separate document to be given to –
 - (i) the Speaker; and
 - (ii) the Minister; and

⁹³ *Independent Commissioner Against Corruption Act 2012* (SA).

(b) must disclose the confidential information in a separate document to be given to the parliamentary committee.

- (3) A member of the parliamentary committee or a person appointed, engaged or assigned to help the committee must not disclose confidential information disclosed to the parliamentary committee or person under subsection (2)(b) until the commission advises the committee there is no longer a need to strictly maintain confidentiality in relation to the information.

Maximum penalty – 85 penalty units or 1 year’s imprisonment.

- (4) Despite subsection (2)(b), the commission may refuse to disclose information to the parliamentary committee if –
- (a) a majority of the commissioners considers confidentiality should continue to be strictly maintained in relation to the information; and
 - (b) the commission gives the committee reasons for the decision in as much detail as possible.

67 Register of confidential information

- (1) The commission must maintain a register of information withheld under section 66(4) and advise the parliamentary committee immediately after the need to strictly maintain confidentiality in relation to the information ends.
- (2) The parliamentary committee or a person appointed, engaged or assigned to help the committee who is authorised for the purpose by the committee may, at any time, inspect in the register information the commission has advised the committee is no longer required to be strictly maintained as confidential.
- (3) The parliamentary commissioner may inspect information on the register at any time, regardless of whether the commission has advised the parliamentary committee the information is no longer required to be strictly maintained as confidential.
- (4) The parliamentary committee may not require the parliamentary commissioner to disclose to the committee information inspected by the commissioner on the register, unless the commission has advised the committee the information is no longer required to be strictly maintained as confidential.

- [387] If this power not to disclose information is conferred on the NT Commissioner, provision should be made for a register of the type envisaged by the Queensland legislation which could be inspected annually as part of the annual review to which I have referred.
- [388] There is a further aspect associated with confidentiality which should be addressed. It relates to availability and use of evidence in subsequent proceedings. If the NT Commissioner seeks to maintain confidentiality of information which might be relevant to subsequent proceedings, a person affected by the subsequent proceedings should be entitled to apply to the Supreme Court for an order directing that the information be released to that person. Sections 112 and 113 of the NSW ICAC Act provide an example, but I would recommend that the right to apply should be broadly worded to avoid technical issues and to provide the Court with an unfettered discretion based on the public interest.
- [389] In the context of exceptions to confidentiality, consideration needs to be given to whether any provision should be made concerning persons publicly disclosing that a complaint or report has been made to the Office for Public Integrity. I anticipate that the creation of the NT Anti-Corruption Commission is likely to lead to a tendency for some persons to seek to gain advantage by telling the media they have referred a matter to the Commission or, strictly speaking, the Office for Public Integrity. In addition, public disclosure could impede an investigation, particularly if covert means are required. Notwithstanding these matters, I am reluctant to suggest that a legislative ban should be imposed upon disclosing the fact of referrals. I recommend that no provision be included in the NT Commission legislation in this regard, except to provide for appropriate confidentiality on the Commission side.

[390] My recommendation that no provision be enacted concerning complainants disclosing the fact of a complaint does not apply to information gained after a complaint has been made.

[391] Finally with respect to confidentiality, the South Australian ICAC Act makes specific provision for public statements by the Commissioner. It is likely that this provision was included because of the direction that the SA Commissioner conduct all hearings in private, but in my view it is a useful provision notwithstanding my recommendation that the NT Commission legislation should permit the NT Commissioner to conduct hearings in public. Section 25 of the South Australian ICAC Act is as follows:

25 Public statements

The Commissioner may make a public statement in connection with a particular matter if, in the Commissioner's opinion, it is appropriate to do so in the public interest, having regard to the following:

- (a) the benefits to an investigation or consideration of a matter under this Act that might be derived from making the statement;
- (b) the risk of prejudicing the reputation of a person by making the statement;
- (c) whether the statement is necessary in order to allay public concern or to prevent or minimise the risk of prejudice to the reputation of a person;
- (d) if an allegation against a person has been made public and, in the opinion of the Commissioner following an investigation or consideration of a matter under this Act, the person is not implicated in corruption, misconduct or maladministration in public administration – whether the statement would redress prejudice caused to the reputation of the person as a result of the allegation having been made public;
- (e) the risk of adversely affecting a potential prosecution;
- (f) whether any person has requested that the Commissioner make the statement.

Witnesses

Fairness

[392] As I have already indicated, if the NT Anti-Corruption Commission is given the power to hold public inquiries, the NT Commission legislation should provide that witnesses and other persons affected by a public inquiry should be entitled to be legally represented, to respond publicly if opening allegations are made publicly by counsel assisting and to defend public allegations through the calling of evidence.

[393] Similarly, when necessary, witnesses should be entitled to the services of an appropriate interpreter.

[394] Leaving aside legal connotations that arise through the use of terms such as “natural justice” and “procedural fairness”, these types of provisions fall within the broad concept of fairness to witnesses and other persons adversely affected by the public operations of the NT Anti-Corruption Commission. The recent publicity surrounding the operations of the New South Wales ICAC highlights the importance of recognising the need to apply the broad concept of fairness to the operations of the NT Anti-Corruption Commission.

[395] In making those observations I do not mean to imply that the NT Anti-Corruption Commission should not be granted the extraordinary powers to which I have referred to or that the Commission is not entitled to employ investigatory methods which are authorised by the legislation and which reach beyond the methods available to the Police in the ordinary course of investigating criminal offences. The NT Anti-Corruption Commission will be a special-purpose investigatory body possessing special powers. It will not be a court of law and, for example, should not be required to give advance notice to a witness of evidence or material in its possession about which it intends to question the witness. Ultimately, however, the broad concept of

fairness requires that a person about whom an adverse finding might be made publicly in a hearing or in a report is entitled to an opportunity to respond to allegations through the calling of evidence and the presentation of submissions. In the case of opening remarks by counsel assisting the Commission in a public inquiry, which may be capable of causing damage to a person's reputation and life, fairness requires that the person be given an opportunity to respond publicly in the same forum.

[396] In Tasmania, s13(a)⁹⁴ provides that the role of the Board of the Integrity Commission is to ensure that the Chief Executive Officer and staff of the Integrity Commission “perform their functions and exercise their powers in accordance with sound public administration practice and principles of procedural fairness....”. Section 46 requires an Investigator to observe the rules of “procedural fairness”. Section 56 provides that before finalising any report for submission to the Board, the Chief Executive Officer may, if the Chief Executive Officer considers it “appropriate”, give a draft of the report to the relevant public authority, the public officer who is the subject of the investigation and “any other person who in the Chief Executive Officer’s opinion, has a special interest in the report”.

[397] In Victoria, in the context of the power of the IBAC to provide a report to each House of Parliament on “any matter relating to the performance of its duties and functions”, s162⁹⁵ provides that if the IBAC intends to include in the report any adverse findings about a public body, or a comment or opinion which is adverse to any person, the IBAC must first give the principal officer of the body or the person concerned a reasonable opportunity to respond to the adverse material and must also “fairly set out each element of the response in its report”.

⁹⁴ *Integrity Commission Act 2009* (Tas).

⁹⁵ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

[398] Interestingly, s162(4) of the Victorian legislation directs that if the IBAC intends to include in a report to be transmitted to Parliament a comment or opinion about any person which is “not” adverse to the person, the IBAC must first provide that person with the relevant material in relation to which the IBAC intends to name that person.

[399] In relation to fairness, as earlier discussed the Independent Panel received a number of complaints about the lack of fairness in the conduct of the ICAC and counsel assisting that body. In the context of the ICAC practice of allowing counsel assisting to make public allegations, but suppressing written responses and not ordinarily allowing counsel for affected persons an opportunity to respond, the Panel observed that the result of this practice was “an imbalance which may be both unfair and inconsistent with the public nature of the hearings” (para 9.4.15). In addition the Independent Panel noted that the public nature of hearings creates a risk of “serious unfairness”.

[400] In Western Australia s45ZC⁹⁶ directs that before reporting any matters “adverse” to a person or body in a report under previous sections, the Public Sector Commissioner must give the person or body a “reasonable opportunity to make representations” to the Commissioner concerning the adverse matters. With respect to reports to Parliament, s86 requires that before reporting any matters “adverse” to a person or body in a report to Parliament, the Commission must give the person or body a “reasonable opportunity” to make representations to the Commission concerning the adverse matters.

[401] I do not recommend the inclusion of a broad provision that requires the NT Anti-Corruption Commission to observe the rules of procedural fairness or natural justice in the course of its investigations. For example, in conducting private inquiries, the NT Commission should not be required to advise the person being investigated of the fact of

⁹⁶ *Corruption, Crime and Misconduct Act 2003* (WA).

private hearings or the evidence gathered. Investigative bodies are entitled to conduct inquiries without the knowledge of the person under investigation.

[402] If, therefore, the NT Commission is restricted to gathering evidence for referral to the DPP, and does not conduct a public hearing or make a report expressing an opinion adverse to any person, there is no occasion for observing “procedural fairness”. It is when public allegations are made in a hearing or in a public report that the requirements of fairness come into play.

[403] Bearing those matters in mind, I recommend the following:

- If the Commission conducts a public hearing in which allegations adverse to a person or body are aired, that person or body should be provided with a reasonable opportunity to respond to the allegations both in public submissions and the presentation of evidence.
- If the Commission proposes to include in a report to a Standing Committee, Parliament or a public sector agency any comment adverse to any person or body, the Commission must give the person or body a reasonable opportunity to respond to the substance of the matter adverse to the person or body and must include in the report the principal features of the response of the person or body to the adverse matter.

Children

[404] Section 123 of the Victorian IBAC Act prohibits the issuing of a witness summons to a person under the age of 16 years.

[405] There is no similar prohibition in other areas of the law, including the criminal law. If it is thought appropriate, children under a specified age could be treated as vulnerable witnesses and provided with the protections applicable in criminal proceedings or in the *Domestic and Family Violence Act* (NT). Alternatively, if special arrangements are

required by reason of a witness's age, or for any other reason, the NT Commissioner can give appropriate directions to meet the needs of the witness.

[406] In my opinion the Victorian prohibition is inappropriate. I do not recommend it for the Northern Territory.

Legal Representation

[407] As I have said, in my view a witness in a public hearing should be entitled to legal representation. In that context, s127 of the Victorian IBAC Act provides that in certain circumstances the IBAC may direct a witness not to seek legal advice or representation from a specified Australian legal practitioner if the IBAC considers, "on reasonable grounds", that the examination would be "prejudiced" because the Australian legal practitioner is:

- (a) the witness in the examination or another examination; or
- (b) the representative of another witness in the examination or another examination; or
- (c) a person involved, or suspected of being involved, in a matter being investigated by the IBAC or the Victorian Inspectorate; or
- (d) the representative of a person involved, or suspected of being involved, in a matter being investigated by the IBAC or the Victorian Inspectorate.

[408] In my opinion this is a sensible provision and should be adopted in the NT Commission legislation.

Prisoners

[409] Three jurisdictions make specific provision for issuing summonses to prisoners and for custodial arrangements for the purposes of hearings (NSW s39⁹⁷, QLD s83⁹⁸ and Vic s126⁹⁹). These are sensible provisions and I recommend their adoption.

Support

[410] A number of jurisdictions provide for various forms of support for witnesses including expenses of attendance, legal or financial assistance and, in the case of public officers, assistance from the employing public authority (NSW ss51 and 52¹⁰⁰, SA s44¹⁰¹, TAS ss83 and 84¹⁰², VIC ss150 and 151¹⁰³ and WA s146¹⁰⁴). Again, these are sensible provisions and I recommend their adoption.

Protection

[411] In addition to the protection of complainants previously discussed, I recommend the adoption of the substance of s50 of the NSW ICAC Act in relation to protection of persons assisting the Commission:

50 Protection of witnesses and persons assisting Commission

- (1) If it appears to the Commissioner that, because a person is assisting the Commission, the safety of the person or any other person may be prejudiced or the person or any other person may be subject to intimidation or harassment, the Commissioner may make such arrangements as are necessary:
 - (a) to protect the safety of any such person, or
 - (b) to protect any such person from intimidation or harassment.

⁹⁷ *Independent Commission Against Corruption Act 1988* (NSW).

⁹⁸ *Crime and Corruption Act 2001* (Qld).

⁹⁹ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

¹⁰⁰ *Independent Commission Against Corruption Act 1988* (NSW).

¹⁰¹ *Independent Commissioner Against Corruption Act 2012* (SA).

¹⁰² *Integrity Commission Act 2009* (Tas).

¹⁰³ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

¹⁰⁴ *Corruption, Crime and Misconduct Act 2003* (WA).

- (2) In this section, a reference to a person who is assisting the Commission is a reference to a person who:
- (a) has appeared, is appearing or is to appear before the Commission to give evidence or to produce a document or other thing, or
 - (b) has produced or proposes to produce a document or other thing to the Commission under this Act, or
 - (c) has assisted, is assisting or is to assist the Commission in some other manner.
- (3) Any such arrangements may (but need not) involve the Commissioner directing the Commissioner of Police or a prescribed public authority or prescribed public official:
- (a) to provide any protection referred to in subsection (1), or
 - (b) to provide personnel or facilities or both to assist in providing that protection, or
 - (c) to otherwise assist in the provision of that protection.
- (4) The Commissioner of Police, or such a public authority or public official, is under a duty to comply with any such direction as far as reasonably possible.
- (5) Any such arrangements may (but need not) involve the Commissioner making orders applying to a specified person for the purpose of protecting the safety of a person referred to in subsection (1) or of protecting such a person from intimidation or harassment. Such an order is not limited to directions of a kind referred to in subsection (3).
- (6) A person who contravenes an order applying to the person under subsection (5) without reasonable excuse is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

- (7) Nothing in this section affects the *Witness Protection Act 1995*.

[412] As is apparent from s50(7), the operations of the New South Wales *Witness Protection Act 1995* (NSW) are unaffected. In Queensland,

s338¹⁰⁵ also preserves the operation of the Queensland *Witness Protection Act 2000* (Qld):

338 Protection of witnesses etc.

- (1) This section applies if it appears to the commission the safety of a person may be at risk or the person may be subject to intimidation or harassment because the person –
 - (a) is helping or has helped the commission in the performance of its functions; or
 - (b) is to attend, is attending or has attended at a commission hearing to give evidence or to produce a document or thing; or
 - (c) proposes to produce or has produced a document or thing to the commission otherwise than at a commission hearing.
- (2) The commission may, with the person's consent, provide witness protection for the person under this Act or the *Witness Protection Act 2000*.

[413] Although there is some attraction to the brief form in which the Queensland legislation authorises protection of a witness, in my view the New South Wales form should be preferred as it explicitly authorises the Commission to direct the Commissioner of Police or a prescribed public authority or a prescribed public official to provide the necessary protection.

Privilege Against Self-Incrimination

[414] As previously mentioned, privilege against self-incrimination is abrogated in all jurisdictions except Tasmania. In my view, this is an essential tool in the armoury of an anti-corruption body and it should apply in the Territory.

¹⁰⁵ *Crime and Corruption Act 2001* (Qld).

[415] Allied with the removal of the privilege against self-incrimination are provisions aimed at preventing the use of documents or answers produced or given to the Commission in the face of a claim that the document or answer might tend to incriminate the person or make the person liable to a penalty. Speaking generally, other than in specified proceedings, documents produced or answers given under a claim that the document or answers might tend to incriminate the witness are not admissible in subsequent criminal proceedings or a proceeding for the imposition of a penalty. Section 144 of the Victorian legislation¹⁰⁶ is expressed in broad terms that, except in specified proceedings, the document or answer is not admissible before “any court or person acting judicially”. Section 26 of the New South Wales legislation¹⁰⁷ is also worded in broad terms which prevent the use of the evidence in “any proceedings” except for proceedings for an offence against the New South Wales ICAC Act or in disciplinary proceedings against the witness if the witness was a public official.

[416] Bearing in mind that the removal of the privilege against self-incrimination is the removal of an important right normally afforded to persons under investigation, in my view it is appropriate to prohibit the use of documents, answers or information obtained from a witness in the face of a claim for privilege against self-incrimination except in the course of proceedings for an offence against the NT Commission legislation. Whether an exception should also be made if the witness is a public official and it is sought to use the information, document or answer in subsequent disciplinary proceedings against the public official, is a difficult question. Such disciplinary proceedings might result in serious ramifications for the public official, which, in substance, amount to a penalty. In these circumstances I tend to favour

¹⁰⁶ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

¹⁰⁷ *Independent Commission Against Corruption Act 1988* (NSW).

not permitting such use of material gained under coercion in the face of a claim for the privilege.

Legal Professional Privilege

[417] Legal professional privilege is specifically maintained in Queensland, Tasmania and Victoria. In South Australia, s8(3) of Schedule 2¹⁰⁸ provides that a legal practitioner is entitled to refuse to answer questions or produce a document on the basis of legal professional privilege and s8(6) provides that subclause (3) “does not affect the law relating to legal professional privilege”. While there is specific reference to the use of evidence gathered over objection that the evidence might tend to incriminate the person under examination, no reference is made to the use of evidence gathered over objection on the basis of legal professional privilege.

[418] In my view it is likely that a Court would conclude that in the absence of clearly expressed abrogation, the law relating to legal professional privilege has not been modified by the South Australian legislation.

[419] In New South Wales s37(2) of the ICAC Act provides that a witness before the Commission is “not excused” from answering questions or producing a document or other thing on the ground that the answer or production might tend to incriminate the witness, nor “on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground”. It is difficult to envisage a more broadly-worded provision which clearly removes legal professional privilege. An exception is provided in s37(5) if the privileged communication occurred for the purpose of “providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a compulsory examination or public inquiry before the Commission”.

¹⁰⁸ *Independent Commissioner Against Corruption Act 2012 (SA)*.

[420] Section 144(1) of the Western Australian legislation¹⁰⁹ maintains legal professional privilege for witnesses other than a public authority or public officer. Section 94 relates to the power to obtain information from a public authority or public officer and s94(4) provides that the powers may be exercised despite any rule of law which, in proceedings in court might justify an objection on the grounds of public interest and despite any privilege the public authority or public officer would otherwise be entitled to claim in a court of law. In addition, s197 specifically removes the right of a public authority or public officer to claim legal professional privilege during an inquiry by the Parliamentary Inspector.

[421] Legal professional privilege is an important protection for individuals and entities which enables them to obtain legal advice without fear that their communications with their legal adviser will subsequently be disclosed to other persons. It is a protection which enables the client to speak freely with their legal adviser. Similar considerations apply to confidentiality of Cabinet discussions which, like legal professional privilege, is a rule borne out of the overall public interest. The application of legal professional privilege should not be removed or diluted without strong reason and it is apparent that the majority of jurisdictions have been able to function adequately without interfering with this fundamental principle.

[422] I do not recommend removing or diluting the application of law governing legal professional privilege.

Parliamentary Privilege

[423] All jurisdictions have retained parliamentary privilege and I recommend that the Territory retain that privilege.

¹⁰⁹ *Corruption, Crime and Misconduct Act 2003* (WA).

[424] As previously discussed, in his submission to the Inquiry Mr Michael Tatham, Clerk of the Legislative Assembly, drew attention to tensions that have arisen between the New South Wales ICAC and the privileges of Parliament. He submitted that the Territory legislation should ensure that the boundaries are clearly defined. I agree with that submission.

[425] The first particular area to which Mr Tatham drew attention concerns the execution of search warrants within the precincts of Parliament House and the seizure of material which might be the subject of parliamentary privilege. Mr Tatham pointed out that since 2009 a Memorandum of Understanding has been in place between the presiding officers of the New South Wales Parliament and the ICAC Commissioner concerning the execution of search warrants in the Parliament House offices of Members of the New South Wales Parliament. A similar Memorandum of Understanding is in place between the Australian Parliament and the Australian Federal Police. There is no similar memorandum in place between the Assembly and the Northern Territory Police.

[426] Execution of a search warrant on the Parliamentary Precinct is prohibited without the approval of the Speaker (s8 of the *Legislative Assembly (Powers and Privileges) Act* (NT)). As Mr Tatham noted, in the absence of a suitable Memorandum of Understanding, the Speaker “would be well-advised to uphold the prohibitions in s8”.

[427] I recommend that an appropriate Memorandum of Understanding be put in place between the Police and the Assembly which could, in due course, also apply to the new NT Anti-Corruption Commission.

[428] Mr Tatham also drew attention to the Register of Interests which MLAs are required to complete. He pointed out that pursuant to the *Legislative Assembly (Disclosure of Interests) Act* (NT), it is for the Committee of Interests to determine how the Register is kept and its

availability for inspection. The Clerk has no authority to make copies available to any person and inspection can only occur by way of physical examination in the Office of the Clerk.

[429] Mr Tatham submitted that in the absence of appropriate legislation, it is arguable that an NT Anti-Corruption Commission would not have the power to require production and release of a Member's Register of Interests:

[I]t is submitted that given the existence and administration of the form of the Assembly Member's Register of Interests is a direct result of the proceedings of a committee of the Assembly and that pursuant to s6(3) of the *Powers and Privileges Act* a court or tribunal shall not have evidence tendered or questions asked or statements, submissions or comments made about proceedings of the Assembly for the purposes [of] questioning or relying on the truth, motive, intention or good faith of anything forming part of these proceedings, then it is arguable that the Member's Return cannot be questioned by anybody other than the Assembly itself.

[430] In this context Mr Tatham noted that s6(2) of the *Legislative Assembly (Disclosure of Interests) Act* (NT) provides for the Assembly to sanction a breach by a Member of the requirement to provide an accurate return and a contempt is to be dealt with under the *Legislative Assembly (Powers and Privileges) Act* (NT). Similarly, the *Legislative Assembly (Members' Code of Conduct and Ethical Standards) Act* (NT) provides that a breach of the Code of Conduct is to be punished as a contempt.

[431] Mr Tatham suggested that Parliaments are "generally loathe to restrict their privileges" and that the Assembly is likely to err on the side of caution before significantly eroding any aspect of parliamentary privilege. However, with respect to the Register of Interests, Mr Tatham referred to the tension that had existed in New South Wales which resulted in specific provision being made enabling the NSW

ICAC to make use of the NSW Register of Pecuniary Interests. Section 122 was inserted into the NSW ICAC Act in 2012:

122 Parliament

- (1) Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.
- (2) The Commission may use a relevant register:
 - (a) for the purpose of any investigation into whether or not a member of Parliament publicly disclosed a particular matter or as to the nature of any matter disclosed, and
 - (b) for the purpose of any finding, opinion or recommendation concerning the disclosure or non-disclosure,and for that purpose Parliament is taken to have waived any parliamentary privilege that may apply to the register.
- (3) Subsection (2) extends to investigations instigated, and relevant registers obtained for use, before the commencement of that subsection.
- (4) In this section, **relevant register** means a register of pecuniary interests or other matters required to be compiled and maintained pursuant to the regulations made under section 14A of the *Constitution Act 1902*, and includes:
 - (a) a copy of any such register (or of a part of any such register) that is published as a parliamentary paper or otherwise, and
 - (b) a return or other document furnished by a member of Parliament for the purpose of the compilation and maintenance of the register, or a copy of the whole or any part of any such return or document.

[432] On the assumption that the NT Anti-Corruption Commission is given the power to investigate the conduct of MLAs, and bearing in mind that complaints about the conduct of members often relate to perceived conflicts of interest, the potential relevance of the Register of Interests

is obvious. Speaking generally, registers are available for public inspection. In his submission Mr Tatham noted that waiver of privilege with respect to disclosure of interest documents is “most unlikely to impact upon the freedom of a Member to engage in unfettered speech”.

[433] In these circumstances, in my view there is no cogent reason why the powers of the NT Anti-Corruption Commission should not extend to inspection, copying and use of a Members’ Register of Interests. I recommend the adoption of a provision such as s122 of the New South Wales legislation¹¹⁰.

Public Interest Immunity

[434] I do not recommend any alteration to the law governing public interest immunity.

[435] The fundamental purpose of an anti-corruption body is to serve and advance the public interest. At times, aspects of the public interest come into conflict. Whether a claim for such immunity should be upheld or rejected requires that competing aspects of the public interest be weighed against each other. If the aspect of public interest that favours production or disclosure to the Commission is outweighed by that aspect which supports non-production or non-disclosure, it follows that the public interest is best served by non-production or non-disclosure. Legislation should not interfere with this process.

Determination of Privilege Questions

[436] If a person claims privilege from answering or producing a document or providing information on the grounds of legal professional privilege, parliamentary privilege or public interest immunity, and the NT Anti-Corruption Commissioner rejects the claim, in my view the

¹¹⁰ *Independent Commission Against Corruption Act 1988* (NSW).

claimant should be able to apply to the Supreme Court for a determination of the issue (TAS s92¹¹¹, and VIC s100¹¹²). Whether it is expressed as an appeal or an application matters not. I recommend that subject to appropriate time limits, the person concerned should be able to seek a determination by the Supreme Court.

Sanctions

[437] As in all jurisdictions, the NT Commission legislation should contain appropriate provisions dealing with sanctions for non-compliance with directions of the Commission and for obstructing the Commission.

Derivative Use of Evidence

[438] In the context of the earlier discussion concerning limitations on the use in subsequent court proceedings of evidence obtained in a hearing in the face of a claim that the evidence might tend to incriminate the witness, it is appropriate to discuss the next step which involves the potential use of evidence gained as a result of information obtained compulsorily in the face of a self-incrimination claim. This is different from using the evidence of the witness in court proceedings and is often referred to as the “derivative use” of evidence. For example, should investigators be permitted to follow useful lines of inquiry provided in answers compulsorily given in the face of a self-incrimination claim? Further, if investigators are permitted to follow such useful lines of inquiry, if those lines turn up evidence adverse to the witness, should such evidence be admissible in court proceedings? Or should it be inadmissible because, in substance, it was obtained by over-ruling a claim of privilege against self-incrimination?

[439] In my view there is no doubt that in pursuing the investigation that gave rise to the examination of the witness, investigators should be

¹¹¹ *Integrity Commission Act 2009* (Tas).

¹¹² *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

able to follow useful lines of inquiry which emerge from information compulsorily obtained in these circumstances. Further, for the purposes of the particular investigation, the NT Anti-Corruption Commission should be entitled to use evidence which is obtained by following those useful lines of inquiry. If these steps are prohibited, potentially much of the work of the Commission will be wasted.

[440] Taking a step removed from the purposes of the particular Commission investigation, however, what if the information compulsorily obtained leads to useful lines of inquiry which provide evidence of other offences? If they are “incidental” offences relating to the matter under investigation by the Commission, there would not appear to be any reason why the Commission should not be entitled to use such evidence for its purposes. However, what if unrelated offences are disclosed? Should other law enforcement authorities be able to use such evidence in pursuing investigations into the unrelated offences?

[441] Where to draw the line is a difficult question of policy. My concern is with the activities of the NT Anti-Corruption Commission and it is not appropriate that I embark on a question of this policy which is removed from the role of the Commission.

[442] I return to the question of use of compulsorily-obtained evidence in subsequent court proceedings. As previously discussed, the primary position taken by Legislatures is that when privilege against self-incrimination is overruled or abrogated, information disclosed in evidence given under compulsion in those circumstances is, ordinarily, not admissible in evidence in any civil, criminal or disciplinary proceedings against the witness. Common exceptions are proceedings for an offence against the anti-corruption legislation or civil proceedings in which a remedy is sought for an act of reprisal arising out of events that occurred in connection with the Anti-Corruption Commission. However, what of evidence obtained indirectly from the

compulsory evidence because that evidence opened up useful lines of inquiry which, in turn, disclosed evidence adverse to the witness. Should this evidence emanating from the useful lines of inquiry be admissible in subsequent proceedings against the witness?

[443] Although it is not entirely clear, it appears that in South Australia the combination of s56A of the ICAC Act and s8 of Schedule 2 might have the effect of abrogating the immunity against this derivative use such that material emanating from the useful lines of inquiry might be admissible in subsequent criminal proceedings. The Commonwealth *Law Enforcement Integrity Commissioner Act 2006* (Cth) specifically provides that such derivative material is admissible in criminal proceedings under Commonwealth law.¹¹³

[444] As I have said, in my view if useful lines of inquiry emerge in a compulsory examination and evidence is obtained by following those useful lines of inquiry, such evidence should be available for use by the NT Anti-Corruption Commission in performing its functions under the NT Commission legislation. However, it is a question of policy whether such evidence should be admissible in criminal proceedings that arise out of the Commission investigation. If a primary purpose of the Commission is to secure evidence for criminal prosecutions, it would appear to blunt that purpose if such evidence could not be used in subsequent criminal proceedings. On the other hand, if the obtaining of evidence for criminal prosecutions is regarded as a secondary purpose, as in New South Wales, a different view might be taken. Ultimately this is a matter of policy for the Legislature upon which it is inappropriate for me to comment further.

¹¹³ Part 9, Division 2, subdivision EAA of the *Law Enforcement Integrity Commissioner Act 2006* (Cth) was inserted by way of the *Law Enforcement Legislation Amendment (Powers) Act 2015* (Cth), in order to counter the decisions of *Lee v the New South Wales Crime Commission* [2013] HCA 39, *Lee v the Queen* [2014] HCA 20 and *X7 v Australian Crime Commission* [2013] HCA 29 and decision of the NSW CCA in *R v Seller and McCarthy* [2013] NSW CCA 42.

[445] In summary, therefore, information compulsorily obtained, or subsequently discovered as a consequence of such information, should be available for use by the NT Anti-Corruption Commission in performing its functions. As to use in criminal or other proceedings, this is a question of policy to be resolved by the Assembly.

Other Powers

[446] Previously I recommended that when investigating corrupt conduct the new NT Anti-Corruption Commission should possess the wide coercive powers of the type commonly possessed by such bodies in other Australian jurisdictions including:

- Entry, search and seizure powers without warrant with respect to public premises or premises used by public persons or entities other than residential premises;
- Power to require productions of statements, documents or other things;
- Power to obtain search warrants in respect of private or residential premises or motor vehicles or ships or other forms of conveyance;
- Power to seek warrants under surveillance and telecommunications legislation;
- Power to seek authorisation to conduct unlawful activities and assume false identities (with appropriate immunities in place – eg WA Part 6, Division 4¹¹⁴);
- Power to require attendance at a hearing and the giving of evidence under oath or affirmation; and

¹¹⁴ *Corruption, Crime and Misconduct Act 2003* (WA).

- Power to second staff from other agencies or to employ investigators or to delegate powers.

[447] I have also recommended the inclusion of safeguards to ensure search warrant powers can only be exercised in appropriate circumstances and that the power to issue warrants should be reserved to a judicial officer, including a Judge of the Local Court¹¹⁵. I noted that the capacity to seek warrants under the telecommunications legislation would require appropriate amendments to that legislation and that it would be necessary for the NT Commission legislation to satisfy the pre-conditions specified in the Commonwealth legislation.

[448] I have recommended that the NT Commissioner possess a broad discretion to accept or reject complaints or reports, to start an investigation and cease the investigation either by dismissing it or by referring it to the appropriate agency for a continuation of the investigation. In that context, in my view the Commissioner should possess the power to take over any investigation being undertaken by an agency and to require an agency which has completed an investigation to report to the Commissioner concerning the conduct of the investigation and the result. The Commissioner should be able to direct the agency to undertake further investigations. As part of this overall supervision and control the Commissioner should possess the power to give guidance and make recommendations to agencies.

[449] In the context of these broad powers, consideration needs to be given to whether the NT Anti-Corruption Commissioner should possess the power to commence or continue an investigation notwithstanding the existence of other proceedings, including a criminal prosecution. In NSW s18 provides for this situation by directing that if the other proceedings are for an indictable offence the NSW Commission must

¹¹⁵ From 1 May 2016, the title of 'Magistrate' in the Northern Territory was replaced with 'Judge of the Local Court'.

ensure that the person's right to a fair trial is not prejudiced¹¹⁶. Similar provisions have been enacted in Queensland¹¹⁷ and Victoria¹¹⁸. In my view similar provisions should be included in the NT legislation.

[450] It must be recognised that the use of coercive powers by an anti-corruption body while criminal proceedings are current possesses the potential to cause significant prejudice to the person under investigation and trial, particularly if both sets of proceedings involve the same subject matter. However, if provisions are put in place such as those enacted in New South Wales, Queensland and Victoria, the risk of the potential coming to fruition in practice would be minimised. In making that observation, I have borne in mind the limits of the derivative use of evidence discussed earlier in this Report.

[451] Against the background of the broad powers to which I have referred, in my view the NT Commissioner should not be bound by the rules of evidence (NSW s17(1)¹¹⁹) and I recommend that the Commissioner possess the following powers:

- To require a public sector agency to refrain from taking action relating to a particular matter under investigation or to conduct a joint investigation with the Commissioner (SA s34¹²⁰ and WA s42¹²¹);
- To exercise the powers of a public sector agency (SA s36A¹²²);
- To commence or continue an investigation notwithstanding the existence of other investigations or proceedings (NSW s18¹²³, QLD s331¹²⁴ and VIC s70¹²⁵);

¹¹⁶ *Independent Commission Against Corruption Act 1988* (NSW).

¹¹⁷ Section 331(2), *Crime and Corruption Act 2001* (Qld).

¹¹⁸ Section 70(2), *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

¹¹⁹ *Independent Commission Against Corruption Act 1988* (NSW).

¹²⁰ *Independent Commissioner Against Corruption Act 2012* (SA).

¹²¹ *Corruption, Crime and Misconduct Act 2003* (WA).

¹²² *Independent Commissioner Against Corruption Act 2012* (SA).

- In referring a matter to a public sector agency, to give directions and guidance with respect to the conduct of the matter (SA ss37 and 38 and WA s41¹²⁶);
- To evaluate the practices, policies and procedures of a public sector agency and to report to the Assembly with recommendations (SA ss40-42);
- To request or recommend that a person be granted indemnity from prosecution (NSW s49);
- To issue seizure and retention orders (SA ss31 and 32);
- To apply to the Supreme Court for injunctions to restrain certain conduct (NSW s27, QLD s344, SA s35 and TAS s99);
- To apply to the Supreme Court for an order that a person's passport be delivered to the Commissioner (SA Schedule 2, s18);
- To request the Auditor-General to conduct an examination of accounts (SA s39);
- To apply to dispose of seized property (NSW s48B);¹²⁷
- To enlist the services of Police personnel to assist in the conduct of investigations and the provision of security for the Commissioner, Commission investigators and staff and witnesses in circumstances where the Commissioner believes on reasonable grounds that such assistance and protection is necessary; and
- To convey information to the DPP, Police or other relevant law enforcement agency concerning proceeds of crime discovered in

¹²³ *Independent Commission Against Corruption Act 1988* (NSW).

¹²⁴ *Crime and Corruption Act 2001* (Qld).

¹²⁵ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

¹²⁶ *Corruption, Crime and Misconduct Act 2003* (WA).

¹²⁷ Note SA Regulations 8-16, *Independent Commissioner Against Corruption Regulations 2013* (SA).

the course of an investigation, regardless of whether the information concerning the proceeds of crime was directly or indirectly relevant to the investigation. The Police submission suggested that consideration should be given to conferring forfeiture powers on the Commissioner, but in my view it is not appropriate to confer forfeiture powers upon an investigative agency such as the ICAC.

Power to Prosecute

[452] The power to institute and conduct prosecutions is normally reserved for the Police in summary matters and the DPP in more serious matters. In Western Australia the Commission may appoint an officer as an “authorised officer” and s184(3c)¹²⁸ provides that an authorised officer may perform all the functions that a Police Officer may perform. This includes less serious prosecutions.

[453] In New South Wales concern was expressed about the delay between findings made by the ICAC and the institution of prosecutions by the DPP. A Memorandum of Understanding existed between the DPP and the ICAC which provided that after the DPP gave advice in relation to appropriate charges and whether a prosecution had reasonable prospects of success, the ICAC could lay charges. An attempt to alter that position failed and the ICAC can only institute prosecutions if it has the written agreement of the DPP.

[454] In my opinion, particularly in the early stages of the operation of the NT Anti-Corruption Commission, the power to institute prosecutions should rest with the Police in summary matters and the DPP in more serious matters. My recommendation is intended to include prosecutions for offences under the NT Commission legislation. In this way emphasis is given to the role of the Commission as an investigator

¹²⁸ *Corruption, Crime and Misconduct Act 2003 (WA)*.

and the checks and balances that normally accompany a prosecution are maintained in the hands of the appropriate prosecuting authority.

[455] I recommend that the NT Anti-Corruption Commission should not be given the power to institute any prosecution.

Conflicts of Interest

[456] One of the issues about which concern has been expressed in the submissions centres on the conflicts of interest that inevitably arise in a community of the size of the Territory. In this context it is appropriate to provide legislative direction requiring disclosure of personal interest and for the consequences that follow if the existence of a conflict of interest is established (QLD s267¹²⁹, VIC s39¹³⁰ and WA ss13 and 218¹³¹). Section 39 of the Victorian IBAC Act imposes a duty on an IBAC officer to ensure that any actual or perceived conflicts of interest are avoided.

[457] These are appropriate provisions and I recommend that the substance of the provisions is included in the NT Commission legislation.

Pecuniary Interests

[458] In Queensland, s238¹³² requires a Commissioner to provide to the relevant Minister a written summary of pecuniary interests and personal or political associations at the time of appointment. Substantial changes that occur after appointment must also be provided to the Minister. The Queensland Commission is required to keep a register of a Commissioner's pecuniary interests and personal or political associations.

¹²⁹ *Crime and Corruption Act 2001* (Qld).

¹³⁰ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

¹³¹ *Corruption, Crime and Misconduct Act 2003* (WA).

¹³² *Crime and Corruption Act 2001* (Qld).

[459] In NSW Regulation 10¹³³ made under the ICAC Act requires Commission officers to furnish the Commissioner with a statement of financial interests.

[460] In my view this is an unnecessary and intrusive requirement. The NT Commissioner and Anti-Corruption Commission staff will be under an obligation to avoid any conflict of interest in the same way as other statutory officers and judicial officers who are not required to maintain a register of interest.

[461] I do not recommend requiring the NT Commissioner to disclose pecuniary or other interests.

Findings – Judicial Review

[462] As the Independent Panel pointed out, the ICAC is an administrative body which is subject to the supervisory jurisdiction of the Supreme Court of New South Wales. The Court possesses both an inherent and a statutory jurisdiction “to ensure that the ICAC carries out its functions and performs its duties in accordance with the law” (para 3.4.1). Emphasising that a judicial review by the court exercising its supervisory jurisdiction is not a “merits review” in which the court can address whether the decision was wrong because it was affected by a mistake of fact, the Panel cited the summary of relevant grounds for judicial review given by McDougall J in *Duncan v ICAC* [2014] NSW SC 1018 [35]:

- (1) there is a material error of law on the face of the record (which includes the reasons given for the decision...);
- (2) the reasoning is not objectively reasonable, in the sense that the decision is not one that could have been reached by a reasonable person acquainted with all material facts and having a proper understanding of the statutory function, or was

¹³³ *Independent Commission Against Corruption Regulation 2010* (NSW).

not based on a process of logical reasoning from proven facts or proper inferences therefrom;

(3) there is a finding that is not supported by any evidence whatsoever – that is to say, there is no evidence that could rationally support the impugned finding;

(4) relevant matters have not been taken into account, or irrelevant matters have been taken into account; and

(5) there has been a material denial of natural justice.

[463] In Tasmania a determination of the Integrity Tribunal is reviewable under the *Judicial Review Act 2000* (Tas). Section 332 of the Queensland legislation¹³⁴ enables a person who claims that a Commission investigation into corrupt conduct is being conducted unfairly, or that the complaint or information on which the investigation is being, or is about to be, conducted does not warrant investigation, to apply to the Supreme Court for an order in the nature of a mandatory or restrictive injunction. On that application s334 empowers a Judge to give directions as to the conduct of the investigation or to direct that the investigation not proceed.

[464] In Western Australia special provision is made for the exercise of powers in respect of organised crime. In that context s83¹³⁵ excludes judicial review except with the consent of the Parliamentary Inspector.

[465] In my view it is not appropriate to grant a general right of appeal to any person. Nor is it appropriate to make a general reference to judicial review. As in New South Wales, the NT Anti-Corruption Commission will hold an administrative role which is subject to the supervisory jurisdiction of the Supreme Court of the Northern Territory and judicial review will be available in the same way as it exists in New South Wales.

¹³⁴ *Crime and Corruption Act 2001* (Qld).

¹³⁵ *Corruption, Crime and Misconduct Act 2003* (WA).

Removal of Commissioner from Office

[466] Provision should be made for the circumstances in which the NT Commissioner may be suspended or removed from office. Both Victoria (s26¹³⁶) and Western Australia (s12¹³⁷) make provision for the Governor to suspend the Commissioner and for Parliament to declare by resolution that the Commissioner should be removed from office.

[467] In New South Wales and South Australia the Commissioner may be removed from office by the Governor on the address of both Houses of Parliament (NSW Schedule 1, s6(3)¹³⁸ and SA s8(9)¹³⁹). In South Australia the Governor may suspend the Commissioner from office for contravention of a condition of appointment for misconduct or failure or incapacity to carry out official duties satisfactorily or failure to provide information to the Attorney-General as required under s49 (s8(10)). If the Governor suspends the Commissioner (or Deputy Commissioner) from office, a full statement of the reason for suspension must be laid before both Houses of Parliament and provisions follow governing the consequences depending upon the response of the Houses of Parliament. Section 8(14) also deals with the Office of Commissioner becoming vacant in nominated circumstances which include conviction of offences or being sentenced to imprisonment.

[468] I recommend that similar provision be made in the Territory for suspension by the Administrator, removal from office by the Administrator and vacancy of office in terms such as those found in s8 of the South Australian ICAC Act.

[469] In the context of misconduct, provision should also be made for the NT Commissioner to discipline or dismiss staff in appropriate

¹³⁶ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

¹³⁷ *Corruption, Crime and Misconduct Act 2003* (WA).

¹³⁸ *Independent Commission Against Corruption Act 1988* (NSW).

¹³⁹ *Independent Commissioner Against Corruption Act 2012* (SA).

circumstances. The NT Commissioner should also possess power to investigate complaints against NT Commission staff and those retained to provide services to the Commission.

Commissioner for Standards/Ethics and Integrity Adviser

[470] I have recommended that the powers of the NT Commissioner extend to investigating complaints about the conduct of MLAs, including the Speaker and Ministers, and that the Commissioner should be able to refer less-serious matters to the Speaker for investigation and report. I have also recommended that the Commissioner possess the same powers of supervision and control with respect to investigations referred to the Speaker as the Commissioner should possess with respect to matters referred to Heads of Public Sector Agencies for investigation and report.

[471] In respect of Members of the Legislative Assembly, there is an alternative to be considered in connection with less-serious matters which the NT Commissioner determines should not be investigated by the Commissioner. This potential alternative arises from the submission of Mr Tatham, the Clerk of the Legislative Assembly.

[472] As I discussed earlier in this Report, in his submission Mr Tatham drew attention to the position in the ACT of Commissioner for Standards which he described as providing an alternative to an ICAC to “fill the gap on matters which are important and serious to be addressed but do not require the so-called ‘nuclear option’ of an ICAC Inquiry”.¹⁴⁰ Mr Tatham submitted that such a position is, arguably, an effective low-cost option suitable for a small jurisdiction such as the Territory. The submission continued:

¹⁴⁰ Mr Tatham noted that the ACT also has an Ethics and Integrity Adviser who is a different person with a different role. In 2014 the Commissioner conducting the Inquiry into Stella Maris recommended that the Commissioner for Public Interest Disclosures be appointed as an Integrity Commissioner for the Northern Territory to provide advice to MLAs in a role similar to the role of Integrity Commissioners in other jurisdictions.

The experience in the ACT is for a retired judge who is incidentally, but perhaps fortuitously, domiciled outside the jurisdiction, engaged on a retainer of approximately \$15 000 per annum to provide ad-hoc advice and be remunerated at a negotiated rate for longer periods of inquiry and advice.

[473] The ACT Commissioner for Standards was first appointed by the Speaker pursuant to a resolution of the ACT Assembly dated 31 October 2013. The principal features of the resolution are as follows:

- The function of the Commissioner is to investigate specific matters referred to the Commissioner by the Speaker in relation to complaints against Members or by the Deputy Speaker in relation to complaints against the Speaker.
- Following investigation, the Commissioner is to report to the Standing Committee on administration and procedure.
- Members of the public, the ACT public service and the Assembly may make a complaint to the Speaker about a Member's compliance with the Members' Code of Conduct or the rules relating to the Registration or Declaration of Interests.
- If the Speaker receives a complaint and believes on reasonable grounds that there is "sufficient evidence as to justify investigating the matter" and that the complaint is not frivolous, vexatious or only for political advantage, the Speaker "may" refer the complaint to the Commissioner for investigation and report. The same provisions apply to complaints received by the Deputy Speaker about the Speaker.
- The Commissioner is directed not to make a report to the Committee if the Member or the Speaker about whom the complaint was made has agreed that there was a failure to register or declare an interest, and if, in the Commissioner's

opinion, the interest involved is “minor or the failure was inadvertent” and the Member concerned “has taken such action to rectify the failure as the Commissioner may have required within any procedure approved by the Committee for this purpose”.

[474] A couple of points should be noted. First, the resolution relates only to complaints about a Member’s “compliance with the Members’ Code of Conduct or the rules relating to the Registration or Declaration of Interests”. Secondly, following receipt of a complaint, the Speaker (or Deputy Speaker), is not obliged to refer the matter to the Commissioner for investigation and report.

[475] In the context of conferring a discretion on the Speaker whether to refer a matter to the Commissioner for Standards, I note that under the current provisions of the *Public Interest Disclosure Act*, disclosures concerning Members of the Legislative Assembly “must” be made to the Speaker who possesses a discretion under s12 as to whether the disclosure will be referred to the CPID for investigation. I do not know how many complaints have been made to the Speaker since the *Public Interest Disclosure Act* came into force on 31 July 2009, but there has not been a referral to the CPID in the ensuing period of almost seven years. It is not difficult to imagine that the public would view with scepticism a system in which complaints about the conduct of Members of the Legislative Assembly could only be investigated with the approval of the Speaker.

[476] I have recommended that the NT Anti-Corruption Commission possess the power to investigate complaints about the conduct of MLAs and that, in respect of less serious matters, the Commission be able to refer a matter to the Speaker for investigation. There is much to be said for the creation of a Commissioner for Standards to whom the NT Anti-Corruption Commission could refer matters for investigation rather than the Speaker. In this system the appearance of independence

is preserved because the Speaker would not have any say in whether a matter was investigated by the Commissioner for Standards. The matter having been referred to the Commissioner for Standards by the NT Anti-Corruption Commission, the Commissioner for Standards would be required to carry out the investigation and to report to the NT Anti-Corruption Commission (and the Speaker) as to the result of the investigation and any action taken. If this system was introduced, it would also remove the restriction that exists in the ACT that complaints must relate to the Member's compliance with the Members' Code of Conduct or the rules relating to the Registration or Declaration of Interests.

[477] If the Assembly determines not to create the position of Commissioner for Standards, my recommendation would stand that the NT Anti-Corruption Commission be empowered to investigate relevant conduct of an MLA and that, in less serious matters, the Commission be able to refer the matter to the Speaker for investigation. However, in this event, I recommend that the Speaker be under an obligation to carry out the investigation and to report to the Commission providing details of the investigation and the result. This would include reporting as to what, if any, action was taken following completion of the investigation. In this situation, as with matters referred to public sector agencies by the Commission, I recommend that the powers of the Commission to reclaim a matter and investigate or to require further investigation apply. In this way the public can be assured that MLAs do not receive any special treatment or protection from investigation and the appearance of independence from political and personal influences is maintained with respect to matters involving MLAs.

Other Legislative Changes

[478] In order to facilitate the creation and function of the new NT Anti-Corruption Commission, it is anticipated that a number of Territory Acts will require amendment. I have not endeavoured to identify all the Acts, but they will include the following :

- *Audit Act*;
- *Australian Crime Commission (Northern Territory) Act*;
- *Criminal Code*;
- *Criminal Property Forfeiture Act*;
- *Information Act*;
- *Ombudsman Act*;
- *Police (Special Investigative and Other Powers) Act*;
- *Public Interest Disclosure Act* (repeal);
- *Surveillance Devices Act*;
- *Telecommunications (Interception) Northern Territory Act*¹⁴¹;
and
- *Witness Protection (Northern Territory) Act*.

¹⁴¹ Amendment is also likely to be required to the Commonwealth *Telecommunications (Interception and Access) Act 1979*.



Indicative Costs

[479] The resolution of the Assembly and the terms of my appointment require that my Report include “indicative costs of establishing the various models put forward”. This is an extraordinarily difficult task.

[480] As set out in the table at para [111], the expenditure by the Commissions in New South Wales, Queensland, Victoria and Western Australia in the 2014-15 financial year ranged from in excess of \$25m in New South Wales to a little over \$54.5m in Queensland. Expenditure for that period in South Australia was \$8.279m and in Tasmania \$2.544m. The combined offices of the SA Commissioner and Office for Public Integrity employ approximately 40 staff compared with a little over 14 staff employed by the Integrity Commission in Tasmania. As mentioned, there is a well-publicised view that the funding for the Tasmanian Integrity Commission is significantly inadequate.

[481] In endeavouring to provide indicative costs, I communicated with the Chief Finance Officer of Corporate and Strategic Services in the Department of the Attorney-General and Justice. I am very grateful for her assistance.

[482] As I have said, regardless of whether the NT Commissioner is employed on a full-time or part-time basis, the model I propose involves absorbing into the NT Anti-Corruption Commission the Office of Public Interest Disclosures, minus the Freedom of Information and Privacy functions. In other words, the Office of Public Interest Disclosures will no longer exist and will be replaced by the Office for Public Integrity.

[483] I have been advised that the Office of Public Interest Disclosures is currently underfunded and understaffed. Approximately two full-time officers are engaged on Freedom of Information and Privacy matters and the lack of staffing in this regard has resulted in delays in resolving these matters. However, for present financial estimates

purposes, I will assume that two full-time officers would be transferred to the Office of the Ombudsman which, in this model, would take over Freedom of Information and Privacy matters.

[484] The current operational budget of the Public Interest Disclosures Commission, minus the two positions to be transferred to the Ombudsman, is approximately \$790 000. Assuming the Commissioner and remaining staff are taken into the new Office for Public Integrity, this amount of \$790 000 is absorbed into the budget of the NT Anti-Corruption Commission and is not an additional cost to the Northern Territory in establishing the Commission.

[485] For the purposes of these calculations, the personnel that are removed from the Public Interest Disclosures Commission to the Office for Public Integrity are as follows:

- Commissioner for Public Interest Disclosures = ECO2
- Chief Investigation Officer = SAO1
- Senior Investigations Officers (x2) = AO7
- Business Manager/Investigation Officer = AO6

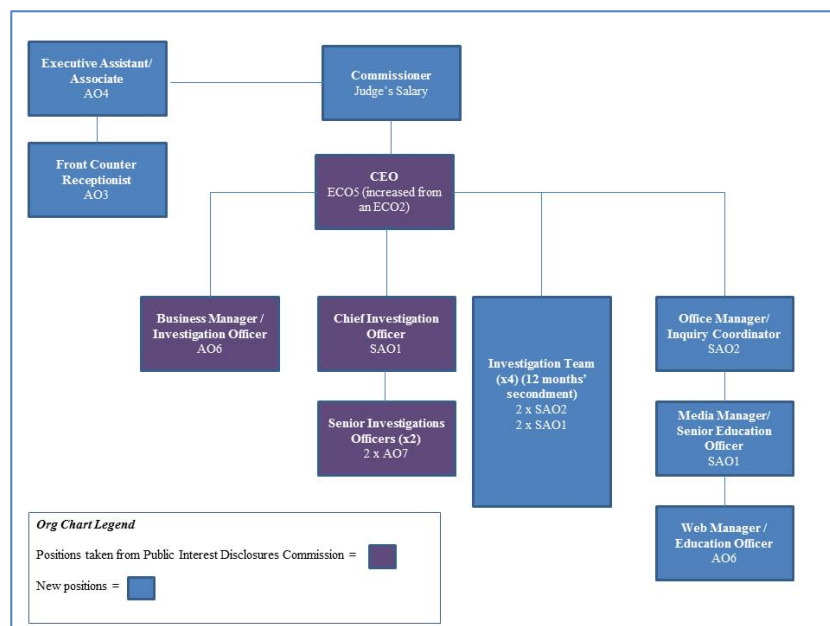
[486] From this point in the process of estimation, life for the estimator becomes a complex exercise of guesswork. As I have said, it is impossible to predict with any confidence the volume of work that the new NT Anti-Corruption Commission will attract in the initial stages of its operation. However, for present purposes I will assume the absorption of the Public Interest Disclosures Commission staff I have mentioned and the employment of the following additional staff:

- Commissioner = Judge's salary
- Executive Assistant/Associate = AO4

- Media Manager/Senior Education Officer = SAO1
- Office Manager/Inquiry Coordinator = SAO2
- Investigation Team (x4) (12 months' secondment) = 2 x SAO2 and 2 x SAO1
- Web Manager/Education Officer = AO6
- Front Counter Receptionist = AO3

[487] On the basis of this assumption, including the Commissioner, a total of 15 persons would be employed. Obviously, the level and role of various persons is not likely to remain identical to the positions postulated in this exercise, but in my view a total of 15 is likely to be the minimum number required to cope with the demand reasonably efficiently and effectively. These observations are particularly pertinent to the initial stages of the NT Anti-Corruption Commission's operations. If any investigations of size or complexity arise, the number of persons employed and retained is likely to rise above the core of 15.

[488] If the CPID is absorbed into the new NT Anti-Corruption Commission, the table below illustrates a possible structure for the Commission.



- [489] Allowing for operational, property management and fit-out/refurbishment costs, the total budget for this group is approximately \$2.4m. In arriving at that figure a number of assumptions have been made which include salaries at the top range for each position without taking into account a 3% pay increase from August 2016. Operational budget assumptions do not include consultant/legal and expert assistance sought for investigations. Property management assumptions do not include setting up the new NT Anti-Corruption Commission, in its entirety, in premises independent from other entities and no allowance has been made for the establishment of a hearing room. The cost of establishing a hearing room could range from approximately \$50 000 to \$250 000 for a hearing room fit-out similar to the standard applied to the Supreme Court. At whatever cost a hearing room is constructed, it is essential that it be self-contained in NT Commission premises with recording and transcription facilities confidential to the NT Commission.
- [490] Bearing in mind these qualifications, the combined figure for the two sets of personnel is somewhere between \$3m and \$3.5m, but this cost would easily escalate to over \$4m if, as I strongly recommend, the NT Anti-Corruption Commission is set up in its own independent premises.
- [491] In addition, if true independence is to exist and appear to exist, the building security should be fixed at a level of a protective agency and this would increase the property costs significantly. Further, although in Tasmania the Commission has a service level agreement with the Department of Justice which provides a range of services including payroll, accounts, HR and IT, other Commissions regard the establishment of independent and secure financial and IT systems as of critical importance. Setting up an independent network would also add to the costs by at least \$1m.

[492] On the basis of employment of a full-time NT Commissioner, therefore, and on the assumption that the Commission is set up in entirely independent and properly secure premises and it possesses its own stand-alone IT network, the initial establishment and operational costs will exceed \$5m. That figure would be reduced by approximately \$529 000 if Mr Lander was employed on a part-time basis but, in that circumstance, the recompense to the South Australian Government would have to be added in.

[493] What then, is the net additional cost to the Territory? For present purposes, the cost of operating the CPID can be treated as approximately \$790 000. This figure must be deducted from the budget estimate to arrive at a net additional cost to the Territory of establishing an Anti-Corruption Commission.

[494] Ultimately, if my recommendations are adopted, the initial budget is likely to exceed \$5m. The ongoing costs after the initial period of operation are a matter of speculation, but it appears highly probable that the workload of the NT Commissioner will not continue at the level anticipated to exist immediately following the commencement of operations.



Conclusion

Conclusion

[495] In this Report I have endeavoured to canvass the principal issues that arise in relation to the establishment of a NT Anti-Corruption Commission. Although a number of details are discussed, necessarily there are numerous operational provisions which will be required and to which I have not referred.

[496] In the framing of legislation careful attention will be required to details which I have not endeavoured to cover. Guidance in this regard can be obtained from legislation in other jurisdictions, particularly in New South Wales and South Australia.



Annexures

(1 – 15)

Annexure 1 – Extract from Hansard, 26 August 2015

Debates – 12th Assembly, 1st Session - 25/08/2015 - Parliamentary Record No: 22

Topic:	MOTION
Subject:	Operation of an Anti-Corruption, Integrity and Misconduct Commission - by leave
Date:	26/08/2015
Member:	Mr WOOD
Other Speakers:	Mr GUNNER; Mr CHANDLER; Mr HIGGINS
Status:	Nelson

Madam Speaker, I move that this Assembly:

1. supports the establishment of an anti-corruption, integrity and misconduct commission
2. that this parliament resolves, pursuant to section 4A of the *Inquiries Act*, to appoint a person qualified to be a judge in the Supreme Court of the Northern Territory to inquire into and report to the Administrator on the following matter: the establishment of an independent anti-corruption body in the Northern Territory, including but not limited to the following considerations:
 - (a) the principles and provisions of ICAC and like legislation in other Australian jurisdictions and their applicability to the Northern Territory
 - (b) the appropriate powers such a body should have, including but not limited to:
 1. the power to investigate allegations of corruption, including against ministers, members of the Legislative Assembly and other public officials
 2. the power to conduct investigations and inquiries into corrupt activities and system-wide anti-corruption reforms as it sees fit
 3. the appropriate trigger for an NT ICAC's jurisdiction and the relationship between this body and other Northern Territory bodies such as the Ombudsman
 4. models from any other jurisdictions
 5. the use of existing NT legislation or NT statutory authorities
 6. the report will include indicative costs of establishing the various models they put forward
3. that the qualified person referred to above be selected for recommendation to the Administrator of the Northern Territory based on the process outlined for the appointment of a Supreme Court judge in Appendix A of the *Review of the Processes for the appointment of Judicial Officers in the Northern Territory*, with the exception that the panel outlined in the process recommends one instead of two for consideration
4. notes that the qualified person appointed will consult with relevant stakeholders including, but not limited to, the NT Police, the NT Law Society and the Criminal Lawyers Association
5. the qualified person appointed provide advice and report back to the parliament in a timely manner

Annexure 2 – Instrument of Appointment

Inquiries Act

APPOINTMENT OF COMMISSIONER

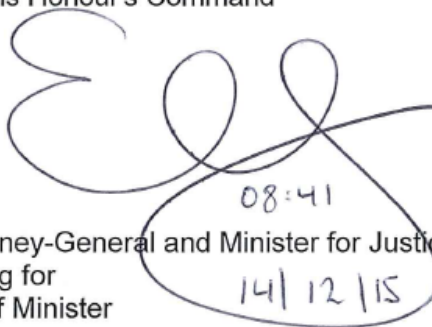
I, John Laurence Hardy, Administrator of the Northern Territory of Australia, acting with the advice of the Executive Council, under section 4A of the *Inquiries Act*, appoint Brian Ross Martin to inquire into and report to me on the matters relating to the Territory and mentioned in the Schedule.

Dated 14 December 2015



Administrator

By His Honour's Command



08:41
14/12/15

Attorney-General and Minister for Justice
acting for
Chief Minister

Annexure 2 – Instrument of Appointment

SCHEDULE

- 1 The establishment of an independent anti-corruption body in the Northern Territory, including but not limited to the following considerations:
 - (a) the principles and provisions of Independent Commission Against Corruption (ICAC) and like legislation in other Australian jurisdictions and their applicability to the Northern Territory; and
 - (b) the appropriate powers such a body should have, including but not limited to:
 - (i) the power to investigate allegations of corruption, including against Ministers, Members of the Legislative Assembly and other public officials; and
 - (ii) the power to conduct investigations and inquiries into corrupt activities and system-wide anti-corruption reforms as it sees fit; and
 - (iii) the appropriate trigger for an NT ICAC's jurisdiction and the relationship between this body and other NT bodies such as the Ombudsman; and
 - (iv) models from any other jurisdictions; and
 - (v) the use of existing NT legislation or NT statutory authorities.
- 2 The report is to include indicative costs of establishing the various models put forward.
- 3 The Commissioner is to consult with relevant stakeholders including but not limited to the Police Force of the Northern Territory, the Law Society Northern Territory and the Criminal Lawyers Association of the Northern Territory.
- 4 The Commissioner is to provide advice and report back to the Administrator in a timely manner.

not
NA.

Submissions Invited

Letters were sent to the following persons and bodies inviting them to make submissions to the Inquiry:

- Aboriginal Legal Aid
- Attorney-General and Minister for Justice
- Chief Minister, NT Government
- Criminal Lawyers Association
- Darwin Press Club
- Department of the Attorney-General & Justice
- Director of Public Prosecutions
- Electoral Commissioner
- Information Commissioner
- Leader of the Opposition
- Legal Aid Commission, Northern Territory
- Local Government Association of the Northern Territory
- North Australian Aboriginal Justice Agency
- Northern Territory Bar Association
- NT Law Society
- Dr John Lowndes, Chief Judge of the Northern Territory Local Court
- Northern Territory Police, Fire & Emergency Services
- Member for Araluen
- Member for Arnhem
- Member for Goyder
- Member for Karama
- Member for Namatjira
- Member for Nelson
- Office of the Commissioner for Public Employment

Annexure 3 – Submissions Invited

- Ombudsman for the NT
- Public Interest Disclosure Commissioner (NT)
- Solicitor-General
- The Hon Trevor Riley QC, Chief Justice of the Supreme Court of the Northern Territory
- Victims of Crime NT

Submissions Received*

- East Arnhem Regional Council
- Ms Jane Aagaard
- Mr Scott Beaton
- Ms Susan Cox QC (on behalf of the Northern Territory Legal Aid Commission)
- Mr Russell Goldflam (on behalf of the Criminal Lawyers Association of the Northern Territory)
- Mr Michael Gunner MLA (on behalf of Territory Labor)
- Dr Bentley James
- NT Police Commissioner Reece Kershaw APM (on behalf the NT Police, Fire and Emergency Services)
- Ms Robyn Lambley MLA (Member for Araluen)
- Mr John Lawrence SC
- Ms Megan Lawton (on behalf of the Law Society NT)
- Mr Iain Loganathan (on behalf of the Northern Territory Electoral Commission)
- Mr Ben O’Loughlin (on behalf of the Northern Territory Bar Association)
- NT Extended Integrity Group (on behalf of the Ombudsman NT, Auditor-General, Commissioner of Police, Commissioner for Public Employment, and Information Commissioner and Commissioner for Public Interest Disclosures)
- Mr Allan Piper
- Ms Kezia Purick MLA (Member for Goyder)
- Mr Peter Strachan
- Mr Tony Tapsell (on behalf of the Local Government Association of the Northern Territory)
- Mr Turner
- Mr Michael Tatham, Clerk, Legislative Assembly of the Northern Territory

*Please note that one submission has not been included on this list as the author requested confidentiality.

East Arnhem Regional Council Submission to the
Northern Territory Anti-Corruption Integrity and
Misconduct Commission Inquiry
into the
Establishment of an Independent Anti-Corruption
Body in the Northern Territory
February 2016

The East Arnhem Regional Council (EARC) welcomes the opportunity to make a submission to the Northern Territory Anti-Corruption Integrity and Misconduct Commission Inquiry on the establishment of an independent anti-corruption body in the Northern Territory (NT). The EARC Local Government Area (LGA) represents some of the most remote, isolated and disadvantaged communities in Australia. The EARC submission will focus on the considerations as identified by the Commission and how they may impact on EARC:-

- a. **The principles and provisions of Independent Commission Against Corruption (ICAC) and like legislation in other Australian jurisdictions and their applicability to the Northern Territory; and**
- b. **The appropriate powers such a body should have, including but not limited to:**
 - i. **The power to investigate allegations of corruption, including against Ministers, Members of the Legislative Assembly and other public officials; and**
 - ii. **The power to conduct investigations and inquiries into corrupt activities and system-wide anti-corruption reforms as it sees fit; and**
 - iii. **The appropriate trigger for an NT ICAC's jurisdiction and the relationship between this body and other NT bodies such as the Ombudsman; and**
 - iv. **Models from any other jurisdictions; and**
 - v. **The use of existing NT legislation or NT statutory authorities.**

EARC is willing to take part in any open or closed inquiry hearings and can provide actual case studies relating to the recommendations appearing at the end of this submission.

East Arnhem Regional Council LGA snapshot

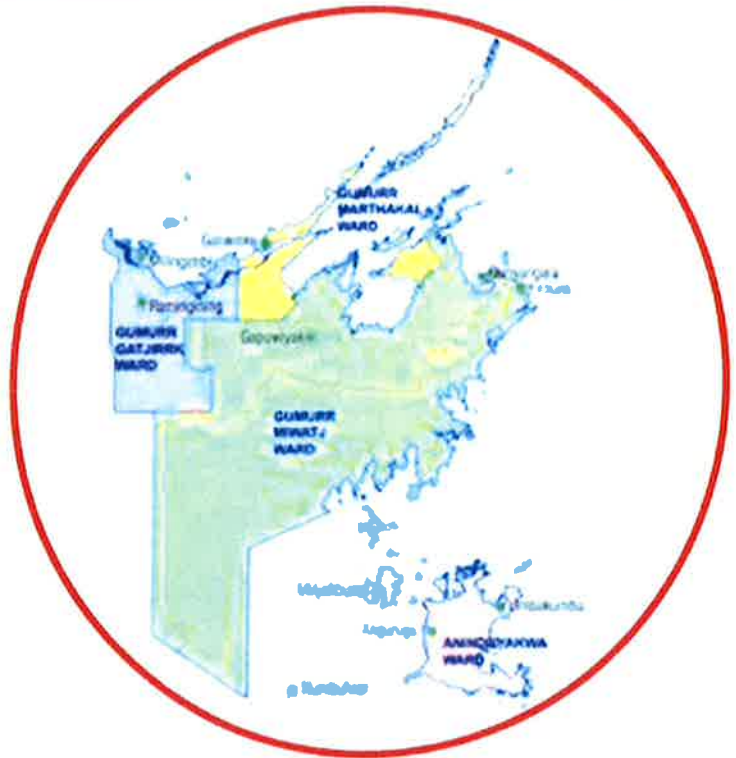
Area: 33,295 km² Population 10,000 Climate – tropical
Length of roads – 1,238km Expenditure - \$46M Number of staff – 316
Average Weekly Individual Income of residents \$268

There are nine (9) communities Angurugu, Galiwin'ku, Gapuwiyak, Gunyangara, Milingimbi, Milyakburra, Ramingining, Umbakumba and Yirrkala with EARC Headquarters (HQ) located in the mining town of Nhulunbuy and an office in Darwin. Five of the nine communities are located on islands exacerbating the remoteness and service delivery. It should be noted that figures quoted are from the Australian Bureau of Statistics (ABS) based on the 2011 census. Anecdotally it is accepted, due to the mobility of residents and data collection issues, that the population exceeds the ABS figures and reported figures range between 12,000 and 14,000.

The population reflects an average 91.2% indigenous population (87% when mining towns outside of the LGA are included) and contains 7/20 Northern Territory Growth areas identified by the Northern Territory government and 6/15 Northern Territory Remote Service Delivery (RSD) sites nominated by the Commonwealth Government.



East Arnhem Regional Council Local Government Area



Service Delivery

EARC delivers a range of services which are detailed in the EARC Annual Report 2014/2015 (www.eastarnhem.nt.gov.au) and include, but are not limited, to the following categories:-

Core Services

Those services that the Council is required to deliver to specified communities under the Local Government Act 2008.

- Cemetery Management
- Administration of Local Authorities, Advisory Boards and Management Committees
- Administration of Local Laws
- Local Emergency Management
- Maintenance and Upgrade of Council Controlled Parks, Reserves and Open Spaces
- Civic Cultural and Sporting Events
- Weed Control and Fire Hazard Reduction
- Library and Cultural Heritage
- Lighting for Public Safety including Street Lighting
- Companion Animal Welfare and Control
- Local Road Upgrade and Construction
- Local Road Maintenance

- Waste Management (including litter reduction)
- Traffic Management on Local Roads
- Training and Employment of Local People in Council Operations

Support Services

Those services that support the operations of the above service groups.

- Fleet and Plant Management
- Community Management
- Maintenance and Upgrade of Council Controlled Buildings, Facilities and Fixed Assets
- Information Technology and Communications
- Advocacy and Representation on Local and Regional Issues
- Financial Management
- Governance
- Public and Corporate Relations
- Customer Relationship Management

Agency Services

Those services that the Council has agreed to deliver on behalf of other Government Agencies on a fee for service basis.

- Community Safety
- Aged and Disability Service
- Children and Family Services
- Youth, Sport and Recreation
- Community Media

Commercial Services

Those services that the Council is striving to undertake on a full commercial basis with the intention of using profits from commercial activities to improve services to the community.

- Mechanical Workshops
- Fuel Distribution Services
- Post Office Agency
- Visitor Accommodation
- Local Commercial Opportunities

Distribution of wealth within the LGA

At the time of the 2011 Census, the East Arnhem Regional (at that time Shire) Council was identified as a region of comparative disadvantage, measured by the ABS Socio-Economic Indexes for Areas (SEIFA) which measures people's access to material and social resources, and their ability to participate in society. East Arnhem Shire (sic) scores a 1 Decile (worst) ranking in all four of the indicators - Relative Socio-economic Advantage and Disadvantage,

Relative Socio-economic Disadvantage, Index of Economic Resources and Index of Education and Occupation – and scores:

- 2nd most disadvantaged in the Northern Territory and 8th across the Nation for the Index of Relative Socio-economic Advantage and Disadvantage
- The most disadvantaged in the Northern Territory in the Index of Economic Resources and 2nd most disadvantaged in the Northern Territory in Index of Relative Socio-economic Disadvantage and 6th across the Nation for both these indexes.
- In the Index of Education and Occupation the East Arnhem Shire Council is ranked 3rd most disadvantaged in the Northern Territory and 20th across the Nation.

This geographic ranking is representative of a whole population rather than singular statistics that focus on income/expenditure.¹ This SEIFA ranking reflects local knowledge that identifies EARC populations as:

- many households with low income and few households with high incomes
- low educational attainment across the community with many people with no qualifications, and with low numbers of people in non-professional, non-managerial roles in the community
- a large number of dwellings needing multiple bedrooms to house families/groups in the community
- high levels of unemployment and single parent families receiving benefits

Based on 2010 estimations, only 7% of the resident population of 10,000 (see previous note) earns a wage or salary despite more than 66% of this population being of working age².

While only 1.6% of the resident population is employed in the mining sector, the high income levels of individuals working with these enterprises, and in the government sector, artificially inflates average income and taxation statistics, creating a false view of community wealth.

(Current ABS Estimates of Personal Income for Small Areas, (released Oct 2013) shows average income in the mining towns of Alyangula (Groote Eylandt) to be \$75,484 (growth of 4.8%

¹ ABS downloaded doc 8/01/2015:

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/2033.0.55.0012011?OpenDocument> 2033.0.55.001 lga population distributions

² ABS downloaded doc 8/01/2015:

<http://www.abs.gov.au/AUSSTATS/abs@nrrp.nsf/Latestproducts/LGA71300Economy12007-2011?opendocument&tabname=Summary&prodno=LGA71300&issue=2007-2011> Table 2

³ ABS downloaded doc 8/01/2015:

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6524.0.55.002Main+Features12005-06%20to%202010-11#Anchor11>

from 2005-6) and Nhulunbuy as \$64,839 (growth of 2.4% from 2005-6)³ demonstrating the disparity.) There is a significant FIFO population in these communities that results in very little benefit to the EARC local communities– the bulk of disposable income is not expended within the LGA, meaning that inflated wage /salary figures have a double negative impact on the broader community

Despite this, recent trend research by the Australian Bureau of Statistics (ABS) does not identify either of the mining towns in the EARC area as boom towns⁴ which infers that the two mining lease operators are not planning any significant operational growth in the immediate future.

Employment within the Council area is primarily in local and state/commonwealth government employment (or in government sponsored employment) equating to more than 50% of employed persons. The next most significant employment sectors are retail (6.5%) and construction (5.7%).⁵

Of the balance of the population, another 706 persons earned an income from their own unincorporated business, investment, superannuation or other income. More than 50% of businesses in the LGA are non-employing businesses and create an income for the owner alone.⁶ Tax concessions provide little impact on the broader community when the majority of persons resident within the LGA are low-income earners.

The cost of accessing goods and services varies greatly during the year and is an added impost especially to low-income earners – the majority of which are in isolated communities without access to competitive suppliers. Most of the Council's road network is in poor condition, and impassable in the wet season, meaning that isolated communities have no way to offset seasonally adjusted charges for goods and services.

20% (1,190 people) of the workforce age-eligible pool of 6,081 people receive the Newstart Allowance – 76% who have been on income support in excess of one year. This indicates that there are few opportunities for these people to move into employment – for whatever

⁴ 4102.0 - Australian Social Trends, April 2013 – Towns of the Mining Boom, ABS,
<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10April+2013#p3>

⁵ ABS downloaded doc 8/01/2015:
<http://www.abs.gov.au/AUSSTATS/abs@nrrp.nsf/Latestproducts/LGA71300Economy12007-2011?opendocument&tabname=Summary&prodno=LGA71300&issue=2007-2011> Table 3

⁶ ABS downloaded doc 8/01/2015:
<http://www.abs.gov.au/AUSSTATS/abs@nrrp.nsf/Latestproducts/LGA71300Economy12007-2011?opendocument&tabname=Summary&prodno=LGA71300&issue=2007-2011> Table 1

reason. 409 people were in receipt of a Parenting Payment (Single) and 239 received a Youth Allowance. Figures for Pensions are not available.⁷

It is hoped that the above gives some clarity regarding the significant levels of disadvantage that exists within EARC's Local Government Area and how this impacts on EARC's ability to raise own source revenue. This will be discussed further within the relevant "considerations".

Considerations

a. The principles and provisions of Independent Commission Against Corruption (ICAC) and like legislation in other Australian jurisdictions and their applicability to the Northern Territory;

As we are aware corruption can take many forms including victimisation and assault, misuse of public funds and/or assets, and the release of information that would be classed as "business in confidence". Within other jurisdictions these Commissions conduct independent investigations that will identify and in most cases respond to the most serious cases of corrupt conduct that may be complained of within the public sector and its agencies. It is noted that these commissions within other jurisdictions can refer allegations of corruption to be investigated by agencies themselves and usually monitored by the commission.

The writer has an understanding of the Queensland Crime and Corruption Commission (CCC) which was previously the Crime and Misconduct Commission (CMC). With that said reference will be, in the main, to the CCC Act (Qld) and the supporting legislation such as the Public Interest Disclosures (PID) Act (Qld) and how this could be applicable to the NT.

It should be noted at this point that the NT PID Act appears to be more appropriate than the Queensland PID Act as there appears to be more protection for public sector organisations, agencies and their senior personnel. But this will be discussed further later.

An extract from the Queensland CCC Annual Report 2014/2015 (p.20) states:-

"A successful investigation outcome does not always mean that an allegation of corruption will be substantiated. A successful investigation could result in:

⁷ ABS downloaded doc 8/01/2015:

<http://www.abs.gov.au/AUSSTATS/abs@nrrp.nsf/Latestproducts/LGA71300Economy12007-2011?opendocument&tabname=Summary&prodno=LGA71300&issue=2007-2011> Table 2

- *clearing a person's name or restoring public confidence in a public sector activity or agency, a politician or the police*
- *criminal or disciplinary charges*
- *identification of systemic weaknesses or a failure of internal controls in agencies that make them more vulnerable to corruption".*

As can be seen the first dot point is "clearing a person's name" and the CCC appears to protect the discloser as opposed to protecting the "person" that may be subject to a malicious complaint.

- b. The appropriate powers such a body should have, including but not limited to:***
- i. The power to investigate allegations of corruption, including against Ministers, Members of the Legislative Assembly and other public officials; and***

An NT ICAC would have a statutory obligation to monitor the way in which Ministers, Members of the Legislative Assembly, public agencies and officials, including the NT Police deal with matters of suspected corrupt conduct "referred" (see below for further comment) or reported to them. This could be achieved by the NT ICAC through conducting or oversight of investigations, the review of draft or finalised investigation reports and possibly reviewing and/or auditing/advising agencies in regards to compliance with legislative requirements.

It is interesting to note from the CCC 14/15 Annual Report (p.23) that "*CCC reviews identified deficiencies in the handling of corrupt conduct by both public sector agencies and the QPS — particularly in regard to the interviewing of witnesses and the adequacy of inquiries. Lack of timeliness in providing reports to the CCC was also a persistent problem. In most cases, there was no reasonable or apparent explanation for the delays in finalising inquiries and reporting the matter to the CCC*".

Further deficiencies identified in this report included:-

- poor interviewing skills; and
- failure to appropriately test the evidence of witnesses; and
- failures leading to flawed conclusions that were not supported by the evidence; and.
- failing to interview all relevant witnesses; and
- failure to appropriately record interviews so that interview techniques could be assessed.

The 2012/2013 Crime and Misconduct Commission (now CCC, Qld) annual report noted that *"increased outsourcing of investigations by public sector agencies"* was occurring and that this *"is likely to represent a significant expense for government"*.

When compared to the identified deficiencies in 14/15 annual report (above) it could be seen that government agencies were outsourcing this work as these skills were unavailable within the agency, and/or insufficient staff numbers, and/or for strengthening the independence of the investigator (this is discussed further below).

ii. *The power to conduct investigations and inquiries into corrupt activities and system-wide anti-corruption reforms as it sees fit; and*

According to the CCC 14/15 Annual report (p.8) *"Before embarking on an investigation, the CCC uses a case categorisation model for all matters that are reported to it and assessed as raising a suspicion of corrupt conduct. The CCC retains the most serious and/or systemic matters for investigation. The remaining matters are referred to agencies to deal with and are subject to the CCC's monitoring role, which may include a review of how the agency dealt with the matter either before or after it has been finalised"*.

When viewed from the position of a Local Government that is the 6th most disadvantaged LGA in Australia out of 566 LGA's and the 2nd most disadvantaged LGA in the NT (ABS, SEIFA, 2011 census) an investigation "referred" to it could result in a financial disaster. In reviewing how the *"agency dealt with the matter"* reflects that best practice would be expected by the CCC and this should be expected. However, best practice comes at a price and current indicative costs for an experienced independent investigator is around \$1,500 per day plus incidentals such as airfares, accommodation, meals and transport. All of these in a remote area such as the Council's LGA are quite expensive. Solicitors, another vital component to ensure procedural fairness and due process, could be in excess of \$600 per hour and of course incidentals. The need for travel is less than that for an investigator but there may be a need if teleconferencing or video conferencing is unavailable which due to the remoteness of Council's communities is not uncommon.

In essence a "referred" matter could cost Council tens of thousands of dollars that the Council cannot afford. This would be the case whether the complaint was upheld or whether the complaint was found to be malicious. As the CCC states only the *"most serious and/or systemic matter"* will be investigated by them. It would be a more equitable situation if the actual ability of the Council is assessed for its ability to pay for an investigation particularly if the investigation results showed either a malicious action by the complainant or that there was no case to answer. It is to be noted that funds allocated by Council for an independent investigation that could be "referred" to it are funds that could

be allocated to Indigenous Australians living in one of the most disadvantaged LGA's in Australian and the NT.

Of course if the complaint is upheld and it was identified that the action of the Council or staff was found to be corrupt conduct then a financial assistance arrangement could be made available to the Council. However, as indicated in the NT PID Act, Division 2, Protection from liability, 14 (4) *However, subsections (1) and (2) do not apply to:*

(a) a public interest disclosure that is an abuse of process; or

(b) a public interest disclosure if the discloser knows the information disclosed is misleading.

If it is found that the complainant knowingly gave false and/or misleading information then assistance be given to Council to recover the costs of the investigation. That is, there is not a "blanket" protection for a complainant that "knows" that they will be protected under the NT ICAC Act.

While a central purpose of the Act is to facilitate the disclosure, in the public interest, of information about wrongdoing in the public sector, and to provide protection to those who make such disclosures, that is not the only goal. Another express object of the Act is to "ensure that appropriate consideration is given to the interests of persons who are the subject of public interest disclosures", (Public Interest Disclosure Act 2010, s.3(c) Qld).

iii. The appropriate trigger for an NT ICAC's jurisdiction and the relationship between this body and other NT bodies such as the Ombudsman; and

Referring to the CCC Act and the Facing the Facts report (p.4.1) where corrupt conduct in local government is directly referenced. Section 38 of the CCC Act *"obliges you to notify the CCC if you reasonably suspect that a complaint, information or matter involves, or may involve, corrupt conduct"*. There are some important distinctions that relate only to local government within the CCC Act such as responsibilities resting with the Chief Executive Officer (particularly "reporting is paramount"), Department of Local Government, Mayors and Councillors when dealing with suspected corrupt conduct on the part of a council employee or a Councillor.

In the interest of maintaining community confidence in the integrity of council all staff and Councillors must take responsibility for preventing corrupt conduct. All staff and Councillors must support an environment of openness, accountability, transparency and integrity in all council dealings.

An appropriate trigger would be the reporting of misconduct or corrupt conduct on the part of an elected official or employee of a Local Government. However, there is a distinction when

relating misconduct and corrupt conduct of elected officials and those of employees as elected officials are not subject to a disciplinary process where employees may be subject to dismissal.

There are numerous Acts that contain misconduct or corrupt conduct that may have particular relevance for local government, including but not limited to:-

- Local Government Act
- Electoral Act
- Building Act(s)
- Environmental Protection Act
- Privacy Act
- Public Interest Disclosures Act
- And others

iv. Models from any other jurisdictions; and

As previously stated the Queensland CCC Act may be a suitable model as there are 19 discrete Indigenous LGA's within this jurisdiction and through appropriate review and consideration may be more relevant to the NT with 30% of the population identified as Indigenous. However, as previously stated the costs of investigations, the protection of the "interests of persons who are the subject of public interest disclosures" and how to deal with malicious complaints must be considered seriously.

This does not minimise the importance of other jurisdictions and as identified the Inquiry will be considering all relevant models.

v. The use of existing NT legislation or NT statutory authorities.

As indicated above there appears to be existing NT Legislation Such as the Public Interest Disclosure (PID) Act which can be used in conjunction and related to any proposed NT ICAC Act. The office of the Commissioner for Public Disclosures is a statutory authority that implements the PID Act and others such as the Anti-Discrimination Commission both of which should be included with those identified above.

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.**

Commissioner for the Northern Territory Anti-Corruption and Misconduct
Commission Inquiry
The Honourable Justice Brian Martin AO QC
GPO Box 4396
Darwin NT 0801
Via email ACIMC.Inquiry@nt.gov.au

Dear Commissioner Martin,

Re: Submission to ACIMC inquiry in the Northern Territory

Attached please find a submission regarding the establishment of an Anti-Corruption Integrity and Misconduct Commission in the Northern Territory.

I have prepared this submission as an individual citizen most concerned about a number of matters that have been brought into the public domain either through the media or the parliament over the last few years and appear to have had inadequate or sometimes no investigation or scrutiny as to the legality or otherwise of the matters raised.

My submission reflects the disquiet in the community, expressed by many ordinary citizens as to whether they can be confident in our systems of government and governance and whether the integrity measures are adequate at the moment.

My view is that they are inadequate and that an Integrity body that is independent of Government is required in order to assure the people of the Northern Territory that our systems are sound and not corruptible.

My submission is especially concerned about the definition of corruption, so that it encompasses a very wide variety of matters. To illustrate the need for a wide a broad definition of corruption, I have included a number of matters which have been made public in the past few years and which have not been adequately responded to. As I write this, the Deputy Chief Minister is being questioned about dealings relating to his work as a Minister. While not wishing to make any allegations about Mr Westra Van Holthe, I think this highlights the need for an independent body to investigate matters separate to our media and parliament.

For the sake of transparency, I advise that I was a Member of the Legislative Assembly from August 2001 until 25 August 2012 when I retired from public life. During this time, I was a Minister in the previous Labor Government, a Chair of various Parliamentary Committees and was Speaker from June 2005 until 23 October 2012.

I would be happy to discuss my submission with you should you wish.

Yours sincerely,

Jane Aagaard 10/2/16

The Honourable Jane Aagaard



Definition of Corruption

One of the most critical aspects of the establishment of an Integrity Commission is the definition of corruption. There are many definitions across Australia defined in legislation and it is critical that any definition in the Northern Territory is sufficiently broad that it captures the large possibilities of impropriety and criminality. I do not believe that current definitions in the Northern Territory in either the criminal code or the "Whistle blowers legislation" or Public Interest Disclosure Act are adequate in dealing with possible corruption in the Northern Territory.

Currently, the Northern Territory Criminal code refers to various aspects of corruption with the main section being at s.77 **Official corruption**: which states:

*(a) Any person who, being employed in the public service or being the holder of any public office and being charged with the performance of any duty by virtue of such employment or office, not being a duty touching the administration of justice, corruptly asks for, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or
(b) corruptly gives, confers or procures, or promises or offers to give or confer to procure or attempt to procure, to upon or for any person employed in the public service or being the holder of any public office, or to , upon or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed or holding such office, is guilty of a crime and liable to imprisonment for 7 years.*

Similarly, sections 56-60 of the Criminal Code refer to corrupt practices such as bribery of a Member of the Legislative Assembly or a Member of the Legislative Assembly receiving a bribe.

In relation to the Whistleblowers legislation, one of the key faults is the referral process in relation to Members of Parliament. The current legislation says that complaints or allegations about a Member of the Legislative Assembly should be referred to the Speaker who may refer the matter to the Public Interest Disclosures Commissioner. In relation to allegations regarding the Speaker, the Chief Minister is the point of referral and he or she may refer the matter. In practice, the only Member who has written to the Speaker regarding alleged corruption and bribery, Ms Larissa Lee, the matter was not referred to the Commissioner and there was never any adequate public explanation of what actually happened if anything. In my opinion, having acted as the Speaker of the Legislative Assembly for more than seven years, a matter referred to the Speaker or the Chief Minister **must be referred** to either the Commissioner of Public Interest Disclosures or to the Police. It should not be optional, even if the matter seems trivial. In addition, the matter should not be discussed with other parties

prior to the referral, and particularly, not to the people complained about. It appears from reading the Parliamentary Hansard relating to the allegations of official bribery or corruption, the parties complained about were advised of the matter and no referral of any kind was made. The Hansard and media reports are the only record of what happened and it would appear these serious allegations were not appropriately investigated. I refer you to **Appendix 1**, the Hansard of the 15.5.14 relating to a question asked by Ms Lee to the Chief Minister about alleged corruption and a related article from the NT News dated the 15.5.14 by Ben Smee and Conor Byrne "CLP figure and NT magistrate hit with bribery allegations by Larisa Lee in Parliament." **Appendix 2**. Further debate ensued about the matter in the Parliament.

Electoral Act changes required

Another area of concern, which has been repeatedly raised, is the relationship between political donors and Members of Parliament and political influence, particularly in the area of developments and building projects. A particular case in point, is the organisation known as Foundation 51, an associated entity of the CLP, which had never made any returns to either the Australian Electoral Commission or the Northern Territory Electoral Commission, despite apparently, receiving hundreds of thousands of dollars of donations, which were subsequently apparently, used in Territory and Federal elections. This matter was raised in the parliament and was referred to the AEC Commissioner and NT Electoral Commissioner. In a very lengthy process, no fines or penalties were made, despite what the legislation indicated should happen, a simple, don't do this again, and fix the earlier years returns, was all that happened.

In addition, the police concluded in July 2014, that there was a prima facie case against Foundation 51 for potential breaches of the Electoral Act and a reasonable chance of prosecution.

The DPP apparently agreed but said it was "not in the public interest" to prosecute and has refused to give further detail.

I refer you to a series of news articles relating to this at **Appendix 3**.

A very concerning allegation which arose in 2014, was from a man called Norm McCleary who gave a political donation of \$10,000 in two parts apparently on the understanding that he would receive access to sensitive government information should the CLP be in Government. There does not appear to have been any referrals to the police, or the Electoral Commissioner even though the matter seems quite a serious allegation. I refer you to **Appendix 4**.

Consideration also needs to be given to strengthening the Electoral laws in relation to political donations and probably considering public funding of elections. In particular, consideration needs to be given to allowing only small donations from individuals and for all donations to be on an on-line website as soon as practicable after the donation is made. Currently, the public does not know who the donors are until the electoral returns are made, frequently nearly a year after an election.

Cronyism and nepotism

The Northern Territory is a small place and so the charge of nepotism or cronyism may not seem to be able to be made as clearly as in larger states where there is a much greater population to choose from. However, there seems to have been a move towards appointing people to positions with no, or little process and who belong to the Government political party. While I am not making any allegations about any of the appointees, it is concerning that a multitude of lucrative board positions, senior statutory officers and senior public servants appear to have been appointed according to their political persuasion rather than their skills for the positions. In many cases, the positions were not advertised at all, such as the Planning Commissioner, a former CLP President and a former Minister in the Howard Government; the Health Services Commissioner, a former Health Minister and junior public servant; and many members or former members of the CLP Management Committee or former members of parliament. I refer you to **Appendix 5**.

Processes of Government

It is clear that processes relating to Government decisions need to be both legal and transparent. This was clearly not the case in the previous Government's handling of the Stella Maris site. Processes relating to Cabinet also need to be improved.

While the inquiry did not find any corruption, it said that some former Labor Ministers had acted unfairly and improperly and "with bias over many years", but not illegally, when they handed Unions NT the Stella Maris lease.

I refer you to **Appendix 6**.

In a similar way, there has been considerable concern and controversy surrounding the allocation of water licenses in the Northern Territory. One case in particular has caused great public interest as it relates to a former, and indeed current CLP candidate for the Federal seat of Lingiari and the allocation of a very large water license that had been previously denied, including by a process in the Supreme Court. Other licenses have also been brought into question as well. I refer you to **Appendix 7**.

Allegations relating to the Police

In February 2015, the Chief Minister made serious allegations about the NT Police suggesting that senior police officers had been involved in the attempted leadership coup against Mr Giles. No proof or evidence was provided and the Chief Minister announced he would hold a public inquiry into the Police. Some months later, he said he would not be following through with the inquiry but no retractions of allegations were made.

I refer you to **Appendix 8**.

Agreements relating to minority governments

The current Government went into minority in the middle of 2015. This changed the dynamics of the parliament significantly. Essentially, the opposition and independents had control of the parliament and the Government needed to negotiate all matters through the parliament with no guarantee of success.

It is usual in this situation, for a Government to attempt to negotiate with a single member or members to form a loose coalition to ensure supply and confidence. Sometimes other particular matters are also agreed to, such as parliamentary reform or requesting a change in a particular policy. It is usual practice for these agreements to be made public by tabling them in parliaments and or by providing the written agreement on line. This is the usual practice and it has been seen in the Northern Territory in 2009 when an agreement was made between the previous Chief Minister and the Member for Nelson and was provided to the Administrator, the parliament and the public.

It was also the case, when the previous Federal Labor Government negotiated with three independents to form Government in 2010.

In November 2015, the Member for Arnhem, Larisa Lee started voting with the Government on every matter. She has refused to provide an explanation, and no agreement has been made public. While a Member may, of course, vote however they wish, it is very unusual in this circumstance.

Legislative change needs to be enacted to ensure that a written agreement is made public and provided to the Administrator of the Northern Territory in the case of minority government.

I refer you to **Appendix 9**.

Freedom of Information laws

Significant work needs to be done to improve the Freedom of Information laws in the Northern Territory. Currently, it appears that matters are blocked for very spurious reasons or for very long periods of time.

A case in question relates to Ministerial travel, including the detail of travel taken by Ministers, who they travel with, the purpose of the travel, and the cost of the travel. This information has been consistently refused or only redacted information provided while the Speaker and non-Ministers have their travel published and tabled in the parliament on an annual basis.

While this is useful, it would be more timely for all travel by Members, whether Ministers or not, to be published on line immediately following the travel.

Of particular concern to me, is that even 30 years after a Cabinet decision, a very significant number of documents are not being released on 1st January of each year. Having lived in the Territory for more than 30 years, most of the matters that are not being released relate to matters, which were very controversial at the time, causing significant debate in the parliament and frenzy in the media.

Despite it being 30 years on, most of these documents are said to be "commercial in confidence" and will not be released. This seems a disgrace to me, as the documents relate mainly to money spent by the Territory to private businesses. The Commonwealth Government releases all documents, except those with a national security context.

While this is a relatively minor matter, it is reflective of government secrecy, which is unhealthy in my opinion.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] but I think it is very important that ordinary citizens who have concerns and information are able to easily refer matters to an Integrity body. Currently, there is absolutely no capacity to do this in the Northern Territory.

In public or in camera?

It is clear that there is considerable public interest in matters to do with corruption in public office. The public would demand at the very least that members of parliament and all senior public servants, including police, would need to give evidence in public. In my opinion, in camera evidence should be the exception rather than the rule.

Resourcing of the Body

Whatever form the Integrity Commission takes, it must be properly resourced and have the same powers as a Royal Commission and headed by an experienced judicial officer. It would probably be useful to have an interim commission and

also links with other states Integrity Commissions to assist with costs and expertise.

It must also have the power and expertise to investigate overseas bank accounts, share dealings and other transactions. This seems particularly pertinent following the recent controversy and allegations regarding the Deputy Chief Minister of the Northern Territory and a Vietnamese company. An Integrity body needs appropriate powers and expertise to fully investigate such matters.

Conclusion

There is a real need for an Integrity Commission in the Northern Territory. There also needs to be a very clear and expanded definition of corruption to include such things as cronyism, nepotism, minority government.

The people of the Northern Territory need and deserve to be confident in the processes of Government.

Call for inquiry into CLP
Ms Lee to Chief Minister

Appendix 1

You are the chair of the Cabinet which appointed Peter Maley as a magistrate. You are aware that on Saturday 23 February 2014 he called me and offered me an inducement. He stated that I would have my own cheque book. Further, there was also an implied threat that if I left the CLP I would no longer be protected. Shortly after that I was called by the Attorney-General, who also tried to stop me leaving the CLP and repeated that I would no longer be protected if I left. I seek leave to table all the relevant documents ...

Leave denied.

Ms LEE: Chief Minister, will you now act to stand these two men aside pending a full, independent investigation?

ANSWER

Madam Speaker, I thank the member for Arnhem for her question. No, not at all; I do not know what you are talking about. I do not know that Peter Maley called you, and if he did, how am I to know what he spoke to you about? That is ridiculous. I will not be doing that.

Power and Water –

Hansard 15/5/14

NT News

News

CLP figure and NT magistrate hit with bribery allegations by Larisa Lee in Parliament

- by: By BEN SMEE and CONOR BYRNE
- From: NT News
- May 15, 2014 10:18AM



THE Opposition has called for a criminal inquiry into allegations of corruption and bribery within the Country Liberal Government.

In a dramatic morning in Parliament, it was alleged Territory Magistrate Peter Maley told rebel MLA Larisa Lee she would "have [her] own cheque book" if she stayed with the Country Liberals.

Ms Lee sought to table letters between herself, Speaker Kezia Purick and Attorney-General John Elferink alleging improper conduct from Mr Maley, but it was blocked by the government's numbers.

But it did not stop her reading the letters recounting details of a phone conversation with Mr Maley in February in which he allegedly tried to "bribe" her to stay with the Country Liberals.

"On the one hand I felt that I was being intimidated if I did not follow what he regarded as the established directions of the party," Ms Lee said.

"On the other hand, I believe there was a clear attempt to bribe me with the offer of a future senior government position and a high level of associated resources."

Mr Maley denied acting inappropriately when contacted yesterday.



Larisa Lee

Source: News Corp Australia

"I had a conversation with Ms Lee. I repudiate entirely the characterisation of the conversation referred to. I emphatically deny any suggestion that I may have acted unethically or inappropriately at any time either personally or on behalf of the Country Liberal Party," he said.

The Government challenged Ms Lee to make the allegations outside the safety of Parliamentary Privilege.

The *NT News* understands Ms Lee and fellow Palmer United Party members Alison Anderson and Francis Xavier Kurrupuwuy are seeking legal advice.

READ: Larisa Lee, Alison Anderson and Francis Xavier Kurrupuwuy join Clive Palmer

(<http://www.ntnews.com.au/news/northern-territory/clive-palmer-and-alison-andersons-plan-to-end-adam-giles-and-clp-rule-in-the-territory/story-fnk0b1zt-1226897354382>)

Mr Maley came under fire in Parliament last week after he was named as a director of Foundation 51, a CLP-aligned research company that "contributed significantly" to the Blain by-election campaign.

He resigned from the party and the company on Friday, saying he no longer believed it was appropriate for a Magistrate to be involved in politics.

Ms Lee told Parliament that at 11.37am on February 23 she returned a call from Mr Maley. She said she found the discussion "inappropriate".

"I could only conclude that he was acting on behalf of the Country Liberals Executive in government," she said.



Larisa Lee, Francis Xavier Kurrupuwuy and Alison Anderson displaying their list of demands that were not met by Adam Giles, leading to their resignations from the CLP. Picture: AMOS AIKMAN

Source: News Corp Australia

"Mr Maley stated that he had a discussion with my adviser Mr Norman Fry and other members of the CLP about what he regarded, quite incorrectly, were my intentions about becoming an independent member of parliament," Ms Lee recounted.

"He advised me not to communicate with my colleague Ms Alison Anderson MLA, who he inferred should be 'let to go off on her own'.

"He stated that 'something very good is coming your way soon' and I would 'have my own cheque book'."

"He further stated that if I become an independent the Country Liberals government would attack me."

That evening, Ms Lee says she had a phone discussion with Mr Elferink where she was asked if she wanted a ministry.

"When I said no to this question Attorney General Elferink stated that if I were to leave the party I would lose all support and protection from the Country Liberals government."

Parliament heard Mr Elferink sent a letter to Ms Lee in response to her complaint that said he was "surprised that you now allege that I bullied or threatened you".

"There is no conceivable way that any interpretation of bullying or inducement could be construed from our last, or even any, conversation," it read.

Opposition leader Delia Lawrie also questioned in Parliament applications for two water licenses on Mr Maley's properties in the Douglas Daly region.

She called for Mr Elferink to stand down and for an inquiry into what she described as long "tentacles and stench of corruption" within the CLP.

Mr Elferink, in a press conference this afternoon said: "I do want to have an inquiry".

"I'm happy to have that enquiry as a plaintiff in a defamation case.

"(Ms Lee) now has to bring that out of the chamber and that will be actionable.

"Parliamentary Privilege is a special privilege that needs to be used when you've a genuine matter of concern."

Asked about offering Ms Lee a ministry, he said: "Untrue".

Asked about alleged intimidation, he said: "Utterly untrue".

He dismissed the notion of standing down until an inquiry was completed as "ridiculous".

"If that's all it takes to get a minister to stand down we wouldn't have any ministers," he said.





Property developers major contributors to Foundation 51, company at centre of NT political donations probe

By James Oaten and James Dunlevie

Updated Sun 28 Dec 2014, 2:59pm

Three Darwin-based developers have been revealed as major financial contributors to a private company at the centre of a political donations storm in the Northern Territory.

Foundation 51 is a private company with close ties to the Country Liberals party (CLP).

The NT Opposition have accused it of being a slush fund, a claim vigorously denied by Foundation 51 and the CLP.

Foundation 51 is listed as having received more than \$580,000 in the 2012-13 financial year.

It said Darwin developers Gwelo Investments, Gaymark Investments and Randazzo Properties each provided between \$20,000 and \$65,000.

A New Zealand-based organisation called The Chrisp Investment Trust also gave \$55,000.

Gwelo Developments, the company run by prominent businessman Even Lynne and the late Hans Vos, has built a number of projects around Darwin, including Pandanus, Soho, Harbour Vista and Litchfield apartments and Coolalinga shopping village.

Gwelo also reportedly paid \$21 million for the run down former Woolworths site in the centre of Darwin.

Randazzo Properties has an extensive property portfolio in the Darwin CBD.

PHOTO: The AEC's political donations Associated Entity Disclosure form for Foundation 51, which Labor says is evidence the company is a fundraising body for the CLP. (Supplied)

RELATED STORY: Former NT chief minister 'held director role in Foundation 51'

MAP: NT

Associated entities form used for declarations

The monies declared by Foundation 51 over the last financial year have been lodged using an Associated Entities Disclosure form.

An associated entity under the Commonwealth Electoral Act means an entity:

- that is controlled by one or more registered political parties; or
- that operates wholly or to a significant extent for the benefit of one or more registered political parties; or
- that is a financial member of a registered political party; or
- on whose behalf another person is a financial member of a registered political party; or
- that has voting rights in a registered political party; or
- on whose behalf another person has voting rights in a registered political party.

Labor Secretary Kent Rowe said this was further evidence Foundation 51 was a fundraising machine for the CLP.

"At the end of the day, it's not about whether money is being donated, is about how it's being done. We have rules in our system to make sure that everything is clean and transparent.

"Foundation 51 has muddied those waters. They've denied that they've been doing it for five years or even longer, and now with these documents coming out we know that they've been used to collect money for the CLP."

But CLP president Jason Newman said the AEC document did not prove Foundation 51 was ever an associated entity of the party.

He said Foundation 51 president Graeme Lewis made the declaration with the AEC without the approval of the CLP.



Foundation 51: Email suggests \$200,000 spent on CLP election campaign

By the National Reporting Team's Kate Wild

Updated Thu 8 Jan 2015, 10:28am

A newly-released email from the director of a company under investigation by the Australian Electoral Commission (AEC) appears to confirm that the company spent money on an election campaign that was never declared as a political donation.

Foundation 51 has been at the centre of a political storm in the Northern Territory since May when a series of leaked emails raised questions about whether the company, set up in 2009, was receiving donations on behalf of the Country Liberal Party (CLP).

The new email, obtained exclusively by the ABC and written by company director Graeme Lewis, was sent to then NT chief minister Terry Mills and four other members of the CLP executive team eight weeks after the CLP took government in 2012.

Mr Lewis has today told the ABC that "no money was ever paid to the CLP, and there was no financial relationship".

The email lays out in detail how \$200,000 of undeclared monies contributed to Foundation 51 were spent on election-related activities in the two months immediately prior to polling day.

It lists another \$216,000 spent on "polling and associated research for the August election" and "Concept Development for [the] August election" in the financial year 2011/12.

"Like you, I will be mortified if this information becomes widely known. It must be closely held for obvious reasons."

Graeme Lewis, director of Foundation 51, in an email to senior CLP figures

"Once again, the contributors were clearly aware, and did generally stipulate that the funds raised would be devoted to NT elections in 2012 or thereafter," Mr Lewis wrote on November 26, 2012.

He said money collected in the eight weeks leading up to polling day was spent on "polling \$110,000, consultants re the debt strategies and policies \$34,000, concept development \$34,160, plus travel, McGrath outgoings etc".

Mr Lewis wrote "I will be mortified if this information becomes widely known. It must be closely held for obvious reasons".

The director of the Country Liberal's election campaign in 2012 was James McGrath, who is now a Queensland senator for the Liberal Party.

In a statement, Mr Lewis told the ABC: "McGrath was paid by the company for minor outgoings prior to being appointed as campaign director during which time he assisted in the workings and research being conducted by the company.

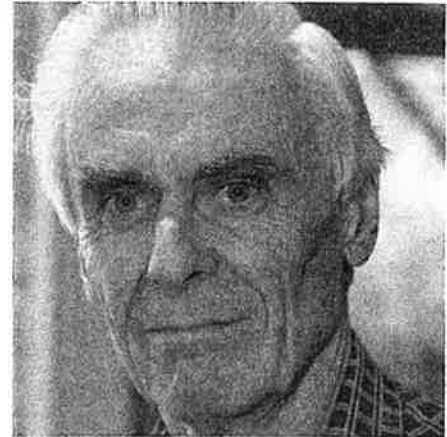


PHOTO: Foundation 51 director Graeme Lewis said no money was ever paid to the CLP.

RELATED STORY: NT Opposition demands CLP explain link with fundraiser Foundation 51

RELATED STORY: Magistrate suggests link to politics during Darwin festival

MAP: Darwin 0800



00:00

00:00

AUDIO: Email appears to provide evidence of undeclared electoral donations to CLP (PM)



PHOTO: NT Chief Minister Adam Giles (ABC)

"As far as I know, once he was appointed, all payments to him for his services were made directly to him by the CLP."

Mr McGrath has told the ABC in a statement: "I am proud to have worked for the Country Liberals, the Territory party, as part of a team that defeated a tired, long-term Labor government. In relation to your email, I think those questions are best answered by the CLP."

The current president of the Country Liberal Party, Ross Connolly, who was copied on the November 2012 email, told the ABC today that "the money never went through the party's hands".

In July, the ABC revealed Mr Lewis had asked current NT Chief Minister Adam Giles to look over a press release refuting the Labor Opposition claims the company was a CLP slush fund.

Do you know more about this story? Email investigations@abc.net.au

More on this story:

- Electoral commission investigating Foundation 51
- NT Chief Minister maintains no links between Foundation 51 and CLP
- Country Liberals election funding furore claims scalp
- Foundation 51 had direct line to NT Chief Minister Adam Giles, FOI documents reveal
- NT may hold inquiry into 20 years of political donations

Topics: government-and-politics, states-and-territories, elections, darwin-0800

First posted Thu 16 Oct 2014, 5:26pm

"The reality is by claiming an associated entity is a thing that Foundation 51 has done towards us, it's not something that we've OK'd.

"[Foundation 51 is] not something that we, as a party, have any active engagement with its operations, in its future, or in its past.

"We've received no funding from Foundation 51."

In an email, Graeme Lewis told the ABC it was wrong to imply that Foundation 51 was established to support any political party, saying the funds received were "consultancy fees" used for marketing and research.

He said he had to use the term "associated entity" due to a legal technicality, adding the "law is stupid, and I am a victim".

Foundation 51 Pty Ltd is currently under investigation by the Australian Electoral Commission (AEC) after allegations were made about its links to senior members of the CLP and its involvement in the Blain by-election – the seat formerly held by ex-CLP leader and chief minister Terry Mills.

In October this year the CLP shut down an inquiry into political donations from the past 20 years, with Chief Minister Adam Giles saying it would be "unwieldy ... unworkable" and would cost taxpayers "tens of millions of dollars".

A motion for an inquiry, unexpectedly passed by Parliament in August, would have meant an investigation into links between the CLP and Foundation 51.

This year, former deputy chief minister and treasurer Dave Tollner said donations would open his door "if you ever need to talk to me about something".

Topics: government-and-politics, activism-and-lobbying, nt

First posted Sat 27 Dec 2014, 3:30pm

Contact James Oaten

"[Foundation 51 is] not something that ~~we~~, as a party, have any active engagement ~~with~~... its operations, in its future, or in its past. ~~We~~'ve received no funding from Foundation 51."

CLP President Jason Newman



Prosecution of CLP-associated entity Foundation 51 not in public interest, DPP says

By James Oaten

Updated Wed 21 Oct 2015, 3:30pm

It is not in the public interest to prosecute an organisation the NT Opposition has labelled a Country Liberals "slush fund", the Director of Public Prosecutions has concluded.

Foundation 51 is a private company with close ties to the Country Liberals Party (CLP).

It kept its finances private for years but late last year it admitted to the Australian Electoral Commission it was an "associated entity" of the CLP, meaning it is either substantially or wholly for the benefit of a political party.

Since then the company's director, Graeme Lewis, has back filed years worth of annual returns, showing more than \$700,000 in payments, including some from major Darwin developers.

NT Police concluded in July that it thought there had been potential breaches of the Electoral Act and a reasonable chance of conviction, particularly in relation to Section 208 that outlines an associated entity must disclose its returns in a timely manner.

But the DPP on Tuesday wrote back to NT Police, saying prosecuting the case was not in the public interest.

Graeme Lewis told the ABC he was relieved at the outcome.

The DPP declined to comment on its decision.

Decision not to prosecute must be explained: Michael Gunner

Territory Opposition Leader Michael Gunner slammed the DPP decision, saying it must now explain the decision not to prosecute.

"There is a prima facie case and a reasonable chance of conviction," Mr Gunner said.

"That means this should go to court.

"I have absolutely no doubt that Territorians consider it is in the public interest for the actions of the CLP and Foundation 51 to be shown to the public."

Labor has repeatedly labelled Foundation 51 as a CLP "slush fund", an accusation both the CLP and Foundation 51 Director Graeme Lewis have vigorously denied.

Mr Lewis has previously told the ABC he provided a service to customers, such as polling and research.

Emails obtained by the ABC showed Foundation 51 director Graeme Lewis had told senior members of the Country Liberals executive team that funds were contributed primarily for NT election purposes.

Mr Lewis also wrote that the then chief minister Terry Mills held a silent "directorial role" at Foundation 51.

In a statement, Mr Mills told the ABC he had never been a director of the company.

Topics: government-and-politics, states-and-territories, darwin-0800



PHOTO: Foundation 51 is an "associated entity" of the Country Liberals party. (ABC News)

RELATED STORY: NTEC refers CLP-associated entity Foundation 51 to police

RELATED STORY: Property developers big contributors to Foundation 51, documents show

MAP: Darwin 0800



Public entitled to know why DPP won't prosecute Foundation 51, Northern Territory MP Gerry Wood says

By James Oaten

Posted Fri 23 Oct 2015, 8:53am

The Director of Public Prosecutions (DPP) must break its silence on why it has not pursued a Country Liberals Party (CLP) associated entity accused of being a "slush fund", the Independent Member for Nelson Gerry Wood says.

A Northern Territory Police investigation concluded in July there was a prima facie case against Foundation 51 for potential breaches of the Electoral Act and a reasonable chance of prosecution.

The DPP agreed but said it was "not in the public interest" to prosecute and has refused to give further detail.

Gerry Wood, who has led a campaign for a parliamentary inquiry into political donations, said he was "very disappointed" at the DPP's decision.

"I think the public are entitled to have a better reason than what [the DPP] has given," Mr Wood said.

"The police have said there's a prima facie case and now the DPP simply gives us a generic type of answer 'not in the public interest' and I think that certainly is not adequate."

The Director of Foundation 51, Graeme Lewis, has long denied Labor's claims of being a CLP "slush fund", saying he provided a service to customers such as polling and research.

But late last year he admitted Foundation 51 was an associated entity of the CLP and has since filed a backlog of annual reports that show the private company received more than \$700,000 in payments, and contributed \$200,000 worth of "in-kind" advice to the CLP.

The police investigation into Foundation 51 came after the Northern Territory Electoral Commission found there had been possible breaches of the Electoral Act.

"I'm very disappointed that [the DPP] has gone down this path," Mr Wood said.

"When the police say there is a problem you would expect that this matter would go to court and we can hear all the evidence that the electoral commission and the police have gathered."

DPP not obliged to explain 'public interest'

Police Commissioner Reece Kershaw said the DPP was not obliged to tell police why prosecuting a case is not in the "public interest", and both Attorney-General John Elferink and the Chief Minister Adam Giles have said they would not seek further detail.

"One thing I'm a big supporter of is process," Mr Giles said.

"The police are independent, the DPP is independent, and in no way would I encourage anybody to get involved in an independent process.

"This has been an open and transparent process in terms of this investigation."



PHOTO: Foundation 51 is an "associated entity" of the Country Liberals Party. (ABC News)

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RELATED STORY: NTEC refers CLP-associated entity Foundation 51 to police

RELATED STORY: NT Parliament axes political donations inquiry

MAP: Darwin 0800

Mr Elferink on Wednesday told reporters he suspected the matter investigated was of "minor consequence" and that a prosecution could have lead to a fine.

Foundation 51 director Graeme Lewis has told reporters that he would probably only be fined \$200 if he was found guilty in a court case.

According to the NT Electoral Act a late or incomplete return can attract a fine of up to \$30,600 or 12 months imprisonment.

An independent review of the NT electoral system found many cases where disclosure forms were filed late or not at all.

Topics: states-and-territories, government-and-politics, darwin-0800

Contact James Oaten

Donations scandal engulfs Adam Giles and CLP

AMOS AIKMAN | THE AUSTRALIAN | AUGUST 29, 2014 12:00AM

THE Northern Territory's Country Liberal government is in crisis mode after allegations of political favours promised in return for campaign donations were aired by the opposition under parliamentary privilege last night.

The allegations, which have been circulating for days but have not hitherto been made public because of legal concerns, involve Chief Minister Adam Giles, his recently resigned deputy Dave Tollner and recently resigned magistrate Peter Maley, a former CLP MP.

According to documents tabled by Labor's Michael Gunner, mining prospector Norm McCleary alleged, in an email sent to Mr Giles in May, that Mr Maley had, in 2008, solicited a \$10,000 donation from him in return for the promise of access to sensitive government information once the CLP took office.

Mr Maley was Mr McCleary's solicitor at the time, but acting on behalf of Mr Tollner, according to the email. The CLP took power in August 2012 and, seven months later Mr Giles became Chief Minister in a partyroom coup. Mr Tollner was appointed his deputy. The Giles government later appointed Mr Maley as a magistrate but he resigned abruptly this week, saying he wanted to return to private practice.

According to Mr McCleary's email, the \$10,000 donation was paid in two parts, one of which appears to have been declared, but the favour was not delivered. Mr McCleary asks Mr Giles to look into the matter.

Mr Gunner told parliament that in further correspondence, Mr Giles had acknowledged receipt of the information by responding: "Thank you for your email Norm. I have flicked your email to Dave Tollner who will get back to you. Please let me know if he doesn't make contact."

He said Mr Giles had "failed to maintain the high standards of probity that his office demands" by not referring the matter to police. "The allegation by Mr McCleary is that (the) member for Fong Lim (Mr Tollner) gave Mr Maley riding instructions to offer Mr McCleary a favour in return for a \$10,000 donation," Mr Gunner told parliament.

"Mr McCleary is under no doubt that the CLP is saying to him, 'If you give the CLP \$10,000 then you will get the information you want when we win government'. Adam Giles is Chief Minister, but he is also Police Minister. We understand that this has not

been referred to the Police Commissioner.”

Mr Giles said last night the claims made by Mr McCleary referred to conversations he allegedly had with Mr Maley before the 2008 election, “before I even entered parliament”. He said that since he became Chief Minister, no documents had “ever been given to this man”.

“Norm McCleary’s main complaint in the correspondence tabled in parliament is that, in fact, we refused to act illegally in handing over government files,” he said. “We acted on advice from the Department of Mines and Energy who suggested that Mr McCleary was a serial complainer with no right to the documents and we should steer clear. That’s exactly what we did. I have never met Norm McCleary or spoken to him.”

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Peter Maley may have said to his client back in 2008 is a matter for him to explain.”

Mr Tollner did not respond to a request for comment.

Mr Maley said last night: “The allegations made by the shadow attorney-general Michael Gunner under parliamentary privilege are denied and untrue. If Mr Gunner repeats these allegations outside of parliamentary privilege, I will take legal action against him.”

The matter relates to a legal dispute over mineral rights to the Angela and Pamela uranium prospects. “At the time there was a court case over this matter and I was unable to assert ownership, and the court ruled against me,” Mr McCleary wrote in his email to Mr Giles. “It has always been my contention that certain officers in the department and the Labor administration at the time colluded to frustrate my bona fide efforts.”

Mr McCleary went on to say that in the July 2008 phone call, Mr Maley explained the CLP was sympathetic to his concerns but “in a bind and unable to raise enough funds for election advertising”. “When they came to power, I would be given the opportunity to review all the files and documents relating to the matter,” Mr McCleary wrote, “if I would be prepared to contribute, ‘say \$10,000’, to help myself and the CLP.”

Earlier this year, backbencher Larisa Lee used parliamentary privilege to allege Mr Maley had telephoned her to offer “inducements” to remain with the CLP before she defected to the Palmer United Party. Mr Maley reportedly denied offering inducements but did not deny making the call. After taking up his position as a magistrate 11 months ago, he attracted controversy for failing to sever his political ties, including taking several months to resign his CLP membership and directorship of a CLP-linked research organisation Labor has described as a “slush fund”.

According to the tabled documents, Mr McCleary emailed Mr Maley immediately after Mr Giles and Mr Tollner assumed control of the government. “Hi Peter, now that Dave Tollner is in the right position can you please arrange for us to view all the

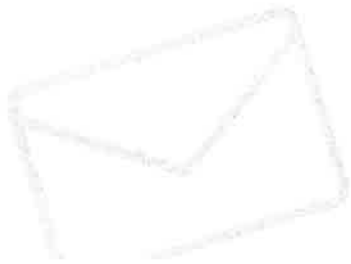
documents and files surrounding my original case? With regards, Norm,” Mr McCleary wrote.

Tabled documents show Mr Maley replied: “I agree! I will give them a week to settle down, then I will contact Tollner!”

Mr Gunner told parliament he had spoken yesterday to Mr McCleary, who had told him he had provided the emails to the *NT News*. One email he tabled states that \$4825.60 was paid on August 1, 2008, direct to the CLP, and \$5174.40 a couple of days before to NT Broadcasters Pty Ltd, authorised to come from a trust fund controlled by Mr Maley.

Electoral funding disclosures for that year show the CLP received a \$4826 donation from Mr Maley. “But what of the \$5174.40 that’s been paid to NT Broadcasters for CLP election advertising?” Mr Gunner said. “We have been unable to find any declaration of that amount, and we will be referring it to the NT and Australian Electoral Commissions for investigation.”

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FROM THE HOMEPAGE

Turnbull to reshuffle cabinet at weekend



JARED OWENS, SID MAHER

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'Thanks for the mansplaining'



RICK MORTON

Gender wars have erupted in Senate estimates during a spat between Labor's Katy Gallagher and a minister.

Northern Territory

Parliament hears claims about cash for access to government files

August 23, 2014 9:05pm

Ben Smea EXCLUSIVE NT News



Former magistrate Peter Maley

FORMER magistrate Peter Maley — who resigned abruptly this week — told a mining prospector the CLP would give him access to sensitive government documents in exchange for a \$10,000 donation, Parliament was told.

The *NT News* has obtained financial records from 2008 that show Mr Maley — then a solicitor in Darwin — processed a political donation on behalf of former legal client Norm McCleary.



Norm McCleary, a former legal client of Peter Maley

Emails also revealed in Parliament confirm that in March last year — before he was appointed to the bench — Mr Maley said he would approach then-Deputy Chief Minister Dave Tollner seeking access to files on behalf of Mr McCleary.

The records relating to the high-profile Pamela and Angela mining case were ultimately refused. Mr Maley explained in an email that there were “some legal impediments”. His former client then took matters into his own hands.

According to an email read in Parliament on Thursday night by Labor MLA Michael Gunner, Mr McCleary wrote to Chief Minister Adam Giles in May claiming he’d been duded — that before the money changed hands six years ago, Mr Maley had said the CLP would throw open the government’s files.

MALEY’S ATTACK ON LABOR

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Parliament heard Mr McCleary wrote to Mr Giles: “(Mr Maley) stated he was ringing on behalf of the CLP.

NT News

“Also (Mr Maley) said the CLP was in a bind and was unable to raise enough funds for election advertising. I agreed (to donate \$10,000) knowing that the CLP was sympathetic and intended to allow me to access the files so I would be able to understand what occurred.”

Parliament heard a trust account ledger in Mr McCleary’s name lists two separate payments — totalling

\$10,000 — as donations to the CLP campaign. About half was paid to NT Broadcasters Pty Ltd.

No payment by Mr McCleary was disclosed by the Country Liberals.

Mr Maley was the lawyer responsible for the trust account. He denies Mr McCleary's claims and told the *NT News* in a text message last Friday that his former client was "mad as a cut snake".

Mr Gunner told Parliament last night: "Mr McCleary was under no doubt Mr Maley was saying to him 'if you give the CLP \$10,000 then you'll get the information you want when we win government'."

"We understand this matter has not been referred to the Police Commissioner. We know the Chief Minister is aware of this matter because he wrote back to Mr McCleary on May 25 after (Mr McCleary) accused the CLP of extorting the money from him.

"... yet in this house all week (Mr Giles) has been playing dumb telling us he had no knowledge of the issue that led to Mr Maley's resignation.

"(Yesterday) Mr McCleary informed me of these (documents) by phone and told me he has provided them to the *NT News*."

Mr Gunner told Parliament his party had been unable to find any declaration for the \$5174.40 paid to NT Broadcasters and they would refer this payment to the NT and Australian electoral commissions for investigation.

Mr Gunner added Mr McCleary eventually met Mr Tollner and Mr Maley when Mr Tollner thanked him.

"Mr McCleary believed Mr Tollner was thanking him for the \$10,000 ... it is not surprising to hear how the CLP does business."

In Parliament, Mr Gunner said: "The Chief Minister has known this allegation since May and has done nothing about it, he should have immediately referred the matter to the Police Commissioner.

"His failure is even greater because he's also the Police Minister. (Mr Giles) has failed to maintain (the) highest standard of probity that his office demands and the community expects."

Mr Gunner also told Parliament: "According to Mr McCleary, (Mr Tollner) is up to his eyeballs in this matter".

In June, when Mr Maley learned about the email Mr McCleary had sent to the Chief Minister, the magistrate suggested his former client should delete it, arguing it could be misinterpreted.

"As to were (sic) from here I would delete all copies of that email where you arguable (sic) link a payment of money for a political favor (sic)," Mr Maley wrote.

"... In 2008 I was in business like you, I wasn't even a member of a political party from memory, but I am and remain a liberal.

"I did not and could not give you an iron clad guarantee of access to your file.

"The support we both gave the party in 2008 was a punt and we lost. They are in power now, as of 2012. Ultimately no one can tell a minister what to do, but we can lobby as hard as we want and that's what has to happen."

The NT Bar Association has led calls for an inquiry into Mr Maley's conduct in recent weeks. His position as a director of controversial company Foundation 51 — described in NT Parliament as a "CLP slush fund" — first

prompted criticism.

Mr Maley was the CLP Member for Goyder from 2001 to 2005 and in April he campaigned for the party at the Blain by-election, leading to debate about whether it was appropriate for a magistrate to be involved in the political process.

Comments in the emails further expose his political leanings. He refers to the Labor Party as "scum" and "filth" and offers to set up a face-to-face meeting with Mr Tollner.

The NT Government ultimately blocked Mr McCleary from accessing the documents he sought.

In a statement last night, Mr Giles said: "The claims made by Mr McCleary refer to conversations he allegedly had with Mr Maley prior to the 2008 election, before I even entered Parliament.

"Since becoming Chief Minister no documents have ever been given to this man. Norm McCleary's main complaint in the correspondence tabled in Parliament is that, in fact, we refused to act illegally in handing over government files.

"... I welcome the Electoral Commission looking into Mr McCleary's donation. What Peter Maley may have said to his client back in 2008 is a matter for him to explain."

CLP president Ross Connolly said he was not around in 2008 when the donation was made and could not explain the discrepancy between Mr McCleary's trust ledger and the 2008/09 electoral funding return. Mr Connolly said the NT Electoral Commission had audited all returns and he was not aware of any issues.

The legal case that set the course of this chain of events dates back to 2006, when Mr McCleary earned himself the reputation of "the midnight pegger" for his attempt to stake the Pamela and Angela uranium leases in Central Australia.

He fought the NT Government and claims to have been denied access to NT Department of Mines and Energy records throughout. He believes he was wronged.

Mr Maley said last night: "The allegations made by the Shadow Attorney-General, Michael Gunner, under Parliamentary Privilege are denied and untrue. If Mr Gunner repeats these allegations outside of Parliamentary Privilege I will take legal action against him."

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Darwin magistrate Peter Maley's festival performance adds to controversy over perception of judicial independence

By James Purtil and Xavier La Canna

Updated Thu 14 Aug 2014, 6:27am

Darwin magistrate Peter Maley has courted further controversy by suggesting he is a member of a political party while being questioned on stage at an event for the Darwin Festival.

RELATED STORY: Call for magistrate inquiry rejected for second time

MAP: Darwin 0800

Mr Maley's former ties to the ruling Country Liberal Party (CLP) have already divided the Northern Territory's legal community, sparking a war of words between the Bar Association, the Attorney-General and a prominent QC.

On Saturday night he participated in 100% Darwin, a headline theatre performance featuring 100 Darwinians standing before an audience and answering questions ranging from what they think about the carbon tax to whether they have lied on their tax return.

For each question, the cast stood behind one of two placards labelled Me & Not Me, according to their answer.

To the question, "Who's a member of a political party?" Mr Maley stood in the Me camp.

The cast was also asked, "Who's donated to Foundation 51?"

Mr Maley stood alone behind the Me placard.

He had previously been criticised for being appointed a director of Foundation 51 - a company that conducts polls and market research for the CLP - in January 2014, several months after being appointed to the bench.

He removed himself as a director of Foundation 51 in June.

Organisers confirmed those participating in the event had been forewarned of the questions.

Magistrate's former ties go to 'perception of judicial independence'

The NT Bar Association has been calling for independent inquiry into the magistrate, a former CLP member of parliament who had remained a member of the party for eight months after being appointed to the bench.

President John Lawrence told 105.7 ABC Darwin on Tuesday that upon appointment to the magistracy or the Supreme Court bench all political ties and affiliations, both direct and indirect, should be cut.

"It's all about perception," he said.

"We don't expect magistrates and judges to be impartial, the law requires them to be."

He said it was expected that things such as attending political gatherings or political fundraising events would not occur by a serving member of the judiciary.

"What's happened here I can fairly describe as gross," he said.

"The longer this goes on the more compromised our Attorney-General is.

"He should have an independent inquiry held by a retired judge. Give us a report and a ruling on what can happen now."

Unlike in other Australian jurisdictions which have judicial commissions, in the NT only the Attorney-General can initiate an inquiry into a judge or magistrate.

"The moment that you have someone who is politically involved, a paid-up member fundraising for a political party, particularly if the party is in power, it starts to raise questions about their independence and that is a fundamental tenet of the law," Dr Curran said.

She said the law was based on the independence and fearlessness of both the judiciary and the legal profession.

"Where a judicial officer actively supports one political party - whether it is Liberal or Labour, Green, Country, National Party, whatever the political party is - that is blurring the lines between political and the independence," Dr Curran said.

She said the Australian Constitution required a separation of judicial powers and the powers of states and territories.

The ABC tried to contact Mr Maley to discuss the allegations but was unsuccessful in reaching him.

Topics: judges-and-legal-profession, law-crime-and-justice, government-and-politics, ethics, community-and-society, darwin-0800

First posted Wed 13 Aug 2014, 5:59pm

Appendix 5

Darwin 26-33 °C

Northern Territory

Double duty under fire

July 31, 2014 7:40pm

By CHRISTOPHER WALSH NT News

NT News



Denis Burke

THE new head of the Territory's land development approval body, former chief minister Denis Burke, is registered as a lobbyist for major Darwin developer the Halikos Group.

The potential conflict of interest has raised questions about the appointment of Mr Burke, who is listed as a registered lobbyist on the Australian Government Lobbyists Register, as of earlier this month. Mr Burke was announced as chair of the NT's Development Consent Authority yesterday with an annual salary of \$136,000. He will have final say over which development projects get approval across the NT.

Lands and Planning Minister Peter Chandler defended the appointment of Mr Burke late last night, saying his experience made him the best candidate for the job.

But he was unable to explain why the Government would appoint a lobbyist for a development company as the head of development approval for the NT. "He will not be carrying out work as a lobbyist during his term as DCA chair," Mr Chandler said.

Lobbyists such as Mr Burke's company, Burke Consulting, are required to register if they are representing third- party clients for the purpose of lobbying the Federal Government. The register was created in 2008 to ensure business between Commonwealth Government officials and lobbyists was conducted in a fair and transparent manner.

The NT does not currently have a lobbyist registry or a code of conduct for how lobbyists and Government officials interact.

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Teens' vicious attack at cafe



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Minister's partner was on payroll of Vietnamese firm

Before the lobbyist information came to light, Labor had already denounced the appointment of Mr Burke as another in a long line of CLP patronage positions.

"Territorians are sick and tired of the CLP's appointment of the old boys," their spokesman for Government Accountability Ken Vowles said.

"There's lots of people with lots of experience. Why do we have to go back to a former CLP chief minister?"

Representatives from Halikos did not return calls before deadline. Attempts to contact Mr Burke were unsuccessful.

It was not clear the extent of Mr Burke's connection to Halikos or whether he has worked on the controversial Nightcliff Island project.

Comments



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Northern Territory

Jobs for mates cry as CLP fills health post

June 2, 2015 6:15pm

CHRISTOPHER WALSH NT News

Health Minister John Elferink decreed on Monday that the plum position of Health Complaints Commissioner will now be filled by his chief of staff and former CLP health minister Stephen Dunham.

The appointment was made without a standard public recruitment process.

The position became available after current commissioner Lisa Coffey – the girlfriend of former top cop John McRoberts – did not seek another five-year term in the senior post.

Labor public employment spokeswoman Lynne Walker called the appointment of Mr Dunham “another blatant case of jobs for the boys”.

“It’s been a hallmark of the CLP Government from day one to appoint mates to jobs,” she said.

“It’s clear the CLP care more about looking after their mates than looking after Territorians.”

Other Stories



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Minister's partner was on payroll of Vietnamese firm

Mr Dunham was the member for Drysdale from 1997 to 2005, serving as health minister for three years and later as senior adviser to four health ministers. He also spent years as a public servant.

The Health and Community Services Complaints Commission provides assistance to Territorians to resolve complaints about health, disability and aged services in the NT. The position is viewed as more of an oversight body than an internal one. The commissioner also makes recommendations to improve services based on investigations into complaints.

Mr Elferink said he was “happy and proud” to announce the new job for his mate. “He knows the NT like the back of his hand and he knows the health system like the back of his hand,” he said.

"Right person for the job."

When questioned over whether the job was advertised, Mr Elferink said cabinet had made the decision to hire Mr Dunham internally. "That was well within the authority of cabinet to do so," he said.

The CLP's last big unadvertised appointment from within was Adam Giles' chief of staff Ron Kelly, who was named chief executive of the Department of Mines and Energy earlier this year.

There was no information available for why Ms Coffey didn't seek another term.

Mr Dunham is expected to start on June 11, with an estimated salary of \$250,000.

Comments



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Labor bias over Stella Maris site

June 20, 2014 9:38am

By BEN SMEE NT News



Opposition leader Delia Lawrie at the Stella Maris inquiry

FORMER Labor ministers acted unfairly, improperly and “with bias over many years” – but not illegally – when they handed Unions NT the Stella Maris lease, an inquiry found.

The findings were tabled in parliament late yesterday.

The report contains criticisms of Opposition Leader Delia Lawrie and her deputy Gerry McCarthy, but makes no recommendation of disciplinary action.

Instead, Commissioner John Lawler suggests that the CLP-majority Parliament should now consider the matter and whether to refer it to the Parliamentary Privileges Committee.

READ: LABOR CAUGHT OUT ON STELLA MARIS SITE

Mr Lawler found that: “In all the circumstances and particularly given there is no statutory definition of corrupt conduct in the Northern Territory, it would be inappropriate for me to make a finding of corrupt conduct against any person as a result of the inquiry’s work.”

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Good guy says goodbye to Territory



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The lease was offered to Unions NT on the day before the former government entered caretaker mode in - August 2012.

Reports by the *NT News* last year sparked the inquiry.

Mr McCarthy, who was lands minister at the time, acted in accordance with the provisions of the Crown Lands Act in granting the lease.

But Mr Lawler found the offer was "arguably unreasonable ... and would be susceptible to challenge before the Supreme Court on that basis".

"Minister McCarthy's conduct was not accountable, responsible or in the public interest," Mr Lawler said.

READ : EYES WIDE SHUT ON STELLA MARIS DEAL

Ms Lawrie, a former lands minister, treasurer and deputy chief minister, was found to have "acted with bias over many years, forming a view in 2009 that Unions NT should be exclusively granted a lease over the site without an expression of interest process".

"Minister Lawrie may have genuinely believed that granting the site exclusively to Unions NT was in the public interest (but) the way she involved herself in the process was not proper and was unfair to the public and other community groups."

An Opposition spokesperson labelled the inquiry "an expensive political stunt".

"The report shows that the actions of the former Labor Government were lawful, that there was no conflict of interest and no benefit received.

"The Opposition rejects many contentions in the report and is seeking legal advice."

"The Chief Minister's outrageous slurs under the cover of parliamentary privilege are completely wrong."

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Water Licence – Blackbull Station**Ms LAWRIE to CHIEF MINISTER referred to MINISTER for LAND RESOURCE MANAGEMENT**

Two water licences granted and advertised yesterday in the *NT News* for a total of 8517 ML were for a company called Blackbull. A major shareholder in Blackbull Station is magistrate and former Foundation 51 director Peter Maley.

These licences have been awarded before the aquifer water allocation plan is finalised. How can Territorians have any confidence that you run a government free from corruption when you grant free water licences which add significant value to a property part-owned by former director of a CLP slush fund?

Will you call an independent Inquiry into the allocation of water licences in the Territory since September 2012?

ANSWER

Madam Speaker, I thank the member for Karama for her question. We are on the last day of a fortnight of parliament where we have delivered the best budget in the Territory's history and you have to slander us in the first question. You are slandering people on the outside.

You want to talk about transparency and accountability – I do not know all the details of this application for a water licence, but in your question, much of the premise of which I do not accept, you spoke about it being advertised. Clearly we are letting the public know what is happening through the advertisement.

I have not seen the advertisement; I do not when the licence was issued. I am happy to grab a paper and read it, member for Karama and current Leader of the Opposition, but if you want to know a little more about the issuing of a water licence, I am happy to ask ...

Mr GUNNER: A point of order, Madam Speaker! Standing Order 113: relevance. Will the Chief Minister hold an independent inquiry into the granting of water licences?

Madam SPEAKER: Member for Fannie Bay, the Chief Minister just started answering the question. It is not a point of order.

Mr GILES: Thank you very much, Madam Speaker. The opposition forgets we have a bureaucracy of around 20 000 working for the Northern Territory government. Some work in an agency under the guidance of the Minister for Land Resource Management, and Primary Industry and Fisheries, and they look at the allocation of water licences. Your query about the allocation of water licences goes right to the heart of those staff who work in those agencies and analyse and make decisions about issuing those licences.

You try to cast aspersions on a political party and on this side of the Chamber, but you are attacking the public servants who assess and make recommendations and decisions on water licences. We will not have an inquiry.

I will hand over to the minister, who can give you some further information about the analysis and issuing of the water licence.

Mr WESTRA van HOLTHE (Land Resource Management): Madam Speaker, I am shell-shocked by this question after my 30-minute contribution last night to a motion from the member for Nhulunbuy about water licencing in the Northern Territory. It is quite clear the members opposite are not listening or are too stupid to understand ...

Madam SPEAKER: Member for Katherine, withdraw that comment.



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Thursday, February 11, 2016



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Water rights in never-never land: Tina Macfarlane denies report Stylo Station sold for \$4m

[Bob Gosford](#) | Jun 10, 2015 8:58AM | [EMAIL](#) | [PRINT](#)

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A report of the sale of a large freehold cattle station in the NT to the country's largest grower of sandalwood is denied by the station owners but questions remain over the future of the station's controversial water allocation.

greenies ... It would be inconsistent of us to deny Stylo Station water simply because the owners have an association with the Country Liberal Party.

On 25 March 2013 new Water Controller Rod Applegate released the written reasons for his decision to allow the MacFarlanes to extract 5,800 megalitres of water each year based upon new and "improved" modelling that included permission to construct seven new bores in addition to the two existing bores on the property. Significantly for present purposes:

The granted licence cannot be traded until a water allocation plan is declared for the aquifer, at which time trading must be in accordance with the requirements of the plan. The granted licence is subject to existing provisions of the Water Act in regard to the sale or subdivision.

The expressions of concern that followed the announcement came not only from Tollner's "extreme greenies" but also from farmers, fishers, indigenous groups and cattle producers with interests in the Roper River region and beyond. NT Land Resources Minister van Holthe assured listeners to the ABC's *Country Hour* that there had been no "dodgy deals" done with the Stylo Station water allocation because Tina MacFarlane was a CLP candidate. "There was absolutely nothing suss about this at all ... [it] was dealt with on its merits, and the consumptive pool is large enough to cope with it." Under the "new and improved" modelling of the Tindall aquifer, the consumptive pool had almost doubled from 19,500 megalitres to 36,000 megalitres per annum.

In August 2013 the ABC reported that in February 2013, a month before Applegate's decision, an NT government Water Resources planner—whose report had been released to the ABC following an FoI application—had opposed the MacFarlane application for several reasons, including possible adverse effects upon the water supply for the downstream Aboriginal township of Ngukurr, a reduction in supply to natural springs in the local national park and potential impacts on a downstream mining project. She recommended, as the local water allocation plan was still being prepared in consultation with local stakeholders, that no new water licences be issued until that plan was finalised.

In the alternative, she recommended that a reduced licence could be issued, allowing incremental increases following the MacFarlanes proving the development of bores on their land and noted that to date the MacFarlanes had not used any of their allocation.

The ABC was denied access to 65 pages of briefing documents provided to the Water Controller and 13 pages of correspondence between elected members of the Country Liberal Party and Water Controller Applegate on the basis that they "formed part of the deliberative process or could cause confusion or unnecessary debate."

In May 2014, amid continuing controversy over the grant of their water licence, the MacFarlanes lodged three subdivision applications over Stylo Station, a plan that a year earlier Dave Tollner said he encouraged. To date it appears that the MacFarlane's applications for subdivision have not proceeded beyond the submission stage.

Under questioning in NT Legislative Assembly Estimates Hearings in June 2014, Minister van Holthe, who had previously denied in two written answers to questions that there had been any formal or informal communications between himself and Tina MacFarlane, admitted under questioning that he had met with her in his Katherine electorate office in January 2013 and had discussed her water licence but that he would not provide any further details as he was "not in the habit of disclosing the details of conversations that occur either in my electorate office or in my ministerial office."

During the same Estimates Hearings Minister van Holthe and Water Controller Applegate were asked to shed light on how water allocations might be traded. Independent MLA Gerry Wood asked Minister van Holthe if the MacFarlanes could sell their water, noting "they received it for nothing and I believe it belongs to the people." Minister van Holthe responded that water trading "becomes effective ... when an aquifer is fully allocated ... no one in their right mind will buy water when it is currently freely available from the NT government."

Under further questioning from Gerry Wood, Minister van Holthe and Water Controller Applegate were able to shed some light on how the MacFarlanes could deal with their water allocation.

Mr Wood: ... If they have a bore on one block – I do not know how it works technically, but Portion 7018 has a water license application. If they sell Lot B and it has no bore on it, can the people who buy Lot B go along to MacFarlane and say, "Can we have a portion of that licence for the entire block?"

Minister van Holthe deferred to Water Controller Applegate.

Mr Applegate: The license is issued to existing bores on the block and for any portion of that licence to be transferred to another portion of the land, a new bore has to go with that portion of the land ... they would have to put the bore in and seek approval to transfer a portion of that bore and then be in a position to subdivide that portion of land and sell it.

...

Mr Wood: To put it in simple terms, can MacFarlane sell the water component that goes with the bore?

Mr Applegate: Trading can only exist in the NT when there is an endorsed water allocation plan in place.

Whether TFS has bought Stylo Station from the MacFarlanes remains unclear, though the MacFarlanes are adamant that it has not been sold. TFS yesterday told *The Northern Myth* that "We have no further comment as the matter is currently commercially confidential." One conclusion that can be drawn from that comment is that a deal of some kind is in the works.

Tina MacFarlane has repeatedly denied to *The Northern Myth* that Stylo Station had been sold and would not respond to any questions about whether the MacFarlanes had entered into any other arrangements with TFS or any other matters to do with their plans for Stylo Station or their water allocation.

On Sunday Tina MacFarlane told *The Northern Myth* "we have not discussed or entered into any arrangements with anyone, we haven't sold Stylo."

Last evening Lindsay and Tina MacFarlane sent an email to *The Northern Myth* and the ABC stating that:

Stylo has not been sold.

We have not negotiated the sale of Stylo to anyone. We will remain owning and running Stylo in its normal manner into the foreseeable future and no event has occurred which will alter that fact.

Demands have been made that we provide some further or alternative version of our personal information. We will not make any further or other comment and we consider that the persistent attempts to harangue us to disclose any matter concerning our personal affairs is illegal and constitutes a fundamental violation of our privacy rights

We wish to confirm that we do not consent to the disclosure of our personal information (in whatever form that information may or may not be obtained). We reserve all rights in relation to any loss which may be suffered as a result of the disclosure of illegally obtained personal information. We further wish to confirm that the publication of incorrect information may result in serious and substantial loss and damage and we reserve all rights. Lindsay and Tina MacFarlane (sic)

On Sunday *The Australian's* Sue Neales told *The Northern Myth* that she stood by the information provided to her by TFS that the company had acquired an interest in Stylo Station.

SATURDAY PAPER

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Ruling puts NT water licences in doubt

May 29, 2015 5:43pm

AAP

LOSING a Supreme Court case over controversial water licence allocations presents the Northern Territory government with the opportunity to reconsider how it manages a precious resource, say environmental lawyers.

ON Friday, Justice Graham Hiley ruled that Land Resource Management Minister Willem Westra van Holthe failed to follow proper procedures when he upheld the water controller's decision to allocate 18 water licences from the Tindall and Ooloo aquifers, which feed the Katherine, Roper and Daly rivers.

The licences were for a combined 68 billion litres, eight billion more than the agreed extraction limit outlined in the draft Ooloo Water Allocation Plan, the Environment Centre NT (ECNT) said.

Environmental Defenders Office (EDO) principal lawyer David Morris, who represented the ECNT, said the awarding of the licences was worrying because it sidestepped the National Water Initiative.

There is now a question mark over all 18 licences, including two totalling over 12 billion litres from the Ooloo aquifer that were granted to Tropical Forestry Services for growing sandalwood, and two issued to former Country Liberals MP Peter Maley for property in the Douglas Daly region.

The ECNT said traditional owners, fishermen and farmers were worried that over-allocating groundwater without a plan or a reserve set aside for indigenous development would hurt communities and damage the rivers' flow.

"It's an opportunity for the government to go back and really have a hard long think about water resources in the Territory, and how to equitably allocate those resources," Mr Morris said.

"I'd just urge the minister to have a little more foresight around water planning in the Territory, particularly when you're going to depart from a nationally accredited scheme."

The EDO has been defunded by the federal government and the ECNT has been cut off by the NT government.

"This is just a fantastic example of why this type of organisation should be around in the NT," Mr Morris said.

"Without the EDO and the ECNT, the minister's decision would have gone through unchallenged, and it's now been found to be unlawful."

Justice Hiley has awarded costs to be paid by the minister, to be assessed at a later date.

"Alarm bells began ringing as soon as the CLP got into government and began handing out water licences with complete disregard for the proper processes," said opposition spokesman for land resources management Gerry McCarthy.

"This damning judgment today against the CLP is a win for the environment."

But Minister Westra van Holthe said the judgment was a good result that clarified an ambiguous part of the Water Act.

He said the 18 licensees would retain their allocations while the government reconsidered them; he could not say whether they would be ultimately quashed.

"We remain resolute that we have a robust system in place for deciding water licences and who should get water and who should not, what the size of those water licences should be, so we're going to continue to allocate within the sustainable limits of water for the growth of the economy of the Territory," he said.

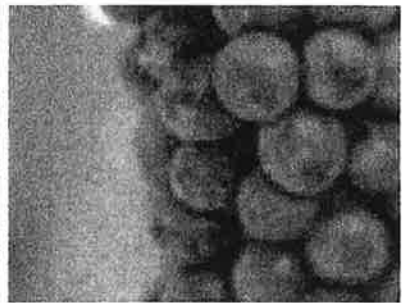
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Adam Giles using NT Police as a political football, Police Association's Vince Kelly says

105.7 ABC Darwin By Anthony Stewart

Updated Wed 4 Feb 2015, 7:13pm

The head of the Northern Territory Police Association has accused Chief Minister Adam Giles of using the force as a political football.

On Tuesday Mr Giles announced a judicial inquiry into the conduct of former police commissioner John McRoberts and alleged that senior police officers had been involvement in the attempted leadership coup.

But Police Association president Vince Kelly said Mr Giles had made general accusations without providing any proof.

"There was no detail provided beyond the Chief Minister's reference to rumour and innuendo relating to senior police and a political figure," he said.

Mr Giles announced the police inquiry in a combative media conference after refusing to resign his commission, despite appearing to have lost the support of his party room.

Mr Giles said he hoped the inquiry would quash "scurrilous rumours" being spread about him and other senior Country Liberal Party (CLP) parliamentarians and the "upper echelons" of the NT Police.

"There have been a series of allegations and rumours made today, particularly in relation to some senior police and members of the political fraternity on the Country Liberal Party side, some of those are quite dramatic things that I'm hearing," he said.

"Spreading rumours about myself, by one parliamentary member in particular and upper echelons of the police, I think is very bad and signifies a significant problem with in police.

"Spreading them through the political circles, the chattering class, the upper echelons of the police force, well the judicial inquiry will take a look at that."

Giles responding to rumours, says police association

Mr Kelly accused Mr Giles of launching the inquiry on the basis of rumours not facts.

"He (Mr Giles) said that he has announced that off the back of rumour and innuendo into the apparent conduct of an unnamed senior police officer and unnamed political figure," he told 105.7 ABC Darwin.

"There is absolutely no basis for a independent judicial inquiry based on that.

"The Chief Minister says he doesn't react to rumours, well here he is reacting to one."

He said the NT Police should be "above politics" and called for the position of commissioner to become an independent statutory appointment.

"The Ombudsman is not on contract, there are number of other senior positions in the administration of justice that are not on contracts, they are statutory appointments," he said.



PHOTO: President of the Northern Territory Police Association Vince Kelly says police are being used as a "political football". (Supplied)

MAP: Darwin 0800



"It means they are not subject to the whim of government and removal requires approval of the majority of Parliament as opposed to the whim of politician."

Mr Kelly called on Mr Giles to back the NT Police force to investigate the allegations of corruption.

"What is needed is for politicians and police management to provide the highly professional police investigators the time and resources to finish the job they have started without interference.

"If the Chief Minister, leader of the Opposition, or commentators from the legal fraternity have evidence and concerns of improper conduct by senior police under former commissioner McRoberts or an improper relationship between Mr McRoberts and the current or previous government they should establish an enquiry for that purpose and no other."

The Chief Minister says he doesn't react to rumours, well here he is reacting to one.

Vince Kelly, NT Police Association

Giles refuses to name 'conspirators'

Speaking on 105.7 ABC Darwin, Mr Giles declined to name who he believed was behind the rumours.

"We don't like to act on rumours, we like to act on evidence," he said.

"As much as I dispel all rumours I thought going with all the calls for another, public investigation... I thought it was time to have that.

"A judicial inquiry can have a proper look at that."

The rumours have been swirling since the former police commissioner was forced to resign last month.

It has been alleged he improperly interfered in a criminal investigation which was centred on travel agent Xana Katmitsis, who was allegedly defrauding the travel scheme.

Those allegations sparked three separate investigations into Mr McRoberts' conduct and the actions taken by police.

The investigations are being run by the solicitor for the Northern Territory, the Public Interest Disclosure Commission and the Ombudsman.

But questions have been raised about how impartial the investigators can be in the small, social city of Darwin.

Public Interest Disclosure commissioner Brenda Monaghan removed herself from the investigation due to a conflict of interest.

Ms Monaghan said she had a friendship with Mr McRoberts' partner Lisa Coffey.

The former deputy ombudsman of Victoria, John Taylor, was brought in to oversee the commission's investigation.

Similarly, Kelvin Currie, a government solicitor involved in the investigation, once worked for Mr McRoberts as a legal adviser.

The Department of Attorney-General and Justice has denied Mr Currie had any conflict of interest.

After seeing off the leadership challenges Mr Giles confirmed the Government was working on terms of reference for the judicial inquiry.

"What we will be doing, probably in the next few days, I don't want to put a specific time on it, is putting out a terms of reference for an inquiry and to start to identify the person to head that up so," he said.

"We do have a bit of a rough idea of a draft terms of reference but we'll put a bit of work around that, we'll take it to Cabinet have a chat with Cabinet and the parliamentary wing and move forward with it on that time frame."

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Timeline of John McRoberts' five years as police commissioner



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Northern Territory

Adam Giles has accused senior police of being involved in political bid to topple him as chief minister

February 4, 2015 7:46am

FRED MCCUE NT News



Adam Giles and Willem Westra van Holthe address the media as Giles takes back his position as the chief minister. Picture: Ivan Rachman

SENIOR police were yesterday accused of being involved in a bid to topple Adam Giles as chief minister.

And as he entered the CLP party wing meeting that would determine his political fate, Mr Giles also accused an unnamed parliamentary colleague of working with the upper echelon of the force to bring him down.

"The allegations that have been coming out about senior members of the police force actively running a coup, or a campaign, in cahoots with some alleged politicians is a significant problem," he said.

Mr Giles has demanded that concerns he has about possible police involvement in destabilising his leadership be investigated as part of a broader judicial inquiry.

READ: GILES STILL CHIEF MINISTER

After consistently rejecting such an inquiry, Mr Giles yesterday said it had become necessary to look into the

police investigation of the government-run pensioner travel scheme which saw the arrest of travel agent and socialite Xana Kamitsis and the forced resignation of former police commissioner John McRoberts.

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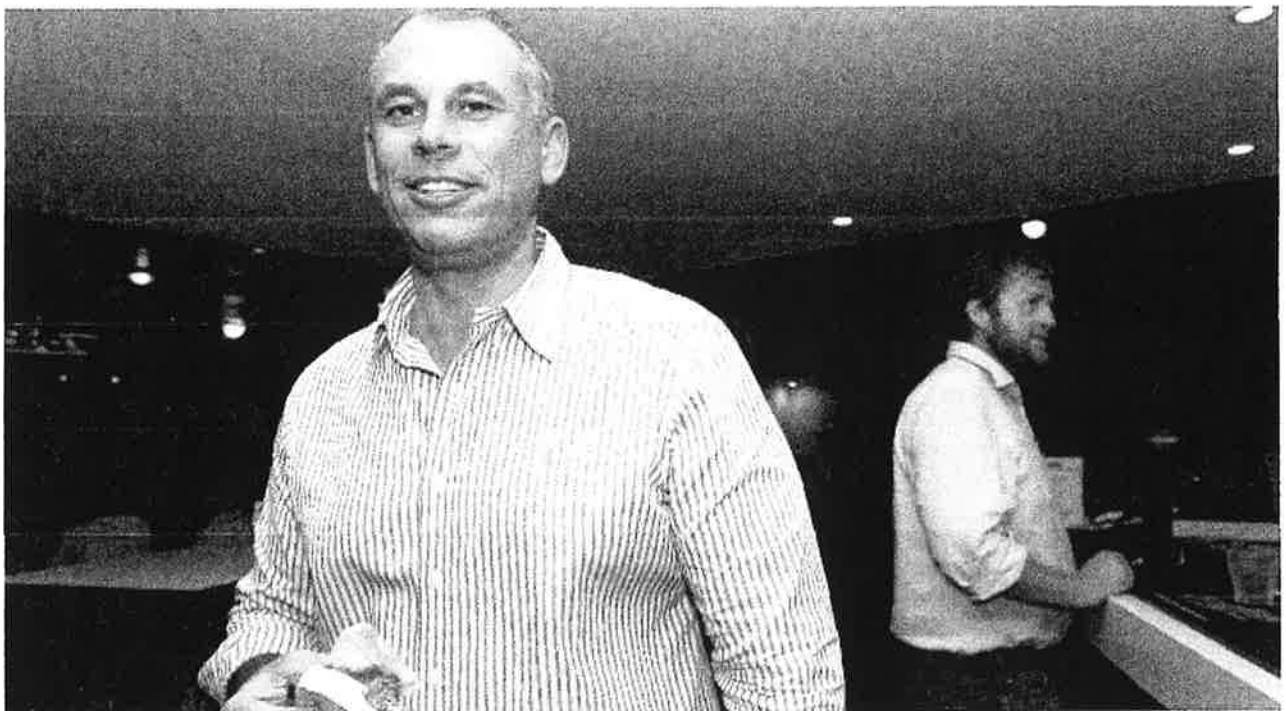
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NT News

After seeing off the leadership challenge, Mr Giles said he would soon begin working on the terms of reference for the proposed judicial inquiry.

Acting Commissioner Reece Kershaw yesterday endorsed "the integrity" of the force, saying Territorians could have complete confidence in Territory police.

Mr Kershaw said he had referred three matters to the Solicitor for the NT, who has been asked to investigate whether the conduct of Commander Richard Bryson, who is under suspension, warranted any further action.

He has also asked if anything in the conduct of Mr McRoberts before his resignation could constitute a breach of the NT Police Force code of conduct and ethics or a breach of any criminal offence provision.

The Solicitor for the NT has also been asked to determine whether any actions by Mr McRoberts or Commander Bryson involved any conflict of interest and, if so, what the nature of the conflict was.

"In relation to the last of these, I have asked the Solicitor for the Northern Territory to assess whether any changes may be required to existing police policies, protocols or procedures governing conflicts of interest," Mr Kershaw said.

"I have taken these steps to ensure there can be absolutely no question as to the integrity of any investigation of any matter that led to the resignation of the former commissioner and subsequent related events.

"I would like to again reassure the people of the Northern Territory that they can continue to have full confidence in the integrity of the men and women of the NT Police Force and the other arms of the tri-service."

Before entering yesterday's party meeting, Mr Giles said he would provide any judicial investigator access to all emails, phone records and text messages "to find out who knew what and when".

"There have been a series of allegations and rumours made today, particularly in relation to some senior police and members of the political fraternity on the Country Liberal Party side," he said. "The only way to get to the bottom of that is through a full investigation."

READ: GILES SEIZED BACK CONTROL OF TERRITORY

No one had yet been identified to head the proposed judicial inquiry.

"I think that there are serious things that have been going on," Mr Giles said.

Mr Giles said that included Mr McRoberts' removal as police commissioner "under a cloud of allegations". "It's time to say 'right, let's have look at exactly what's happened in that investigation process'."

While Mr Giles did not name the politician he accused of working with police to topple him it is believed to be Attorney-General John Elferink

Mr Elferink returned from a US holiday on Monday afternoon, shortly before Willem Westra van Holthe launched his unsuccessful bid to become chief minister.

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Minority Governments in Australia 1989-2009: Accords, Charters and Agreements

Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.

Background Paper 1/2010 by G. Griffith

SUMMARY

This paper discusses minority governments in Australia between 1989 and 2009, a period of two decades in which there have been at least ten examples of this political phenomenon in the Australian States and Territories. This paper confines itself to those instances where a minority government has been based on an agreement, charter or accord between major parties on one side and minor parties and/or Independents on the other. In particular, in the context of the ACT, it looks only at the minority governments formed in 1998 and 2003. [1]

Hung Parliament: The focus is on those political circumstances where no party or formal coalition of parties has majority support in the Lower House of Parliament, that is, in the House in which governments are formed. This is what is meant by the term 'hung Parliament'. [2.1]

It is said that 'there are no 'rules' about government formation from a hung Parliament' – aside, that is, from the principle that the person best able to command a stable majority in the Lower House (or at least maintain a stable government) should be appointed. Australian experience over the past 20 years bears out that observation. In several instances minority governments have been formed on the basis of agreements with the major party holding the most seats in the Lower House, but not in every case. [5]

Minority government: A minority government is formed in those circumstances where, in the context of a hung Parliament, some accommodation is made between political rivals or competitors, be they political parties or Independent Members of Parliament. A minority government is therefore a form of government established under the conditions of a hung Parliament, but not as the inevitable effect or result of those conditions. Rather, it is a political creation, formed by means of compromise and negotiation. The detailed arrangements for a minority government can vary, from a loose coalition agreement entered into between political parties and/or Independents, to other kinds of 'confidence and supply' agreements, or 'co-operation' agreements. [2.1]

Minority governments in Australia: A feature of many minority governments in Australia since 1989 is that they have been based on a written accord, charter or parliamentary agreement, setting out the conditions under which the political arrangements are to operate, at least in relation to no confidence motions and supply bills. Further, as a condition for their support of a minority government, minor party or Independent Members of Parliament often require the inclusion of certain reform measures in these charters or agreements. Another innovation on this minority government theme is the inclusion in Cabinet of minor party or Independent Members in 'loose coalition' with a major party, again subject to a written statement of the terms and conditions for such involvement. [2.1]

Models and Ideal Types: Various models and ideal types of minority governments are discussed in the literature. The four ideal types formulated by Jeremy Moon are: Ersatz majoritarianism; Ersatz coalition; Ad hoc minoritarianism; and Minoritarianism. Moon's ideal types concentrate on outcomes which may be: highly particularistic, based on personal or constituency needs (*Ersatz majoritarianism*); or limited to defined policy areas (*Ersatz coalition*). Alternatively, the intended outcomes under Moon's ideal types may be: reformist in nature, albeit without a strategic policy agenda (*Ad hoc minoritarianism*); or a broad reformist agenda outlined in a formal agreement with the governing party (*Minoritarianism*). [3.2]

Reform agendas: The first Australian example of a written accord was the Tasmanian Parliamentary Accord agreed to on 29 May 1989 between Labor's Michael Field and five Green Independent Members (Bob Brown, Gerry Bates, Dianne Hollister, Lance Armstrong and Christine Milne). Brian Costar has argued that the Tasmanian Accord is an example of a more policy based agreement with a strong environmental bias. In comparison, Costar argues, the Charter of Reform (and later Memorandum of Understanding) in NSW between 1991 and 1995 is more of an 'accountability' charter, including a broad agenda for constitutional and parliamentary reform. Both the Tasmanian and NSW agreements are examples of Moon's *Minoritarianism*. [3.4]

In broad terms, the Tasmanian and NSW models have set the tone for later accords or charters of reform, in which environmental, constitutional and parliamentary reforms have featured prominently. But of course each minority government situation is very much dependent on its own facts and must be understood in its own context. For example, where Independents have represented rural or regional constituencies, as in Victoria in 1999 and South Australia in 2002, a policy commitment to addressing the needs of these areas has tended to be built into the charters or agreements under which minority government operates. The same applies for the 2009 agreement reached in the Northern Territory between the Independent Gerry Wood and the minority Labor Government. [3.4]

Loose or Ersatz coalitions: A further development, away from the norms of the Westminster system of Cabinet government, starting in the ACT and spreading to South Australia, is where Independents and crossbenchers have taken Cabinet posts, subject to certain conditions. These are probably best seen as forms of 'loose' or *Ersatz Coalitions*. These arrangements involve the identification of issues to which Cabinet solidarity will not apply. They can also involve reformist agendas, notably on behalf of regional or rural interests, as in the case of the current agreement in place in WA with the Nationals. In that State there is currently an informal yet seemingly stable coalition of Liberals, Nationals, plus one Independent Member who has taken a Ministry (Elizabeth Constable). This informal or loose coalition must also rely on the two other Independent members (John Bowler and Janet Woodland) voting with the Government. [3.4]

Constitutional issues: It may be that the extent to which these 'loose' or *Ersatz Coalition* arrangements depart fundamentally from constitutional practice should not be overstated. This is especially the case in the light of British constitutional history, in which context the suspension of collective Cabinet responsibility has been achieved either by an 'agreement to differ' on certain issues, or by declaring certain issues to be 'open questions'. [5]

Ian Killey in *Constitutional Conventions in Australia* discusses these precedents. He also considers the New Zealand position where, in order to facilitate the formation of broad coalition administrations, the Cabinet Manual includes procedures for Ministers to 'agree to disagree'. The agreements reached in the ACT, South Australia and Western Australia discussed in this paper can be seen as extensions on this theme. Whereas the New Zealand arrangements are designed for actual coalitions, in the Australian precedents the participating Ministers retain their independence and operate only within a loose coalition.

subject to agreed conditions. [5]

Clause 3 of the Western Australian agreement, signed by Premier Barnett and Nationals Leader Brendon Grylls on 18 September 2008, sets out the procedures and rules involved for 'attendance at Cabinet'. Basically, after receiving Cabinet papers and finding that it would be inconsistent with their independent status to be bound by a Cabinet decision, Nationals Ministers must inform the Nationals Leader who must, in turn, meet with the Premier to seek an accommodation on the issue. The issues upon which Cabinet unanimity may not apply are limited to: issues which significantly affect regional Western Australia; and other matters as the National Leader may have advised the Premier from time to time. Despite the emphasis on regional matters, there is therefore no actual restriction on the issues upon which the parties may 'agree to disagree'. Where no accommodation can be reached, Cabinet papers are to be returned by Nationals Ministers who are to absent themselves from relevant Cabinet discussions. Subsequently, the Nationals Ministers may disagree publicly with the policy in question but only after it has been publicly announced. Clause 3 ends by stating that, except as provided in the agreement, Nationals Ministers will be 'full members of the Cabinet', subject to 'the usual rules of Cabinet solidarity'. [4.8 and 5]

The particular agreements in place in Australia are not discussed by Vernon Bogdanor in *The New British Constitution*. However, his commentary does suggest that such arrangements may be relevant in the future in Britain, especially in the devolved Scottish Parliament, where a loose coalition might exist 'on something like a 'confidence and supply' basis, that is, to allow the convention of collective responsibility to be suspended for key matters on which the parties to the coalition disagree'. Indeed, having reviewed the constitutional precedents, Bogdanor goes on to say: 'The implication would seem to be that collective responsibility is as much a maxim of political prudence as it is a convention of the constitution'. [5]

Conclusions: Basically, what has emerged over the past 20 years or so is the normalization of accords, agreements or charters of reform as the basis of mostly stable minority governments in the Australian States and Territories. These agreements further suggest that balance of power holders are well positioned to gain certain pay-offs, be it in terms of official positions, constituency interests, broader policy interests and/or constitutional and parliamentary change. [6]

List of Tables

Table 1: Independents in Australian Lower Houses, 2008

Table 2: Models and Types of Minority Governments in Australia, 1989-2009

Table 3: Reform agendas of Independents/minor parties

Table 4: Tasmanian Greens Accord commitments

Table 5: NSW Independents Charter of Reform commitments

Table 6: Minority government ruling parties that did and did not have more seats in the Lower House than any other party

Independent Gerry Wood sides with Labor to avert Northern Territory poll

NATASHA ROBINSON THE AUSTRALIAN AUGUST 14, 2009 12:10PM

LABOR will hold on to power in the Northern Territory after independent member for Nelson Gerry Wood sided with the Government in a no-confidence motion brought in parliament this morning.

Mr Wood, who holds the balance of power in the 25-seat legislative assembly, delivered a speech on the floor of parliament this morning confirming he would vote against the no-confidence motion.

His decision allows Chief Minister Paul Henderson to remain in power to lead a minority government.

The crisis was triggered last week after indigenous policy minister Alison Anderson quit the Government in protest at its management of the \$672m Strategic Indigenous Housing and Infrastructure Program.

Mr Wood told parliament he would agree to support the Henderson Government's future supply and appropriation bills, and would also vote against any no-confidence motion in the Government except in cases of corruption or serious maladministration.

But in return, he extracted promises from the chief minister on parliamentary reform, a review of the location of a new Darwin prison, property law reforms and public housing.

Mr Wood said he was using the extraordinary turn of events in NT politics as a "unique opportunity to try and change things".

He said government in the NT had been "stifled by party politics" and called for a radical change to the territory's political culture.

He has extracted a promise from the chief minister to refer the \$672m SIHIP to a new Council of Territory Cooperation that will be made up of six members of the legislative assembly, including two Labor members, two Country Liberals members, and at least one independent.

An emotional Mr Wood said sending the territory to an election would have been the "easy way out".

"This has been the hardest decision that I have ever had to make" he told parliament. "I see this as an opportunity for me to bring change and to bring all sides of government into the decision-making."

Parliamentary Agreement

THIS AGREEMENT is made on the *14th* day of *August* 2009

BETWEEN Hon Paul Henderson MLA, Chief Minister of the Northern Territory

AND Mr Gerry Wood MLA, Independent Member for Nelson

The aim of this Agreement is to:

- Provide for stable government for the people of the Northern Territory.
- Enhance Parliamentary democracy and to ensure an accountable and transparent government, public service and Parliament.
- Provide for Mr Wood to be consulted in areas of Government policy and also issues where he has specific interest.

AGREE to the following for the current term of the Legislative Assembly:

1. Provided that all Labor Government MLAs continue to support the Government, vote in favour of its legislation and Paul Henderson retains the position of Chief Minister, Mr Wood shall vote:
 - In favour of Government Supply and *Appropriation Bills*;
 - Against any no-confidence motion in the Government, except in a proven case of corruption or serious maladministration.
2. To enhance inclusion and transparency in decision making, in consultation with Opposition and other MLAs, the Government shall ;(i) form a Council of Territory Cooperation comprised of 2 Government Members, 2 Opposition Members and at least one Independent Member ; (ii) commit to reforms of Parliamentary procedures; and (iii) progress the matters in Appendix A and any matters added by agreement.
3. To hold monthly meetings with the Chief Minister, the Hon Paul Henderson MLA to review progress of agreement and add items to Appendix A as agreed.
4. The items identified on Appendix A shall be advanced in line with the process and timeframes outlined.
5. The parties will, in the event of a perceived non-adherence to this agreement, notify the other party in writing immediately with a view to the Chief Minister and Mr Wood rectifying the situation or agreeing to a mechanism to resolve the dispute.



PAUL HENDERSON
CHIEF MINISTER



GERRY WOOD
INDEPENDENT MEMBER FOR NELSON

CHANGE POLITICAL CULTURE

The approach and mechanisms of governance in the Northern Territory are often overly Party political and adversarial in nature. There should be enhanced recognition of the contribution that can be made by all MLAs and those from the broader Territory community to devising approaches to tackle the important issues facing the Territory.

MLAs, Local Government and the community should have a greater involvement in the oversight of important initiatives across the Northern Territory.

Legislation will be enacted to establish the Council of Territory Co-operation. The Council shall be made up of up to six Members of the Legislative Assembly: 2 ALP, 2 CLP and at least 1 Independent.

The Council shall facilitate:

- greater levels of collaboration in the governance of the Northern Territory;
- enhance Parliamentary democracy by providing a stronger role for MLAs who are not members of the Executive – particularly on matters of common concern;
- expand involvement in important Northern Territory initiatives and projects;
- provide new avenues for Territorians to have input through the Legislative Assembly into the governance of the Northern Territory; and
- provide a roadmap for tackling some specific issues currently facing the Northern Territory.

The Council shall be empowered to conduct inquiries and make recommendations on matters of public importance which are referred to it by the Legislative Assembly or self referred.

Current matters of public importance which the Government agrees to support being referred to the Council include: Strategic Indigenous Housing and Infrastructure Program (SIHIP); Local Government Reform; the Planning Scheme and the establishment of Weddell; and A Working Future (including Homelands Policy).

The Council shall determine the appropriate timeframes and workplan for the matters referred to it. Where the Council has multiple references to it, the Council shall determine which matter it enquires into first.

Appendix A to Parliamentary Agreement between Chief Minister Paul Henderson and Mr Gerry Wood, Independent Member for Nelson

The Council shall be empowered to conduct enquiries which shall include the capacity to conduct public hearings, consult with stakeholders such as Local Government and call expert evidence.

Reports and recommendations of the Council shall be tabled in the Legislative Assembly and made publicly available.

PARLIAMENTARY AND OTHER REFORMS:

1. Reform Question Time to allow more non-government questions
2. Dispense with Ministerial Reports.
3. Other Parliamentary reforms to be discussed.
4. Allow Government reports available under FOI to be free of charge to MLAs.

PROCESS	TIMELINE	CONSULTATION	FINAL DECISION
Government to produce a public discussion paper with a report to be presented to Parliament with any necessary legislation to implement the reforms	Report to Parliament – Nov 09	Public and MLAs (Independent Opposition and Government)	Parliament

BUDGET CONSULTATIONS

Prior to the framing of the Territory Budget Mr Wood shall receive a briefing from NT Treasury regarding Budget parameters.

Prior to the finalisation of the Budget, Mr Wood and the Budget Cabinet Sub-Committee shall meet to enable Mr Wood to advocate Budget proposals.

Appendix A to Parliamentary Agreement between Chief Minister Paul Henderson and Mr Gerry Wood, Independent Member for Nelson

PRISON LOCATION

1. Establish Expert Review Panel to review location
2. Examine alternative options to one large prison.
3. Investigate prison farms for Alice Springs, Tennant Creek, Katherine and Darwin.

PROCESS	TIMELINE	CONSULTATION	FINAL DECISION
Review of location and alternative options by an expert panel reporting to Sub Committee that reports directly to Cabinet	End Nov 09 – report to Sub Committee	Sub Committee consisting of Mr Wood, Minister for Corrections and Treasurer	Cabinet
Prepare discussion paper on prison farms	Discussion Paper – Jan 10		

CARAVAN LEGISLATION

1. Protect permanent tenants.

PROCESS	TIMELINE	CONSULTATION	FINAL DECISION
Cabinet Submission to approve legislative changes	Introduce legislation in October 09 sittings	Mr Wood's comments on legislation to be provided to Cabinet	Parliament

PROPERTY LAW REFORM			
1. Vendor disclosure.			
PROCESS	TIMELINE	CONSULTATION	FINAL DECISION
Cabinet Submission	Introduce legislation in October 09 Sittings	Mr Wood's comments on legislation to be provided to Cabinet	Parliament
LANDS AND PLANNING ISSUES			
<ol style="list-style-type: none"> 1. Address pricing and availability of land especially for first home owners. 2. Subdivision of Forestry Land in rural area. <p>Where possible expedite Native Title issues and housing proposals for Howard Springs Forestry Land to overcome residential land shortage.</p> <ol style="list-style-type: none"> 3. Industrial Land. <p>Review Glyde Point as a potential site and detail other options.</p> <ol style="list-style-type: none"> 4. Review and update the Humpty Doo District Plan with a view to encouraging housing opportunities. 5. Investigate development of Girraween District Centre. 6. Establishment of the City of Weddell. <p>Competition to be announced by November 09 asking for architects and town planners to design a visionary plan, including sustainability principles, for the new city of Weddell.</p>			

Appendix A to Parliamentary Agreement between Chief Minister Paul Henderson and Mr Gerry Wood, Independent Member for Nelson

7. Future Development of Middle Arm.			
Future approvals to be dealt with by the existing Litchfield Development Consent Authority.			
8. Town Planner			
Appoint a qualified and experienced town planner to provide direct advice to the Minister.			
9. Darwin Regional Land Use Structure Plan			
Review and update the Darwin Regional Land Use Structure Plan following public consultation.			
10. Address issues with traffic from Robertson Barracks to Northern Suburbs via Knuckey Lagoon (Campbell Road Realignment).			
PROCESS	TIMELINE	CONSULTATION	DECISION
1. Cabinet Submission on land price and availability	March 2010	Mr Wood to be consulted in preparation of Cabinet Submission	Cabinet
2. Prepare Cabinet Submission dealing with Native Title and other issues dealing with the Foresty area	November 2010	Mr Wood, Native Title claimants and Representative Bodies to be consulted	Cabinet
3. Cabinet Submission on Industrial Land including Glyde Pt to be prepared	March 2010	Mr Wood to be consulted in preparation of Cabinet Submission	Cabinet
4. Review Humpty Doo District Plan	April 2010	Minister, Mr Wood, Litchfield Shire Council and local community to be consulted	Cabinet
5. Investigate development of Giraween District Centre	June 2010	Minister, Mr Wood, Litchfield Shire Council and local community to be consulted	Cabinet
6. Refer to Council for investigation and report to Parliament	Determined by Council		
7. Policy decision	November 2009	Minister to consult Mr Wood	

Appendix A to Parliamentary Agreement between Chief Minister Paul Henderson and Mr Gerry Wood, Independent Member for Nelson

6. Regional Waste Facility

Review and expedite the development of a regional waste facility in the rural area

PROCESS	TIMELINE	CONSULTATION	FINAL DECISION
1. Technical report	Report by March 10	Minister with Mr Wood on final report	PWC/Minister
2. Discussion with Mr Wood, Fred's Pass Reserve Trustees and representatives of users, followed by a report and public discussion paper	Report by Nov 09	As outlined	Cabinet
3. Review of current plans for aquatic centre in the rural area in conjunction with stakeholders and Mr Wood	Report with Costings – Feb 2010	As per process	Cabinet
4. Discussion between Litchfield Shire, NT Government and Mr Wood	Ongoing		
5. Technical and heritage report followed by public consultation	Report by March 2010	Mr Wood and Minister to monitor process	Budget Cabinet 2010
6. Review work to date and present to Cabinet for decision	Dec 2010	Minister to discuss options with Mr Wood prior to developing Cabinet Decision	Cabinet

Appendix A to Parliamentary Agreement between Chief Minister Paul Henderson and Mr Gerry Wood, Independent Member for Nelson

8. Appoint Town Planner	December 2009			
9. Review and update Darwin Regional Land Use Structure Plan	Recommendations by August 2010	Broad community		Cabinet
10. Traffic study	June 2010	Local community		

ENVIRONMENT PROTECTION AUTHORITY (EPA)

The Environmental Protection Authority to receive the following additional powers and functions:

- Auditing and reporting on compliance with environmental approvals and licences;
- Investigating and responding to pollution complaints;
- Monitoring and reporting on water and air quality across the Territory;
- Producing regular "report cards" on the health of our environment; and
- By amending the referrals criteria empower the EPA to comment on Environmental Impact Statements for future major developments

PROCESS	TIMELINE	CONSULTATION	FINAL DECISION
Ministerial Statement and Legislation	Introduce legislation in Nov/09 Sittings	AIEMLEAS	

PUBLIC HOUSING

1. Public housing waiting lists

The Government will set goals to reduce waiting lists for public housing by type, by region each year. Work towards these reductions over the next 5 years.

Appendix A to Parliamentary Agreement between Chief Minister Paul Henderson and Mr Gerry Wood, Independent Member for Nelson

PROCESS	TIMELINE	CONSULTATION	FINAL DECISION
Report goals and achievements to Parliament	Oct 2009 and annually	Parliament	
<u>NATURAL RESOURCES & THE ENVIRONMENT</u>			
1. National radioactive waste repository			
The Northern Territory Government will continue to call on the Australian Government to repeal the <i>Radioactive Waste Management Act 2005</i> (Cwth) and for site selection for the national repository to be based on scientific evidence and allow for appropriate consultation and approvals.			
2. Container Deposit Legislation			
Continued commitment to the implementation of the Container Deposit Scheme.			
3. Heritage Parks			
Establishment of Heritage Parks especially WWII Heritage			
PROCESS	TIMELINE	CONSULTATION	FINAL DECISION
1 & 2. Continuation of current efforts			
3. Develop policy position	December 09	Minister and Mr Wood	Cabinet
<u>STRATEGIC INDIGENOUS HOUSING AND INFRASTRUCTURE PROGRAM</u>			
1. Refer Strategic Indigenous Housing and Infrastructure Program (SIHIP) to the Council of Territory Cooperation for enquiry and report back to Parliament.			

Appendix A to Parliamentary Agreement between Chief Minister Paul Henderson and Mr Gerry Wood, Independent Member for Nelson

YOUTH

1. Youth Clubs

Development of Youth Clubs based on the old Police Boys Clubs model in urban areas at Casuarina, Palmerston, Katherine and Alice Springs, to be managed by Police or non-government organisations.

PROCESS	TIMELINE	CONSULTATION	FINAL DECISION
Identify potential partners and locations and develop policy framework	Plan by December 09, implementation ongoing	Minister to consult with Mr Wood through the process and receive comment on final proposal	Minister and Cabinet

RURAL AREA ISSUES

1. Investigate:

- sewer system to Howard Springs commercial area to allow for existing demands and future growth.
- sewerage infrastructure for Coolalinga.
- replacement of private water mains with Power Water Corporation mains where appropriate

2. Fred's Pass Reserve

Support Fred's Pass Reserve by funding greater capital and operational funds on an annual basis

3. Development of aquatic centre for the rural area.

4. Work on improving relations between NT Government and Litchfield Council.

5. Commence construction of bicycle paths into the rural area in conjunction with preserving the old railway corridor.

Appendix A to Parliamentary Agreement between Chief Minister Paul Henderson and Mr Gerry Wood, Independent Member for Nelson

<u>SPECIAL EDUCATION</u>			
1. Investigate and report on delivery.			
2. Investigate and provide plan for infrastructure upgrades.			
<u>PROCESS</u>	<u>TIMELINE</u>	<u>CONSULTATION</u>	<u>FINAL DECISION</u>
Reports by Department of Education and Training	Feb 2010	Community	Cabinet
<u>AGRICULTURE</u>			
1. New emphasis placed in Primary Industry in the NT as a key industry and driver of regional economic development and employment.			
2. Ord River			
NT Government will have an ongoing relationship with the WA Government and Kimberley Development Commission into matters concerning the development of Ord River Irrigation Project, especially those areas in the NT.			
The relationship will be managed by a senior officer of the Department of Regional Development, Primary Industry, Fisheries and Resources.			
3. Beef Roads			
Further upgrades of beef, commercial and community roads such as those in the Douglas Daly Region.			
4. Land Clearing / Native Vegetation			
Introduce Native Vegetation Act to provide clearer guidelines for vegetation preservation land clearing			

PROCESS	TIMELINE	CONSULTATION	FINAL DECISION
182 Ministerial Statement	Feb 2010	Parliamentary Debate	
2 To provide 10 year plan for development of rural roads	Dec 09	Minister to consult with Mr Wood on the draft plan	Cabinet
3 Exposure draft of legislation	Feb 2010	Community Stakeholders	
LOCAL GOVERNMENT			
1. Local Government Reform			
Refer to the Council of Territory Cooperation for enquiry and report to Parliament.			
MISCELLANEOUS			
1. Promote bi-partisanship in the Territory - hold quarterly meetings with Chief Minister, Leader of the Opposition and Mr Wood.			



Claims of political 'deal' between NT independent Larisa Lee and CLP Government

By Alexandra Fisher and Xavier La Canna

Updated Wed 18 Nov 2015, 9:10am

Northern Territory Chief Minister Adam Giles must "come clean" about any deals struck with independent MLA Larisa Lee in exchange for her support in stifling debate in Parliament over controversial Government advertisements, fellow independent MP Kezia Purick says.

"I did give [Ms Lee] a little more credibility than just sliding across the floor to vote with Government but clearly the Government has done some kind of deal with her," Ms Purick said.

"So the Government should come clean and tell us what's going on."

Ms Purick, who is also Speaker in the NT Parliament, made the comments after Ms Lee broke ranks from other independents and Labor MLAs and voted with the Government to stop the advertisements being referred to the Privileges Committee.

The controversial advertisements were run in the NT News earlier this year after Labor and independent MPs opposed an urgency motion from the CLP to pass laws that would have increased police powers to search cars in designated zones for drugs.

The full-page advertisement named each Labor and independent MP it said "blocked" the law.

Ms Lee was among those listed in the advertisement.

It is unclear whether the move from Ms Lee to vote with the Government was a one-off or signals a return of her support to the CLP.

The ABC has sought comment from Ms Lee.

Mr Giles currently leads a minority government, and a move by Ms Lee to return to the CLP would allow his party to govern in its own right.

Ms Lee sensationally quit the CLP along with two other MPs in April last year amid claims the party was racist and that there was "no hope" for Aboriginal people in it.

"If we are going to walk out, that is going to be the proudest moments of our lives, to leave the Country Liberal Party, because we are not breast-plated niggers," Ms Lee said at the time.

Some of the MPs targeted in the newspaper advertisement at the time expressed anger, saying they had only opposed an urgency motion because they wanted time to consider the laws before voting on them, not because they were trying to block the measure.

Ms Purick had moved to refer the ads to the Privileges Committee to investigate whether they constituted contempt of Parliament.

Leader of Government Business John Elferink today moved to adjourn the debate, saying it was a "clear trap and a connivance".



PHOTO: NT Chief Minister Adam Giles (left) and Northern Territory MP Larisa Lee (right). (ABC News)

MAP: Darwin 0800

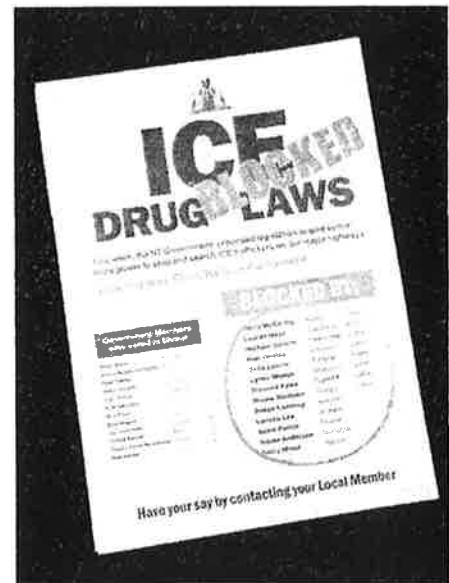


PHOTO: The full-page newspaper advertisement, criticising opponents of the NT Government's "ice drug laws". (ABC News)

Ms Lee voted with the Government on the move, but apologised to her fellow independents and Labor and said:
"Sorry guys."

Mr Giles denied there was a deal and said his Government had offered Ms Lee "nothing" for her support.

He later told Parliament Ms Lee supported him because she was impressed by his investment in telecommunications in Aboriginal communities.

"She [Ms Lee] said 'thanks very much, what else are you doing in Aboriginal Affairs?'," he said.

"And I sat through and went through everything that we're doing and she was quite impressed with everything we've been doing.

"She has been supportive in conversations since then."

When Ms Lee left the CLP Mr Giles said she would have to do a "lot of healing work" if she was to be welcomed back.

From other news sites:


- **NT News:** Larisa Lee votes with the Giles Government to stifle debate about NT Government attack ads
- **Mercury:** NT Speaker calls on MP to come clean

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Topics: government-and-politics, indigenous-aboriginal-and-torres-strait-islander, darwin-0800


First posted Tue 17 Nov 2015, 7:34pm




7th February 2016

Dear Commissioner,

RE: Written Submission

I make this submission to the Anti-Corruption Integrity and Misconduct Commission Inquiry 



Unfortunately the Northern Territory is rife with corruption at all levels, this results from legislation that is either non-existent, weak or simply not applied because an individual decision maker deems it not in the public interest. Then there is plain and simple incompetence in the public sector. The result is massive wastage of public funds with a failure to provide efficient and effective services. Corruption impedes development of the Northern Territory.

The solution must be stronger legislation, bodies that are independent from politicians and Ministers, funding that allows functions to be carried out and officers who are not deterred in prosecuting individuals no matter who their family is, of what ethnic group they belong and no matter how long they have been in the Northern Territory.

Only a multi-pronged approach will achieve the result of deterring, reducing, identifying and effectively prosecuting corruption.

My submission is attached.

Yours sincerely,

Scott Beaton

The people of the Northern Territory have right to live in a corruption free society.

Submission

Introduction

I make this submission because I have seen firsthand how the current legislation in the Northern Territory does not work to reduce corruption. The Corruption Perceptions Index shows that Australia is perceived as becoming more corrupt.¹ The Northern Territory is not free from corruption. It may be claimed that better detection, monitoring and reporting account for what appears to be an increase in identified corruption in the Northern Territory, it does not excuse it.

There is a perception in the Northern Territory that it is acceptable for some people to do as they like and if others do not like it they can leave. I believe the expression consists of an expletive and "off back down south". The so-called "Territocracy" will run anyone who rocks the boat out of town.

Other Australian jurisdictions have made attempts to curb corruption by establishing various bodies to investigate and conduct hearings in relation to corruption. Whilst the establishment of such bodies such as Independent Commissions Against Corruption (ICAC) appears substantial there must be the political will to enact robust legislation that can lead to individuals and corporations being brought before the Courts.

A hollow anti-corruption body will achieve nothing and will maintain the current situation.

The Northern Territory

The key feature of the Northern Territory is low population. Low population is a key factor when attempting to achieve independence real or perceived for that matter. Karinyth 1929 introduced the concept of six degrees of separation² and Milgram 1967 found that there was less than six degrees of separation³. There is no doubt that the Northern Territory has far less degrees of separation than those described by Karinyth and Milgram.

Many public bodies have husbands, wives, children, entire families for that matter employed, not a sign of corruption and certainly not corrupt. However it is an indication of degrees of separation, an issue throughout the entire Northern Territory.

Any commission or authority that is going to deal with corruption must be totally independent both in appearance and substance. Such a body should it be created will need to engage independent investigators and judiciary from outside of the Northern Territory.

¹ <http://www.transparency.org/cpi2015>

² Karinyth, F. (1929) *Everything is Different*

³ Milgram, S. (1967) 'The small world problem' *Psychology Today* 2(1): 60-67.

Other Jurisdictions – Tasmania

The *Integrity Commission Act 2009* (Tas) may provide a suitable anti-corruption model for the Northern Territory.

Current Northern Territory Legislation

Criminal Code Act (NT)

Employees of government (the Crown) who are they? In *Isles v McRoberts*⁴ it was highlighted that holding office and employment are not the same. All individuals and corporations contracted, directly employed or “commissioned” by government must be subject to the same anti-corruption legislation.

Information Act (NT)

What is a Government Record? There is actually no definition of what a record is within current Northern Territory legislation. Giving a definition of a record will enable greater transparency and reduce the attempts by government to hide information from the public.

Public Interest Disclosure Act (NT)

Division 3 of the *Act Protection from Reprisal* is meant to protect those who make disclosures. However, it is difficult to prove an act of reprisal unless a statement is made such as “you are being transferred because you are a whistleblower”, an unlikely event.

An employer can simply use a variety of techniques and state we are doing this for every other reason except that you are a discloser.

The Act does not provide any real and substantial support to those who make disclosures. A recent position for an investigator (Appendix A) highlights the issue with the matter of fact “support disclosers”. What support? The Act and Regulations make no mention of support.

“Let’s make it up as we go” aka there is no support for disclosers within the Act!

An individual who agonises over making a disclosure may well be placing their career and livelihood at risk. The pressure and risks involved in disclosing are such that physical and mental health can be impacted upon, suicide is not out of the equation.

Support for those who disclose must be enshrined in legislation otherwise it will continue to be “woe to the whistleblower”.

⁴ *Isles v McRoberts* [2011] NTMC 001.

Penalties and Standards

Politicians are given higher status within the law. Penalties for corruption by a member of the Legislative Assembly should be far greater than those imposed upon others. The same can be said for members of the judiciary.

Conclusion

There must be a review of all legislation in the Northern Territory in conjunction with the establishment of an anti-corruption body. The anti-corruption body must have the authority to initiate and conduct inquiries being able to table findings direct to the parliament. The body must also have the authority to have charges laid against those who are alleged to have been corrupt.

Provision to make recommendations to government that must be made public should be a consideration. Corruption tends to flourish where *ad hoc* procedures and processes exist. Standard procedures across government should be an aim, failings in this regard have been identified a recent high profile corruption case.

It is the support and protection of those who disclose that is paramount. Without adequate legislation disclosers are at risk. Potential disclosers are unlikely to come forward if they feel there is a risk to their livelihood.

Appendices

Appendix A:

JOB DESCRIPTION			
Agency	Department of the Attorney General and Justice	Work Unit	Office of the Commissioner for Information and Public Interest Disclosures
Job Title	Senior Investigations Officer	Designation	Administrative Officer 7
Job Type	Full Time	Duration	Fixed for 12 Months
Salary	\$96,325 - \$103,626		
Position Number	33821	RTF	86315
Location	Darwin		
Closing	30/01/2016		
Contact	Allan Borg 08 8999 1403 allan.borg@nt.gov.au		
Agency Information	www.blowthewhistle.nt.gov.au		
Information for Applicants	Applications must be limited to a one-page summary sheet and an attached resume/cv. For further information for applicants and example applications see: http://www.nt.gov.au/ocpe		
Information about Selected Applicant's Merit	If you accept this position, a summary of your merit (including work history, qualifications, experience, skills, etc.) will be provided to other applicants to enable transparency and understanding of the decision. For further information see: http://www.nt.gov.au/ocpe		
Special Measures	Not Applicable		
Apply Online Link	https://jobs.nt.gov.au/Home/Application?rtfId=86315		

Primary Objective: Provide reliable assessment, investigation services and reports to the Commissioner, Information and Public Interest Disclosures. Provide effective support to disclosers.

Key Duties and Responsibilities:

1. Perform the statutory functions under the Public Interest Disclosure Act relating to assessment, investigation and reporting on allegations of serious improper conduct within NT public bodies.
2. Support disclosers
3. Assist in handling complaints and related matters under the Information Act.



Northern Territory Legal Aid Commission

Your Ref: SC:hr:

Our Ref:

6 January 2016

Mr Brian Martin QC
Commissioner
Anti-Corruption Integrity &
Misconduct Commission Enquiry
GPO Box 4396
DARWIN NT 0801

Dear Commissioner,

Thank you for your letter of 14 December 2015 inviting the Northern Territory Legal Aid Commission ("NTLAC") to make a submission to the Anti-Corruption Integrity & Misconduct Commission Enquiry. The NTLAC is not funded to be able to provide detailed input into policy nor to make detailed submissions to such Enquiry.

Generally, however, I would like to say that the NTLAC welcomes the Enquiry into the establishment of an independent anti-corruption body in the Northern Territory. There is a quite widely held perception in the Northern Territory that paying for political influence does exist. The NTLAC certainly has an interest in good governance in the Northern Territory so as to ensure that scarce resources are allocated appropriately and efficaciously in the best interests of the Northern Territory community.

In the event that such an independent anti-corruption body is established in the Northern Territory, the NTLAC is also concerned that it does not become an instrument of oppression. In this regard I am mindful of the NSW's experience and the links between the NSW ICAC and the National Crime Authority.

In our view an ICAC like body, if established, should be for the first 2 or 3 years, a stand alone Northern Territory body with the appropriate power to do its own investigations on its own motion into the health of governance in the Northern Territory. An Ethics Committee should also be established so as to provide advice to members of Parliament, as well as to other bodies such as Town Councils and Public Authorities in relation to conflict of interest and what is appropriate and inappropriate conduct in terms of overall governance.

The NTLAC does, however, feel that in the longer term it would not be necessary to maintain a fulltime Commissioner in the Territory. Following the initial appointment of a Commissioner for 2 or 3 years it could be more cost effective for the NT to enter into an arrangement with South Australia

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or Tasmania for their ICAC to investigate referrals from the Territory. Perhaps we could maintain a lower level Public Integrity Commissioner in the NT to provide ethical advice and education and to receive complaints of corruption. A Public Integrity Committee comprising, the Public Interest Commissioner, The Ombudsman and the Public Disclosure Commissioner could determine which matters should be referred to the interstate ICAC for investigation.

Thank you for the opportunity to make this brief submission and we look forward to your Report.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Suzan Cox' with a stylized flourish at the end.

SUZAN COX QC



Criminal Lawyers Association of the Northern Territory (CLANT)

Patron: The Hon Justice Dean Mildren • President: Russell Goldflam (telephone: 040 1119020) •
Secretary: Isabella Maxwell-Williams (PO 969, ALICE SPRINGS NT 0871) • www.clant.org.au • ABN:64391168 310

NT Anti-Corruption Integrity & Misconduct Commission Inquiry Submission by Criminal Lawyers Association of the Northern Territory

1. INTRODUCTION

Since its foundation in 1986, the Criminal Lawyers Association of the Northern Territory (CLANT) has robustly contributed to public policy debate in relation to the administration of criminal justice. CLANT's Objects and Purposes relevantly include:

- to promote and advance the administration of the criminal justice system and development and improvement of criminal law throughout the Northern Territory
- to actively contribute in public debates in issues relating to the criminal justice system
- to represent the views of members to bodies and persons engaged in the administration of criminal justice and a review in development of criminal law, procedure and civil liberties

CLANT was actively involved in public discussion in relation to the events leading to the resignation of Peter Maley from the magistracy in 2014, and the events which surrounded and succeeded the resignation of John McRoberts as Police Commissioner in 2015. In relation to both of those matters, CLANT initially called for independent inquiries under the *Inquiries Act*.¹ In the light of subsequent developments, CLANT did not continue to press for those specific inquiries, but we apprehend that the instant Inquiry was commissioned in the context of and in response to these and various other recent matters involving allegations of misconduct by or in relation to persons in public office. Accordingly, CLANT welcomes this Inquiry, and is grateful for the invitation to make submissions to it.

It is beyond the scope of this submission to provide a detailed or comprehensive review of anti-corruption legislation and agencies in other jurisdictions. With respect to ICACs around Australia, it is easier to identify their problems and limitations than their accomplishments and achievements. This submission is therefore necessarily piecemeal and broad-brush.

2. THE NEED FOR A NORTHERN TERRITORY ANTI-CORRUPTION COMMISSION²

Both the Maley affair and the McRoberts affair highlighted the need for a stronger institutional framework in the Northern Territory to protect and maintain the integrity of our public institutions. The Northern Territory does not have some of the protections available in larger jurisdictions, such

¹ R Goldflam, "Peter Maley SM" (16 August 2014), accessed at <http://www.clant.org.au/index.php/news/118-peter-maley-sm>; ABC On-Line, "Adam Giles should order fully independent probe into John McRoberts, lawyers say" (21 January 2015), accessed at <http://www.abc.net.au/news/2015-01-21/john-mcroberts-investigation-government-solicitor-lawyers/6030488>

² For convenience, this submission will henceforth refer to the proposed NT body as 'the Anti-Corruption Commission', although this is but one of many possible available names.

as a legislative Upper House or a Judicial Commission. The Office of the Ombudsman and the Public Interest Disclosure Commissioner have only limited resources and powers in comparison to their interstate counterparts.

CLANT welcomes the very recent amendments passed with bi-partisan support by the Legislative Assembly on 15 March 2016 to strengthen the provisions of the *Inquiries Act*. However, the fact remains that an inquiry established pursuant to the *Inquiries Act* is a creature of either the Executive (section 4: "The Minister may... appoint a Board of Inquiry...") or the Legislature ("section 4A: "Where the Legislative Assembly passes a resolution..."). Usually (but not always), the government of the day controls the passage of resolutions by the Assembly. Accordingly, a fundamental limitation of the *Inquiries Act* is that it is only engaged when politicians either in government or able to secure the support of a majority on the floor of parliament, resolve to commission an inquiry.

In recent times the Northern Territory has seen a litany of complaints of misconduct involving senior official figures, including elected politicians. Some of these matters have led to the commissioning of inquiries under the *Inquiries Act*. Other matters, despite appearing to be of comparable seriousness and concern, have not. In CLANT's view, the apparent politicisation of the process by which decisions are made in relation to the conduct of inquiries under the *Inquiries Act* has seriously undermined public confidence in the measures currently available to scrutinise and investigate allegations of misconduct in public office.

The response to the allegations in relation to "Foundation 51" exemplify this politicisation problem.³ On 20 August 2014, the Legislative Assembly resolved that this matter be made the subject of an *Inquiries Act* inquiry.⁴ Shortly thereafter, the NT Government decided not to act on that resolution. The matter was referred to the NT police and NT Electoral Commission for investigation. Despite a determination by police that there was a prima facie case and reasonable prospect of conviction, the Director of Public prosecutions determined that it was not in the public interest to prosecute. In the face of intense media scrutiny of this decision, the DPP took the unusual step of explaining his decision by way of a statement to the NT News.⁵ It is undesirable that the Director be placed in a position of having to publicly defend a decision made in the exercise of the prosecutorial discretion. The establishment of an Anti-Corruption Commission would mitigate both the risk that the response to allegations of misconduct involving politicians is placed in the hands of politicians, and the risk of the DPP being dragged into the glare and dust of the political arena.

Accordingly, CLANT submits that to regain and retain public confidence in public administration, a Northern Territory statutory authority should be established using lessons learnt from the experience of the anti-corruption agencies now established in most other Australian jurisdictions.

That said, CLANT is concerned that although the NT Anti-Corruption Commission should be strong, independent, transparent and adequately resourced to perform its functions, it should not become an unwieldy, oppressive or ruinously expensive institution, or a lawyers' picnic area. We just do not know the extent to which the NT suffers from serious and systemic corrupt conduct that has been exposed in several other Australian jurisdictions in recent years. However, that experience has shown that corruption is often sophisticated, covert, difficult to detect, and more widespread than had been anticipated.

³ CLANT makes no comment on the substance of the allegations themselves

⁴ Accessed at:

<http://notes.nt.gov.au/lant/hansard/hansard12.nsf/webSearchView/3455C8D02C10219369257D6C001598E7?opendocument>

⁵ Accessed at: <http://www.ntnews.com.au/news/northern-territory/clp-fund-trial-not-in-public-interest/news-story/016204d488b4503abb2e2d01246ed8ad>

3. COST

An effective NT Anti-Corruption Commission will necessarily be expensive. However, an inexpensive Commission will inevitably be ineffective.

Most interstate ICACs have an annual budget in the order of \$30,000,000 or even more. By contrast, the Tasmanian Integrity Commission manages on a budget of \$3,000,000. However, the powers, functions, activities and achievements of this self-described 'boutique integrity agency'⁶ are correspondingly restricted. CLANT opposes the establishment of a boutique integrity agency along Tasmanian lines. It may look attractive, but it will not stop corruption. On the other hand, CLANT does not support the permanent establishment of a full-blown ICAC comparable to those in the more populous States. The cost would be prohibitive and unjustifiable. CLANT proposes instead that a hybrid inhouse/outsource model be developed for the NT, in which acceptance of complaints and preliminary investigations would be undertaken locally, with matters meriting further investigation and inquiry to be referred to an established interstate ICAC.

4. A ONE STOP SHOP

Recent experience in South Australia has highlighted problems of duplication, overlap and confusion between the ICAC and the Ombudsman in that State.⁷ Similar problems have been reported in several jurisdictions regarding the investigation of complaints of misconduct and corruption by police. In a small jurisdiction such as the Northern Territory, there is a particularly strong case to establish a single portal through which the public can make complaints to and access the services of the Ombudsman, the Public Interest Disclosure Commissioner, the Information Commissioner, the Health and Community Services Complaints Commissioner – and the Anti-Corruption Commissioner. That portal should also be used for the making of complaints against police.

5. STRONGER PROTECTION FOR WHISTLEBLOWERS

Consideration should be given to incorporating the existing powers and functions of the Public Interest Disclosure Commission into those of the Anti-Corruption Commission. In doing so, the limited whistleblower protections currently afforded by the *Public Interest Disclosure Act* should be significantly expanded, enhanced and strengthened.

Furthermore, CLANT submits that, as is the case in some other jurisdictions, public servants in executive positions be subject to provisions which make it mandatory for them to report reasonably suspected corrupt conduct within or in relation to their own agency.

6. PROCEDURES AND POWERS

There has been widespread and sustained criticism of the South Australian, Western Australian and Queensland agencies for their lack of transparency. The SA ICAC, for example, is designed on the Australian Crime Commission model of secret hearings. In WA, the agency's reputation has been tarnished by findings of systemic misconduct within its specialist covert operations unit.

⁶ Tasmania Integrity Commission *Annual Report 2013-2104*, p 14

⁷ Parliament of South Australia *Annual Review of the Crime and Public Integrity Policy Committee into Public Integrity and the Independent Commissioner Against Corruption: 1st Report* (2015)

On the other hand, the public hearings model favoured by the NSW ICAC has been blamed for causing serious reputational damage to individuals who have been the subject of ICAC investigations leading to adverse findings that have been discounted or even dismissed in subsequent legal proceedings.⁸

CLANT submits that a balance should be struck between the protection of the privacy and reputation of individuals (particularly those accused of serious impropriety), and the integrity and effectiveness of sensitive investigations regarding serious allegations. Anti-Corruption Commission hearings should be conducted in public unless there are cogent reasons not to do so. Where the discretion to conduct a hearing in camera is exercised, reasons should be given.

By their nature, investigations (as distinct from inquiry hearings) are less public, and should generally be carried out behind closed doors. For the Anti-Corruption Commission to be able to perform its investigative functions effectively, provision should be made to endow it with resources including search warrant powers, the use of telephone intercepts and listening devices, powers of entry, search and seizure, and the capacity to enlist the services of interstate investigators.

The Anti-Corruption Commission should also be equipped to engage counsel assisting to direct investigations and test the evidence of witnesses at hearings.

The Anti-Corruption Commission should be charged with the detection, exposure and prevention of corrupt conduct in public administration; but not (as is the case in WA and Queensland) with the functions and powers of a Crime Commission. Fortunately, organised crime in the Northern Territory does not exist on a scale which requires the establishment of a specialist separate agency with extraordinarily coercive powers to confront it.

7. SETTING THE BAR

The Victorian Independent Broad-based Anti-corruption Commission (IBAC) may only investigate where it is reasonably satisfied (rather than holding a reasonable suspicion) that there is serious corrupt conduct that would, if the facts were proven beyond reasonable doubt at a criminal trial, constitute an indictable offence (or one of three common law offences). The IBAC itself has criticised this limitation on the exercise of its functions⁹, and the Law Institute of Victoria has similarly recommended that the IBAC investigation bar be lowered.¹⁰ CLANT submits that the Anti-Corruption Commission be empowered to commence an investigation, whether preliminary or full, where it has a reasonable suspicion of corrupt conduct.

Similarly, the ambit of corrupt conduct should not be too narrowly circumscribed. The scope of 'corrupt conduct' in relation to the NSW ICAC was recently clarified by the High Court of Australia in *Independent Commission Against Corruption v Cunneen*.¹¹ Following this, an Independent Panel

⁸ For example, see Michaela Whitbourn, "Criminal charges dismissed against former SES Commissioner Murray Kear following ICAC probe", *The Sydney Morning Herald* (16 March 2016), accessed at <http://www.smh.com.au/nsw/criminal-charges-dismissed-against-former-ses-commissioner-murray-kear-following-icac-probe-20160316-gnkh8.html#ixzz43CjYCeZh>

⁹ Independent Broad-based Anti-corruption Commission, *Special report following IBAC's first year of being fully operational* (April 2014), Part 5

¹⁰ Law Institute of Victoria, *Strengthening Victoria's Integrity Regime* (2015)

¹¹ [2015] HCA 14 (15 April 2015)

(‘the Gleeson Panel’) reviewed the ICAC Act in light of the High Court’s decisions, making a number of recommendations, including expansion and clarification of the definition of ‘corrupt conduct’.¹² CLANT submits that the Gleeson Panel’s proposals should be adapted and adopted for the Anti-Corruption Commission. They represent a practical compromise between the broad view rejected by the High Court in *Cunneen*, and the need to ensure that the agency is not unduly restricted in the discharge of its functions.

8. WHO SHOULD BE SUBJECT TO INVESTIGATION?

Among the well publicised shortcomings of the IBAC in Victoria is a lack of clarity around its powers to investigate Members of Parliament. The *Public Interest Disclosure Act (NT)* only permits investigation of MLAs who have been referred to the Commissioner by the Speaker. CLANT submits that the Anti-Corruption Commission should be empowered to investigate on its own motion complaints it receives of corrupt conduct against Members of the Legislative Assembly, including Ministers. In addition, it should have the power to deal with complaints directed at Ministerial advisors and electorate officers.

In a jurisdiction without a Judicial Commission, the Anti-Corruption Commission should also be empowered to deal with complaints of corrupt conduct by judicial officers.

The Anti-Corruption Commission should also deal with complaints of police corrupt conduct, with provision made to ensure that investigators in such matters are independent of NT police.

9. ACCOUNTABILITY

As is the case in other jurisdictions, an all-party Parliamentary Committee should be established to oversee the Anti-Corruption Commission and deal with complaints against it. Consideration should also be given to appointing an Inspector to provide oversight of the Anti-Corruption Commission.

10. CONCLUSION

CLANT welcomes the opportunity to contribute towards this important Inquiry, and looks forward to the implementation of effective, affordable and practical measures adapted to the circumstances of the Northern Territory, for the purposes of detecting, exposing, preventing and deterring corrupt conduct, and enhancing public confidence in public administration.



Russell Goldflam
PRESIDENT

18 March 2016

¹² The Hon. Murray Gleeson AC (Chair) & Mr Bruce McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption Report* 31 July 2015

Territory Labor

Submission to the Anti-Corruption Integrity and Misconduct Commission Inquiry

January 2016

Introduction

In August 2015, Territory Labor released its Position Paper on Restoring Integrity to Government.

The discussion paper articulated Labor's case for the improvement of the Territory's integrity framework in the Northern Territory, in light of dubious decision making of the CLP Government that has led to the loss of trust and confidence of Territorians in Government processes, including:

- Lack of transparency in the allocation of water licences
- Lack of due process in judicial appointments
- A staff member charged with corruption offences
- The operation of Foundation 51 and being found to flaunt NT electoral laws
- Lack of transparency in the decision to sell TIO, resulting approximately 40 job losses and increased premiums for home insurers
- The lack of a mandate in the long term lease of the Port of Darwin
- Continued questions about the lack of transparency regarding Ministerial travel and refusal to answer questions about Ministerial Travel.

Territory Labor has a good record on improving the openness, transparency and accountability of Government for Territorians. In Government, Territory Labor:

- Introduced freedom of information laws supporting the provision of information about Government services to the public
- Introduced whistle blower laws, with protections for individuals, to improve the administration of Government Services
- Established the Estimates process allowing public scrutiny of the Government's budget
- Established a Ministerial Code of Conduct
- Limited Government use of advertising through the Public Information Act
- Established the first ever independent Electoral Commission

Territory Labor supports the establishment of an Independent Commission Against Corruption within an Integrity Framework that works for Territorians. It should be complementary to our existing bodies to support open, transparent and good government and the individuals and organisations involved must have sufficient autonomy and resources to fulfil their duties.

Territory Labor also supports the establishment of an Integrity Commissioner. This was a recommendation of the NT Ombudsman and Labor would welcome the addition of this position to those statutory roles that monitor the delivery of public services in the Northern Territory.

Territory Labor has fought for the establishment of an ICAC for the Northern Territory for some time now. Territory Labor welcomes the independent Inquiry established by the Parliament in September and looks forward to the recommendations of the Inquiry.

Michael Gunner

Leader of the Opposition

Terms of Reference Addressed

- a. The principles and provisions of the Independent Commission Against Corruption (ICAC) and like legislation in other Australian Jurisdictions and their applicability to the Northern Territory; and**

The vision for an ICAC in the Northern Territory is to improve the ethical standards in public administration for the benefit of all Territorians and to have a public sector and public officials that resists corruption.

Labor believes that the powers to investigate corruption within the public sector by an ICAC should be broad ranging and that its jurisdiction should include:

- All public sector employees and departments, including the Police
- Members of public sector boards and other governance or advisory committees
- Local council
- Statutory officers
- Members of Parliament
- Ministers
- The Judiciary
- The Administrator

Territory Labor has reviewed the models of anti-corruption entities in other jurisdictions and believes that the principle functions of an ICAC for the Northern Territory (NT) are to:

- Investigate and expose corrupt conduct in the NT public sector of a serious and systemic nature; and
- Refer misconduct to appropriate NT bodies for investigation; and

Territory Labor believes that:

- An ICAC should fall within the jurisdiction of the Supreme Court;
- Anyone should be able to make a referral to an ICAC for assessment and that principal officers in agencies and local councils should be required to report matters they reasonably suspect involves or may involve corrupt conduct as they do in NSW.
- The Parliament should be able to direct a matter to ICAC;
- An ICAC in the NT should be independent, have a self-referral mechanism., and should have the authority to co-opt specialists in other jurisdictions to support investigations;
- Legislation should guide the investigative process and detail investigative powers;

- Investigations should be undertaken in a confidential manner and that methods of investigation, whether covert or overt, public or private are determined on a case by case basis as determined by the entity, keeping in mind the population size and demographics of the NT;
- An ICAC for the NT should have powers to compel witnesses and have the authority to compel documentation as required;
- An ICAC in the NT should operate as per other jurisdictions, making recommendations for systems and procedure changes and any criminal matters referred to Police, the Ombudsman or the Director of Public Prosecutions, or bodies in other jurisdictions such as the Australian Federal Police, for further action. An anti-corruption and misconduct entity should monitor the implementation of any recommendations; and
- Unless the NT public sector is involved, an anti-corruption entity should not have power to investigate the private sector, issues arising in other jurisdictions, and federal parliamentarians, departments or agencies.

An ICAC established in the Northern Territory should exist within an Integrity Framework. The Northern Territory already has a strong scaffold of existing statutory authorities with significant powers to investigate matters in an independent manner within their legislative purview. These officers and offices play an important role in the reduction of corruption in the Northern Territory. These bodies include:

- The Ombudsman
- The Auditor General
- The Information Commissioner
- The Office of the Commissioner for Public Disclosures
- The Electoral Commissioner
- The Health and Community Services Complaints Commissioner
- The Anti-Discrimination Commissioner
- The Children's Commissioner
- The Commissioner for Public Employment

Territory Labor has already outlined a desire to add an ICAC and an Integrity Commissioner or Committee to this framework. The recent multiple investigations into alleged misconduct by the former NT Police Commissioner showed the need for a holistic framework that can investigate all matters raised in a way that maintains public confidence.

Territory Labor sees the role of the Integrity Commissioner or Committee to provide advice and assistance to Government agencies and other statutory officers to actively prevent corruption, as well as education to the Northern Territory community and public sector about corruption and its effects.

- b. The appropriate powers such as a body should have, including but not limited to:**
- i. The power to investigate allegations of corruption, including against Ministers, Members of the Legislative Assembly and other public officials;**

Territory Labor has reviewed the operation of ICAC entities in other jurisdictions and supports an ICAC to investigate allegations of corruption against:

- All public sector employees and departments, including the Police
- Members of public sector boards and other governance, tribunals or advisory committees appointed by Ministers or the Administrator
- Local council
- Statutory officers
- Members of Parliament
- Ministers
- The Judiciary
- The Administrator

NSW recently changed its jurisdiction to support their Electoral Commissioner referring possible criminal offences under election funding, election or lobbying laws. Territory Labor would support this capacity for referral to a Northern Territory ICAC for investigation.

An ICAC should also have jurisdiction over allegations of police corruption as Western Australia and Victoria do. The NSW ICAC does not have jurisdiction over police corruption due to the existence of the Police Integrity Commission. Territory Labor will consider the findings of the independent Inquiry whether jurisdiction over Police would be of benefit to the Territory Integrity framework, given the Ombudsman and the Information Disclosures Commissioner already have powers to investigate police conduct.

- ii. The power to conduct investigations and inquiries into corrupt activities and system-wide anti-corruption reforms as it sees fit;**

Territory Labor supports an NT ICAC having the power to conduct investigations and inquiries into corrupt activities and system-wide anti-corruption reforms. There may be a necessity to delineate between serious corruption and misconduct within the Northern Territory's Integrity Framework.

For example, Western Australia has recently introduced legislation separating serious and minor misconduct. The Crime and Corruption Commission has jurisdiction over Western Australian public officers including in WA Police, government departments, government instrumentalities, boards, public universities and local governments. Minor misconduct matters are referred to the Public Service Commission. This is something that could be considered by the Inquiry as part of our existing Integrity Framework.

Some jurisdictions' ICAC entities have the power to investigate crime as well as serious corruption, while others are much narrower in focus. For example, the Queensland Crime and Corruption Commission investigates both crime and corruption as it relates to organised crime, paedophilia, terrorist activity, other serious crime and serious or systemic corruption. Western Australia's ICAC also supports the investigation of organised crime.

Territory Labor is of the view that an NT ICAC's powers should be focused upon serious and systemic corruption as it relates to public sector administration.

iii. The appropriate trigger for an NT ICAC's jurisdiction and the relationship between this body and other NT bodies such as the Ombudsman; and

For Territory Labor, the key functions of an ICAC for the Northern Territory are:

- a. The receipt, analysis and assessment of complaints and reports of alleged corruption; and
- b. The conduct of investigations, examinations and inquiries into serious and systemic corruption.

The trigger of *serious and systemic corruption* is the possible point of separation from the existing statutory investigative framework within the Northern Territory.

If it is accepted that anybody can make a referral to an ICAC, there needs to be a receiving entity to receive and assess allegations. In South Australia, the Office for Public Integrity is the point of contact to the public and assesses complaints with recommendations made to the Independent Commissioner Against Corruption about how a complaint might be dealt with.

For the Northern Territory, questions arise about whether complaints can be received by an existing entity such as the Office of the NT Ombudsman or the Office of the Public Interest Disclosures Commissioner and a process established to manage referrals to an Independent Commissioner Against Corruption for action or whether it is in the best interests of Territorians to establish an organisation to receive and assess complaints as in other jurisdictions. Territory Labor will consider the recommendations of the Independent Inquiry in this regard.

Furthermore, the jurisdiction of an ICAC entity elsewhere is further reaching than that of the Ombudsman and the Public Interest Disclosures Commissioner in the Northern Territory. There are some public bodies or some public officers that these current entities cannot investigate, or require permission to despite having wide-ranging powers. An ICAC completes the framework for investigating allegations of corruption in public sector decision making, or improper or misconduct by a public officer.

An ICAC is not a court. The outcomes of investigations are for recommendations to be made to government agencies about systemic and procedural changes that need to be made to prevent any findings of corruption from reoccurring and for playing an ongoing role in the monitoring of recommendations.

An ICAC may make referrals to police for further criminal investigation, the advice of the Director of Public Prosecutions upon findings of corruption, or in the course of investigation may find that the most appropriate agency to respond is another statutory agency such as the Public Employment Commissioner.

An ICAC's relationships with other statutory bodies are integral to our integrity framework.

iv. Models from any other jurisdictions; and

There are elements of all ICAC entities established in other jurisdictions that could be applied in the Territory. The common feature is that all jurisdictions have a stand-alone organisation to deal with allegations of corruption and that the powers to investigate corruption are wide-ranging and comprehensive.

The Northern Territory needs to define the parameters of an ICAC's powers that suit our own circumstances, address concerns around corruption that have surfaced in the last 3 years Northern Territory and the size of our population. Our submission above has made references to models implemented in other jurisdictions.

ICACs in other jurisdictions also have external oversight and accountability mechanisms, including reporting to a bi-partisan committee of Parliament, applying to the Supreme Court for the exercise of certain powers and having an external audit function in the role of a Judge of Supreme Court status. Accountability is an important mechanism for such a powerful investigative body that Territory Labor is supportive of and looks forward to the views of the Inquiry in this regard.

v. The use of existing NT legislation or NT statutory authorities.

The Government In August 2015 flagged the bolstering of the powers of the Public Information Disclosures Commissioner, by allowing for self-motion investigations, for the power to investigate Members of the Legislative Assembly without referral from the Speaker, and increasing penalties for not cooperating with an investigation. This is one avenue that could be pursued to improve investigations into allegations of corruption in the Northern Territory. The review requested by Government of the Integrity Group appears to have been superseded by the establishment of the Independent Inquiry by the Parliament.

Issues to be considered when deliberating on the best model to prevent corruption in public sector administration in the Northern Territory is about the best use of taxpayers funding, the most effective regime to achieve the stated aims, and how best to promote transparency and openness in Government processes and reinstate public confidence in Government decision making.

[REDACTED]

From: Bentley James [REDACTED]
Sent: Tuesday, 2 February 2016 7:58 AM
To: ACIMC Inquiry
Subject: PUBLIC SUBMISSION TO INQUIRY ON CORRUPTION N.T ACIMC

Submission to the commissioner ACIMC inquiry.

To the commissioner,

Sir it is necessary in the most absolute terms for the Northern Territory to create an effective and widely recognisable authoritative anti-corruption commission with the greatest haste.

Both the administrative and political arms of the NTG have been immersed in scandal and unjustifiable activities to the point where public and national recognition for credibly and legitimacy has been seriously undermined. Not one group in the wider society, outside government (paid employees) can continue to countenance such disreputable conduct. There must be a legal consequence to this mendacity.


The ongoing denial of just legal terms for indigenous water rights, legal representation and protection under law, education department miss appropriation and misconduct, health department scandal and so on.

The recent vote by members of the Government not to institute such a body as exists in every other state may well be construed as collusion to continue a corrupt business as usual attitude from an indentured culture of corruption.

I have just returned from an international conference on crime and incarceration an astounded audience 'hissed' at the figures from the Northern Territory. When I explained the situation of indigneous water rights, provision of housing and education audiences were outraged.

I urge you in the strongest terms to put an end to this appearance, the Northern Territory will never achieve maturity or state hood under these conditions. It is time to clean up the Territory. Yours Dr Bentely James.

Bentley James
Anthropologist/Linguist





COMMISSIONER'S OFFICE

HQ2015/0628 : Our Ref

Mr Brian Martin AO QC
Commissioner
NT Anti-Corruption Integrity
and Misconduct Commission Inquiry
GPO Box 4396
DARWIN NT 0801

Dear Commissioner

I write in response to your appointment as Commissioner under the *Inquiries Act* to conduct an Inquiry into the establishment of a Northern Territory (NT) Anti-Corruption and Misconduct Commission. You have sought written submissions in relation to the reference from the NT Legislative Assembly.

Please find attached the NT Police, Fire and Emergency Services written submission.

If you wish to discuss further or seek additional information my contact for this matter is Executive Director Katherine Van Gorp, Office of the Commissioner of Police and CEO who can be contacted on (08) 8985 8803 or at katherine.vangorp@pfes.nt.gov.au.

Yours sincerely



Reece P Kershaw APM
Commissioner of Police

10 February 2016

NT Police, Fire and Emergency Services Submission

The Northern Territory (NT) Police, Fire and Emergency Services (NTPFES) agrees that, if established, an integrity commission would require wide reaching powers to investigate corruption, internal misconduct and maladministration both on own motion and on referral of a complaint. There are a number of significant considerations in relation to the establishment of the Commission for a small jurisdiction to ensure financial viability, independence and capability identified within the scope of the inquiry.

The NTPFES supports the proposal of an Integrity Commission as an oversight, supervision and referring body with supportive legislation to allow for the integration of existing capabilities within the Northern Territory Government; including the NT Police, Public Interest Disclosure, and Ombudsman with assistance from the DPP where applicable as part of the establishment of a whole of government integrity framework.

The NTPFES submit that, as with interstate bodies, a key role of a new commission should be a focus on prevention and education. Particularly relevant in a small jurisdiction, the education of public officials and information available for the general public needs to enhance awareness of what constitutes 'corrupt conduct', which includes conduct that *could have* an adverse effect *directly or indirectly*. This will be the key to building public confidence in its public service and elected officials.

There are significant requirements and considerations when developing an ICAC Act that has been identified that will affect the operational capability of any investigative arm of an integrity commission. This includes the key definitions of Corruption, Public Administration and specific functions, powers and reporting requirements surrounding criminal investigations, internal investigations, examinations and forfeiture orders. This also includes consideration of coercive powers of; production, inspection and interview, along with examination or hearing capabilities in the absence of sufficient evidence to support criminal prosecution.

A key legislative capability for the ICAC Act should include consideration as to forfeiture powers for matters both criminal and internal that may not reach the threshold for criminal prosecution, where however there is on the balance of probability sufficient evidence to support the conduct to enable recovery of costs associated with corrupt conduct or misconduct. This power is absent from many interstate jurisdictions ICAC legislation.

At the beginning of 2015, the NTPFES established the Special References Unit (SRU), the SRU is an investigative division managed by a Detective Superintendent which sits within the Professional Standards Command (PSC), to ensure the highest level of integrity when investigating allegations of corruption, matters that are politically sensitive, serious conflicts of interest and other complex internal matters. This unit has successfully investigated a number of complex corruption matters since commencement and continues to investigate high-level corruption referrals on behalf of the Commissioner of Police.

As stated above any Independent Corruption / Integrity Commission needs to be established with its own investigative powers and referrals. However, in the majority of jurisdictions, comparable to the NT Jurisdiction, the Police Professional Standards area generally receives referrals from the Commission to undertake the criminal investigation and reports back on matters to the commission, which maintains oversight throughout the process.

In cases where the Police do conduct the investigation the Independent Commission may accept the investigation report, refer the matter back to police for further examination or undertake its own additional investigations. This process is usually formalised through a Memorandum of Understanding or similar to confirm the process and the level of investigation that will occur.

If an independent integrity commission was established in the NT, the process and referral functions should be similar to that of the Australia's smaller jurisdictions with the use of the SRU as the investigative arm; that said the structure, management and oversight requires significant consideration due to the overwhelming costs and operational restrictions that may arise throughout the investigations and prosecution that are not immediately visible.

There are several options for any proposed commission in relation to a criminal investigative arm and use of the existing SRU. This includes;

- (a) Funding being provided to the SRU as part of the integrity commission however remaining within the PSC Command of NTPFES with independent investigative reporting to the Integrity Commissioner. This allows for Police assets to be used in criminal investigations and will utilise office space and assets identified by police. This differs from jurisdictions where the ICAC has options to investigate within or refer the investigation. In this proposal all matters relating to possible corruption and misconduct, maladministration would be investigated by police or other organisations; for example the Ombudsman's Office or PID. Whilst the SRU would remain within the police organisational structure, the SRU would report independently to the Commission on investigations and be bound by own motion and referred investigation from an Allocation Board (Board members being identified by the Commissioner); or

- (b) The SRU forms the operational investigative arm of the Integrity Commission; fully integrated and relocated to the Commission office location. The staffing numbers for the SRU would be seconded as per MOUs similar to that operating in Tasmania and South Australia. This is similar to other models interstate, however, relies heavily on police secondments, access to systems and reliance upon legislation accessible to law enforcement agencies. This will require significant funding and additional legislative amendments to enable the ICAC to investigate without assistance from Police. It is likely, similar to interstate experiences, that a significant number of investigations would still require referral to police and other agencies; or
- (c) The ICAC creates its own Investigation arm with government investigators employed on the basis of investigative experience with the option of an agreement with the Police Commissioner to second members if appropriate or agreed upon by the Police Commissioner. The SRU may still remain an internal asset to the Commissioner to investigate referred matters and serious conflicts of interest. The lack of directly available assets for use by small Commissions that will require user pay including legal advice, police assets and prosecution requirements along with legislative restrictions may make investigations more difficult. This may also result in significant budgetary expense along with availability restrictions of external assets and services. Additionally, there would be a requirement to formalise the ICAC as a law enforcement agency in order to access the covert options for investigations that are accessible only to law enforcement agencies, such as Telecommunications intercepts and Surveillance Devices.

The NTPFES supports the continued use and allocation of funding for the expansion of the SRU whilst remaining within the organisational structure of the NTPFES with oversight from the Integrity Commission as indicated in **option (a)** above.

There are number of advantages to this proposal including:

- (i) qualified, experienced and professional investigators within Police, including the capability required to investigate complex corruption matters;
- (ii) availability and use of police indices, human resources and managerial structures and services;
- (iii) use of specific assets including surveillance and covert technologies; and
- (iv) use and availability of interception legislation afforded of Law Enforcement Agencies.

A fully funded SRU will enable sufficient investigators, intelligence analysts and legal practitioners to be employed to investigate allegations of corruption and serious misconduct. The unit will maintain its current chain of command however include investigative oversight and independent reporting to the Independent Commissioner

similar to the that of the Ombudsman's Office and current internal and legislative arrangements with the NT Police.

To further support an integrated integrity commission utilising existing agencies this submission notes the NSW Government recently announced the creation of a new Law Enforcement Conduct Commission (LECC) to remove duplication and overlap between oversight bodies. Further, current recommendations to the South Australian Government recommend the transfer of the Police Ombudsman's roles and responsibilities into the ICAC.

This possible duplication of investigation and involvement of other agencies should be considered when establishing the framework for a new independent commission in the NT. The oversight of integrated services by an independent commission involving existing agencies will ensure no duplication or confusion for the public between the roles of the new commission, the Public Interest Disclosure Commission and the Ombudsman and police etc.

The NTPFES submit that the Ombudsman's Office would still maintain their jurisdiction to examine complaints around decisions, recommendations, actions or inactions by government officials (excluding those matters that amount to 'corrupt corruption').

NT Public Interest Disclosure (PID) Commission could maintain its ability to take confidential disclosures on minor misconduct complaints, or alternatively, the PID and the newly established commission could be merged into an Integrity and Corruption Commission to cover misconduct and corrupt conduct, to reduce bureaucracy in a small jurisdiction. Ideally, the PID function should form part of any investigative regime.

The recent commencement of the SA ICAC identified the crucial need to establish clear Directions and Guidelines to government staff along with education of the expectations within the guidelines prior to or at the early commencement of an ICAC in the NT.

It is recommended that the primary focus on any investigation into allegations of corruption (where elements of criminality are established or expected to be established during the investigation) should be on the collection of evidence in an admissible form. This leads to the conclusion that any coercive powers to produce or provide information should be reserved for a later process. The role of the investigation arm should be primarily focused on the potential progress of the matter through the justice system.

The role and function of coercive aspects should be applied to the matter once it is finalised in the justice system or not prosecuted for other reasons. In this case, the subjects should be examined where appropriate in relation to the recovery of assets, costs or the forfeiture of property.

In considering the physical look and make up of the integrity commission it would most likely involve NT Police, Ombudsman, Public Interest Disclosures working in partnership to conduct investigations. This team would remain under the umbrella of Police and operate as a law enforcement agency. At the conclusion of any investigation a report would be prepared for the Integrity Commission (however that is constructed) to recommend either criminal proceedings or coercive measures.

It would be of benefit to introduce a form of judicial proceedings where Detectives attached to the investigation arm of the proposed ICAC could present evidence to a judicial structure that would authorise coercive interviews, production and any other evidence gathering regime that would be admissible for use in a forfeiture proceeding. In simple terms it would provide for a mechanism where a criminal investigation does not capture sufficient evidence in an admissible format however there are reasonable grounds to believe that a subject has benefitted from improper conduct.

Summary of Key Points for consideration:

- Definitions including corruption
- Jurisdiction – i.e. level of investigation – from Private contractors, local government, bodies, parliament, speaker etc.
- Clear guidelines to establish systems for own motion investigations.
- Public Sector investigative standard (individual departments internal investigation capability).
- Referral from SRU or investigative arm to public sector for investigation.
- Referral from Parliamentary Committees - Public Accounts or Auditor General reports etc.
- Power to demand agencies cease investigations until after ICAC or police investigation.
- MOU with NT Police will need to be exhaustive and include;
 - Intelligence
 - Database
 - Info Sharing
 - Resource use (surveillance etc.)

This will then need to consider costing user pay etc.

- Growth industry – Feedback from SA ICAC is that the initial allocation and estimates was insufficient.
- Interstate ICAC experiences have identified that a significant issue surrounding investigations is the lack of appropriate and enforced policy by government departments. This will require significant change in NT departments.
- DPP and legal considerations – Smaller ICAC jurisdictions do not have prosecutors and are therefore reliant on DPP to do this. Again MOU will be required. Feedback is that this causes significant issues due to differing policies surrounding prosecutions etc. i.e. definitions of public interest etc.



Robyn LAMBLEY MLA
Member for **ARALUEN**



Mr David Martin
Inquiry Commissioner
NT Anti-corruption Integrity and Misconduct Commission
GPO Box 4396
Darwin NT 0801

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Dear Mr Martin,

I would like to lodge this Submission to the inquiry into the establishment of an anti-corruption commission in the Northern Territory.

Background

Since becoming a Member of the NT Legislative Assembly in 2010 I have developed a strong appreciation of the absolute need for an Independent Commission against Corruption (or an equivalent) in the NT to provide Independent investigation into impropriety in the Public Administration.

There have been several instances in recent history whereby matters of conduct, integrity and allegations of maladministration and impropriety within the public administration have come into question.

With the NT being such a small jurisdiction (population approx. 245,000 people) it is often difficult, if not impossible to identify a qualified, truly Independent person to undertake investigations into allegations of misconduct within the Public Administration. The problem is that Territorians are often linked socially and professionally, particularly within the public service.

The problem becomes vastly more complicated and potentially more incestuous when it is the conduct of a Minister or Member of Parliament that comes into question. In recent times we have had several investigations initiated by Ministers, in which questions of the involvement of the Minister themselves or their Cabinet colleagues have been questioned.

Clearly an absolute Independent body is required to conduct allegations of misconduct and corruption involving Members of Parliament.

It has been the experience of all other Australian States and Territories that an Independent Commission against Corruption has been considered essential in providing arms-length investigation of Government. Despite our small size, the NT has the same obligation to provide Territorians with the same level of Government accountability and integrity, currently lacking. In matters of corruption or serious impropriety, an Independent Commission Against Corruption has been found to be the only appropriate means of conducting robust, Independent investigations.

The Model

As an active proponent of an Independent Commission Against Corruption in the NT, I have undertaken considerable research into the different models in different jurisdictions.

There are three key factors I believe will shape the establishment of an Independent Commission Against Corruption in the NT.

1. The size of our jurisdiction – The NT is arguably too small to justify a fully functional Independent Commission against Corruption, equivalent to interstate models. It is questionable whether the NT will generate enough work for a stand-alone Corruption Commission.
2. The cost of an Independent Commission against Corruption is difficult to justify given our small population. We know through the experiences of other jurisdictions that the cost to operate a Corruption Commission is extremely expensive.
3. A question of Independence. Can anyone who lives, works, socialises and has investments in the NT be truly Independent? In the Kamitsis / McRoberts controversy that came to light in January 2015, the Government had enormous difficulty finding a suitably qualified person in the NT who had not socialised or worked with the key players, and therefore did not have a potential conflict of interest.

It is my view the NT is too small socially, economically and politically to warrant, sustain and afford a fully functional Independent Commission against Corruption.

It would make sense that this inquiry investigates a more creative and efficient approach to providing a Corruption Commission.

1. A fully out-sourced model

This inquiry needs to explore if it is possible for the NT to craft its legislation for a Corruption Commission to allow the NT to use the services of other jurisdictions on a contractual basis.

Obviously this would be highly political and possibly fraught with all sorts of other potential conflicts and perceptual problems, but I think it is a model that makes practical and economic sense.

Other Australian jurisdictions would need to review their own Corruption Commissions and perhaps need to change their terms of reference and legislation to allow them to investigate matters outside their own jurisdictions. This is thinking outside the circle, but it may be a model that appeals to other small Independent international jurisdictions within the Asia Pacific region that face the same dilemmas as the NT, in terms of being too small to provide truly Independent scrutiny.

2. Partly out-sourced model

If a fully out-sourced model is not possible, then a partly out-sourced model should be considered.

Perhaps a NT Corruption Commission could be set up to accept and initiate referrals, but then outsource the actual inquiries to other providers.

3. A full review and restructure of the NT Complaints mechanisms

As the former NT Minister for Health for 2 years (2013-2014) it became apparent that the office and the position of the Health Complaints Commissioner, although performing a critical role, did not have the volume of work to warrant the level of resourcing allocated to it. It was my plan before a dramatic cabinet reshuffle in December 2014 in which I lost the Health portfolio, to review this expensive service and consider another model for processing health complaints.

My hunch is that other similar NT complaints offices may not be as productive as they could be. The tell-tale sign is when you see these offices self-initiating work in new, relatively low priority areas to top up their workload.

I would like to see this inquiry into establishing an NT Corruption Commission look into the existing complaints mechanisms and use this as an opportunity to rationalise the resources allocated.

The question needs to be asked: how much does the NT spend already on the numerous offices that operate to process and investigate complaints about Government?

- Ombudsman
- Health Complaints Commissioner
- Anti-discrimination
- Consumer Affairs
- Public Interest Disclosures

There is likely to be a case for rationalising some of these services, in order to pay for the establishment of a Corruption Commission that is currently seen as a higher priority.

Conclusion

I think the NT needs an Independent Commission against Corruption of some description with the emphasis being on true Independence. My recommendation would be for this inquiry to look at a practical and affordable model. This may involve creating a new model of supplying this highly specialised service to a small jurisdiction like the NT. It could be a windfall for other larger Australian jurisdictions that have the existing infrastructure and experience to provide the NT with the expertise we require on a case by case basis.



Robyn Lambley
Member for Araluen
01 February 2016

JOHN B. LAWRENCE SC

Barrister at Law

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NT 0801

Telephone (08) 8941 8969 Fax No (08) 8941 4581

Mobile: [REDACTED]

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11 April 2016

ATT:

Re; Anti-corruption, Integrity and Misconduct Commission Inquiry.

Dear Sir,

I apologise for the lateness of this submission.

I write this submission as a concerned NT citizen of over thirty years and as a NT legal practitioner of 29 years standing. I was admitted to practice in the NT Supreme Court on 3 March 1987. I worked thereafter for five years as a Crown Prosecutor with the Prosecution Division of the NT Attorney General's Department which became the DPP. Following that I worked for five years as Solicitor in Charge of NAALAS (now NAAJA). I joined the Independent Bar in 1997 and was appointed Silk in 2010. I was

President of CLANT from 2000 to 2003 and 2008 to 2011 and President of the NTBA from 2013 to 2015. I practice from John Toohey Chambers which I joined in 2002. I am now Head of those Chambers. In that period I have been an active participant in the NT legal system and a witness to its development within the context of the Northern Territory's general development.

In my opinion the need for an Anti-Corruption Commission is obvious and urgent. I bear witness to an NT legal system which when I joined was smaller and effectively self-controlled. Over the last twenty years I have witnessed in many, if not all aspects of the legal profession a decline in standards and quality as to the service provided to the public by the legal profession as well as the quality of the entire legal system. This stretches from the quality of law graduates entering the profession to the standard of jurisprudence being produced by the judiciary. This decline in standards is not unique to the legal system and has occurred in other Government Departments and institutions, including the NT Police Force. In more recent times standards of public life have descended to mediocrity, all of which is relevant and causative for the need now for the establishment of an Anti-Corruption Commission.

In my opinion, mateship and mediocrity are the bedfellows of corruption and the Northern Territory in 2016 has become a fertile place for corrupt conduct assisted by these two features. Relegated in this regressive narrative has been the pursuit of excellence and merit.

The recent publicity concerning "The Maley Affair," "The McRoberts Affair" and "The Lawrie/Lawton Affair" all illustrate corrupt crops from, what has become, a fertile field.

It is necessary to precis some of their details in order to illustrate the need for an Anti-Corruption Commission.

The 'Maley Affair' involved grossly unethical conduct by a judicial officer and the refusal by his 'mate', the present NT Attorney-General to inquire into the same. The 'McRoberts Affair' involved gross dishonesty by the NT Police appointed Coordinator of Crime Stoppers [Mrs Kamatsis] amidst an intimate relationship with the NT Police Commissioner who it is alleged stymied police investigations into her conduct relating to rorting Government travel funds and corruptly giving benefit to a Ministerial Advisor. The 'Lawrie/Lawton' matter stems from the interrelationship of some members of the legal profession with then current political leaders whose close relationship led to behaviour which appears to breach fundamental professional ethical conduct.

In my opinion these matters clearly illustrate the urgent need for the establishment of a proper body to fully investigate corrupt conduct in the public administration of the Northern Territory.

My view is that such an Anti-Corruption Commission should be independent, appropriately powered, accountable, transparent and adequately funded. My view is that it cannot be created from any amalgam of existing NT bodies such as the Ombudsman and the NT Public Interest Disclosure Commission. The recent farce when conflicts abounded in the 'McRoberts Affair' illustrates this.

The new body should be staffed by people independent of the NT Police force and the NT Public Service.

Political approaches should attempt to harness, at reasonable cost, other interstate I.C.A.C. units to investigate and ultimately conduct hearings here in Darwin in relation to reasonably suspected corrupt conduct in the Northern Territory.

The definition of 'corrupt conduct' should follow the Recommendations of the recent *Independent Panel-Review of the Jurisdiction of the ICAC Report 31 July 2015* relating to the High Court decision *ICAC v Cunneen [2015] HCA 14 vis vis* the NSW I.C.A.C.

The powers to investigate, obtain evidence and conduct hearings can be replicated, subject to local requirements, either from the NSW or SA I.C.A.C. legislation.

My view is public hearings risk the fairness of subsequent trials and can inflate the public expectation which can then undermine their faith in the traditional legal system, especially in our small jurisdiction. Hearings therefore should be held *in camera* but with discretion to have public hearings if it can be established they would be in the interests of the administration of justice.

There should also be established some appropriate mechanism by which the Anti-Corruption Commission can be overseen and reviewed thus making it accountable. This could be through an NT Parliamentary Committee or some separate Inspectorate to oversee it, ala the NSW I.C.A.C.

In conclusion I stress two things: One, an Anti-Corruption Commission is definitely required and two, it will not be effective unless it's carried out by experienced, appropriately empowered personnel from outside the Northern Territory.

Yours Faithfully



John B. Lawrence SC

15 March 2016

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Dear Commissioner

Inquiry – NT Anti-Corruption Integrity & Misconduct Commission

The Law Society Northern Territory (Society) is grateful for the opportunity to comment on the Inquiry. Unfortunately due to the broad nature of the Inquiry the Society response is limited to general considerations. We would be pleased to provide more detailed input to the Inquiry as it progresses.

As a general principle the Society endorses the establishment of an Anti-Corruption Integrity & Misconduct Commission ("ACIMC"). The Society acknowledges the concern that there is a need to improve transparency and public confidence in NT Government agencies, Ministers, Members of the Legislative Assembly, police and corrections officers. An ACIMC should have broad powers to investigate misconduct and corruption and provide recommendations and guidance regarding conduct ethics and matters of propriety. An ACIMC would provide an appropriate forum and framework for investigating the integrity of public officials and encourage public confidence in the effective workings of government.

[Executive summary](#)

Any integrity body should promote respect for the Rule of Law. The body must have adequate powers to tackle corrupt conduct and the definition of corrupt conduct should be broad and not just based on a breach of the criminal law. The definition should cover serious conflicts of interest and undue influence matters.

[International obligations](#)

As you may be aware Australia ratified the United Nations Convention Against Corruption (UNCAC) on 7 December 2005, and has also ratified the United Nations Convention against Transnational Organised Crime for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. At a federal level a number of anti-corruption measures have been put in place

1 / 4

and anti-corruption bodies have been established in New South Wales, Western Australia, Tasmania, South Australia, Queensland and Victoria. As such the Northern Territory now finds itself out of step with almost all other Australian jurisdictions.

Whilst the Northern Territory is not bound by these commitments they provide an essential backdrop and the establishment of an ACIMC will make an important statement of the Northern Territories rejection of bribery and corruption. It will reflect positively on the Territory as a safe trading partner as it continues to press for increased business with our near neighbours to the north.

Scope

The Society recommends that government agency be broadly defined. Public confidence in NT Government agencies, Ministers, Members of the Legislative Assembly, police and corrections officers has been seriously undermined in recent years.

Financial Independence

In considering the establishment of an independent ACIMC consideration needs to be given to ensuring that it has adequate resources such that those that may come under its scrutiny cannot curtail the performance of its functions through a lack of resources. This would be an important consideration if such a body were incorporated within an existing agency. At present it is the practice that even the most independent commissioners and the ombudsman are staffed by government employees and supported by government corporate systems. Long term funding would need to be secured by legislation and careful consideration to how provide sufficient structural freedom so as not to undermine the independence.

Coercive powers

The Society is concerned that any governing legislation is likely to contain considerable coercive powers and appropriately so. Importantly the Society is concerned that these powers must balance the need for robust public scrutiny and the protection of the rights of participating individuals particularly witnesses. These powers will not be exercised by judicial officers and are outside of any judicial process. Attention needs to be paid to ensure such powers are only available for a legitimate purpose with adequate protections to mitigate adverse impacts on individual rights. Such as to ensure coercive powers are only exercised when required and proportionate to the matter under investigation. Suggestions include the staging of the coercive powers to align with the gravity of the matter under investigation. Particularly the legislation should enshrine the need for an application to a judge for warrants of entry, search and seizure or apprehension of witnesses. I refer to the Australian Law Reform Commission *Making Inquiries* report.¹

Public inquiries

The Society also supports careful consideration as to whether inquiries would be open to the public or held in camera. The Society notes that the ICAC (NSW) public inquiry process has been called into question. The Society submits that the publication of information before ICAC has added a greater level of public scrutiny, arguably increasing awareness of what may be questionable conduct has the potential to impact future conduct – achieving effect for the expense of the investigation.

Appointment

The Society is concerned that the process of appointment and term of appointment of an individual commissioner should be open and transparent. The present protocol with respect to appointment of judicial officers presents a positive example however would not be adequate in this instance. Importantly the appointment should not be at the discretion of a Minister or Cabinet and any selection panel should not be constituted by majority Government employees. The Society would recommend an appointment process enshrined in legislation consisting of public advertisements and a selection panel the majority of whom are independent of Government like independent judicial officers. Similarly term of appointment should be enshrined.

Threshold for investigation

It is important that the threshold for matters that would be the subject of the Inquiries investigative and coercive powers be adequately balanced. The Society suggests a preliminary investigation phase where the more extreme coercive powers are not available that may ultimately progress to an investigation where the full gamut of coercive powers could be called upon. The Victorian IBAC which is limited to 'serious' corrupt conduct has been considered problematic as has the overlap with matters that would attract criminal prosecution. Territorians will have greater confidence where the conduct that may be investigated is broadest. This would include capacity to commence own motion investigations and investigations of systemic corruption that do not require a notification trigger.

Compulsory notification

The Society would recommend consideration of a compulsory reporting requirement that applies to government employees. Importantly this should provide adequate guidance about the reporting requirements and protections from any civil or criminal liability. It is likely that this could result in numerous notifications and procedural challenges about how to prioritise investigation and follow-up. A positive obligation and protection will comfort many who would otherwise know of concerning conduct.

Application to members of the Legislative Assembly and Ministers

The Society submits that an ACIMC should have power to investigate the conduct of members of the legislative assembly and Ministers. Unfortunately issues such as conflict of interest appear complex and elected members are not immune from allegations of this nature. Having a mechanism to thoroughly investigate such allegations in a transparent and fulsome way will provide a significant safeguard to those members and an opportunity to clear the air. The Society is of the view that there is a need for investigation of police conduct to be undertaken by an agency external to police. At times the close association between the office of the Ombudsman and the police does not provide the necessary perception of independence that should be required when investigating the conduct of senior officers.

Privilege against self-incrimination

The privilege against self-incrimination is recognised as a fundamental human right. For example, article 14(3) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge, everyone shall be entitled to the right not to be compelled to testify against him or herself or to confess to guilt. The Society would support ensuring that this is protected.

Natural Justice and Procedural fairness

Overall the Society is of the view that any such Inquiry should be governed by the principals of procedural fairness and natural justice. The Society is concerned that parties involved in investigations or that may be the subject of findings of an Inquiry should have the opportunity to know the charges against them, the evidence upon which those charges are based and have the opportunity to respond to those charges. This would preserve the procedural fairness for all parties. The regime should provide that the Inquiry has taken all reasonable steps to give notice of any proposed findings, particularly adverse findings, or the risk or likelihood of adverse findings, and disclosed the relevant material relied upon and the reasons on which such a finding might be based. Further, the Inquiry should take all reasonable steps to give that person an opportunity to respond to the proposed finding, and should properly consider any response given.

Overlap with other oversight bodies

The Society has considered the existing oversight bodies such as the Ombudsman and the Office of Public Interest Disclosure. Similarly the police would equally have the capacity to investigate conduct that is of a criminal nature. Unfortunately these agencies do not have the resources, sufficient independence or broad powers that are required to meet the objects and purpose of an ACIMC.

The Society looks forward to receiving a copy of your report and would the opportunity to provide further comment in due course.

Yours faithfully



MEGAN LAWTON

Chief Executive Officer

megan.lawton@lawsocietynt.asn.au

¹ Australian Law Reform Commission, Report 111, *Making Inquiries: A New Statutory Framework*, October 2009. Available from <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC111.pdf>.



Commissioner Brian Martin
NT Anti-Corruption Integrity & Misconduct Commission Inquiry
GPO Box 4396
Darwin NT 0801

Dear Mr Martin

Re: NTEC Submission – Anti-Corruption Integrity & Misconduct Commission Inquiry

I refer to your letter dated 29 February and thank you for providing the NTEC with the opportunity to make a submission to this inquiry.

I advise that I have been provided with a copy of the Joint Submission – Anti-Corruption Integrity & Misconduct Commission Inquiry, February 2016 prepared by the five NT statutory officers and generally support the comments made in their submission, noting that a number of the issues addressed are outside the ambit of the NT Electoral Commission.

In relation to Chapter 8 - Elections of the NSW Independent Panel Report – Review of the Jurisdictional of the Independent Commission Against Corruption (provided with your letter), it is important to recognise the substantial differences and complexities when comparing NSW electoral legislation with that of the NT, including:

1. NSW has an entire Act, separate to their *Parliamentary Electorates and Elections Act*, for election funding and financial disclosure matters - the *Election Funding, Expenditure and Disclosure Act 1981* (EFED Act).

NT disclosure provisions are contained within the NT *Electoral Act*.

2. The NSW Electoral Commission is a statutory body, consisting of a former Supreme Court Judge as Chairperson, a member with financial or audit skills and qualifications, and the Electoral Commissioner. The body makes decisions about payment of funding for campaign finance expenditure and compliance with NSW electoral laws. It can also refer certain possible criminal offences under election funding, election or lobbying laws for investigation by the ICAC.

The NTEC is funded and structured as an electoral body, with the Electoral Commissioner responsible for the overall conduct of its operations. As a relatively small organisation it does not have investigatory resources of note, nor a dedicated funding and disclosure section as do other electoral jurisdictions. The Commission is not a prosecutorial body.

The majority of breaches of the NT *Electoral Act* are likely to be criminal offences and therefore it is the role of the NT Police to investigate breaches and, in consultation with the Director of Public Prosecutions, determine whether a matter should proceed to prosecution. An exception to this is in relation to alleged breaches of the disclosure provisions.

Under Part 10 of the NT *Electoral Act*, the Commission has the responsibility to conduct a preliminary investigation and refer the matter to the NT Police if it forms the view that a breach of the disclosure provisions has occurred. This is the process followed recently in response to complaints alleging that Foundation 51 Pty Ltd was an associated entity of the Country Liberals.

Following the investigation(s) into Foundation 51, the NTEC initiated annual independent compliance reviews of political disclosure returns to be undertaken by an accounting firm. The purpose of the reviews is to verify whether political disclosure returns are both accurate and complete, with the reports made publically available. A copy of the 2014/15 compliance review report prepared by the accounting firm BDO is attached.

3. The EFED Act provides for public funding of state election campaigns.
There is no public funding provided to political parties and candidates under the NT *Electoral Act*.
4. The EFED Act imposes caps on political donations for state elections and makes it unlawful for anyone to accept a donation exceeding the prescribed cap.
The NT *Electoral Act* does not prescribe caps on political donations.
5. The EFED Act prohibits donations from property developers or tobacco, liquor or gambling industries.
Currently there is no limit or prohibition of donations from certain classes of donors (excepting anonymous donors) in the NT, however the Member for Nelson, Mr Gerry Wood, has lodged a private members bill proposing such a change (see attached for a copy of the Bill and the NTEC information paper regarding the proposed change).
6. The NSW Electoral Commission is responsible for monitoring compliance with and enforcement of the *Lobbying of Government Officials Act*.
There is no equivalent to the *Lobbying of Government Officials Act* in the Northern Territory.

The NTEC does not put forward a view as to whether an Anti-Corruption Integrity and Misconduct Commission should be established in the NT, noting the possible options outlined in the joint submission by the five independent officers.

If such a body is established, however, it is important that clear definitions are in place regarding which entity has jurisdiction over electoral and lobbying matters, including

alleged breaches of political disclosure laws. Paragraph 8.5.2 of the NSW Independent Panel states:

'The Commission is of the view that the extension of its jurisdiction in this way is only justified if all of the breaches to which Mr Mason refers are brought within the ambit of corrupt conduct. Otherwise, the Electoral Commission itself is better placed to investigate such breaches.'

A similar clarification would be appropriate if an anti-corruption entity was to be established in the NT with a clear definition required of 'corrupt conduct'.

In addition, a review of the NT *Electoral Act* would need to take place in order to ensure there are no inconsistencies or overlap with the legislation governing any anti-corruption entity and referral procedures to that entity are clearly prescribed.

Should you have any queries please do not hesitate to contact me by phone (8999 8614) or email (iain.loganathan@nt.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Iain Loganathan', with a stylized flourish extending to the right.

IAIN LOGANATHAN
Electoral Commissioner

6 April 2016

Serial
Electoral Amendment Bill 2015
Mr Wood

A Bill for an Act to amend the *Electoral Act*

DRAFT ONLY
Prepared by the Office of the Parliamentary Counsel
Date: 24 April 2015 13:05

Ref: 01bIIIE029v4

NORTHERN TERRITORY OF AUSTRALIA

ELECTORAL AMENDMENT ACT 2015

Act No. [] of 2015

Table of provisions

1	Short title	1
2	Act amended	1
3	Section 3 amended.....	1
4	Part 10, Division 3A inserted	2
	Division 3A Prohibited donations	
	198A Definitions	
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	198C Determination that person not prohibited donor	
5	Expiry of Act	5



NORTHERN TERRITORY OF AUSTRALIA

Act No. [] of 2015

An Act to amend the *Electoral Act*

[Assented to [] 2015]
[Second reading [] 2015]

The Legislative Assembly of the Northern Territory enacts as follows:

1 Short title

This Act may be cited as the *Electoral Amendment Act 2015*.

2 Act amended

This Act amends the *Electoral Act*.

3 Section 3 amended

Section 3

insert (in alphabetical order)

close associate, for Part 10, Division 3A, see section 198A.

donation, for Part 10, Division 3A, see section 198A.

liquor or gambling industry business entity, for Part 10, Division 3A, see section 198A.

prohibited donor, for Part 10, Division 3A, see section 198A.

property developer, for Part 10, Division 3A, see section 198A.

tobacco industry business entity, for Part 10, Division 3A, see section 198A.

tobacco product, , for Part 10, Division 3A, see section 198A.

4 Part 10, Division 3A inserted

After section 198

insert

Division 3A Prohibited donations

198A Definitions

In this Division:

close associate, of a corporation, means:

- (a) a director or secretary of the corporation, or a spouse or de facto partner of the director or secretary; or
- (b) a corporation that is a related body corporate to the corporation, within the meaning of the Corporations Act 2001; or
- (c) a director or secretary of such a related body corporate; or
- (d) another corporation (the **second corporation**), if:
 - (i) the ability or capacity to control or procure the composition of the board of directors of the second corporation is held by not less than 50% of the persons comprising, or having the ability or capacity to control or procure, the composition of the board of directors of the corporation; or
 - (ii) the ability or capacity to cast, or control or procure the casting of, not less than 50% of the maximum number of votes that may be cast at a general meeting of the second corporation is held by persons having the ability or capacity to control, or procure the control of, not less than 50% of the maximum number of votes that may be cast at a general meeting of the corporation; or
 - (iii) the holding of legal title to, or of a beneficial interest, direct or indirect, whether by medium of interposed corporations or trusts or otherwise in, not less than 50% of the shares in the second corporation carrying voting rights in respect of one or more subject matters capable of resolution at a general meeting of the second corporation, is held by persons holding legal title to, or a beneficial interest, direct or indirect, whether by medium

of interposed corporations or trusts or otherwise, in not less than 50% of the shares in the corporation carrying voting rights of the same kind.

donation means a donation that is a gift or loan mentioned in Division 3.

liquor or gambling industry business entity means:

- (a) a corporation that engages in a business that includes, for the purpose of making a profit, one or both of the following:
 - (i) the manufacture or sale of liquor as defined in section 4(1) of the *Liquor Act*;
 - (ii) gambling, including the manufacture of machines used primarily for gambling; or
- (b) a close associate of a corporation mentioned in paragraph (a).

prohibited donor means a property developer, a tobacco industry business entity or a liquor or gambling industry business entity and includes any other corporation the majority of members of which are prohibited donors.

property developer means a corporation that engages in a business that regularly involves the making of development applications under the *Planning Act* with the ultimate purpose of the sale or lease of land, or a close associate of the corporation.

tobacco industry business entity means a corporation that engages in the business of the manufacture or sale of a tobacco product, or a close associate of the corporation.

tobacco product, see section 6 of the *Tobacco Control Act*.

198B No donations by prohibited donors

- (1) A prohibited donor must not make a donation.
- (2) A person must not make a donation on behalf of a prohibited donor.
- (3) A person must not accept a donation that is wholly or partly made by a prohibited donor or by a person on behalf of a prohibited donor.
- (4) A prohibited donor must not solicit another person to make a donation.
- (5) A person must not solicit another person on behalf of a prohibited

donor to make a donation.

- (6) A person who contravenes any of subsections (1) to (5) commits an offence.

Maximum penalty: 200 penalty units.

198C Determination that person not prohibited donor

- (1) A person (the **applicant**) may apply to the Commissioner for a determination that the applicant is not a prohibited donor.
- (2) The application must be made in the approved form and contain information as to why the person does not consider that they are a prohibited donor.
- (3) The Commissioner must consider the application and, not later than 60 days after the application is made, do one of the following:
- (a) make a determination in writing as to whether the person is not a prohibited donor;
 - (b) refuse to make such a determination.
- (4) The determination remains in force for 12 months after it is made but the Commissioner may revoke the determination at any time by notice in writing to the applicant.
- (5) A determination, while in force, has the following effects:
- (a) it creates an irrebuttable presumption that the applicant is not a prohibited donor, as regards a person who makes or accepts a donation;
 - (b) it does not create a presumption in favour of a person who knows that any of the information contained in the application was false or misleading in a material particular.
- (6) The Commissioner must keep a public register of the determinations that the Commissioner makes under this section and publish it in the manner that the Commissioner considers appropriate.
- (7) An applicant must not make an application under this section that the applicant knows contains information that is false or misleading in a material particular.

Maximum penalty: 200 penalty units.

5 Expiry of Act

This Act expires on the day after it commences.



**NORTHERN
TERRITORY
ELECTORAL
COMMISSION**
EVERY vote counts!

Information Paper

**Gerry Wood MLA – Private Member's Bill
Electoral Amendment Bill 2016 (Serial 155)**

INFORMATION PAPER: ELECTORAL AMENDMENT BILL 2016 (SERIAL 155)

On 10 February 2016, the Electoral Amendment Bill 2016 (Serial 155) was tabled by Mr Wood MLA.

The Bill proposes changes in respect to definitions contained in Section 3 of the Electoral Act (the Act) and Division 3A of the Act which will deal with Prohibited Donations.

As an independent agency, the Northern Territory Electoral Commission (NTEC) makes recommendations regarding electoral reform, primarily through its public reporting on general elections and submissions to public enquiries. Any changes to electoral legislation, however, rest with parliament.

In this context, this paper seeks only to touch on issues of clarification and the likely impacts associated with the implementation and administration of the proposed amendments. It does not put forward an opinion on their merits.

Application of Legislation

The Bill proposes to identify and prohibit donations from certain classes of prospective donors, including the liquor/gambling industry, property developers and the tobacco industry.

The prohibition of certain classes of prospective donors has recently been of interest in other jurisdictions. New South Wales has established legislation similar to the proposed NT changes, whilst at the Commonwealth level a private members bill, sponsored by Senator Rhiannon, proposed amendments along similar lines. It did not progress beyond the second reading speech. This private members bill listed the mining and fossil fuel industry as prohibited donors in addition to those identified in the proposed NT amendments.

A recent High Court ruling in the McCloy case (NSW) confirmed that parliament has the right to exclude classes of prospective donors and therefore such exclusions have been determined to be lawful.

There are a number of challenges associated with the management and enforcement of compliance with such exclusions. These include the ability to adequately identify excluded donors and the provision of additional resources to the administrators responsible for maintaining a management system and enforcing compliance.

Definitions

Generally speaking, electoral authorities have been continually challenged in managing reporting compliance and the prosecution of offenders in respect to political donations made through indirect channels. The identification of undisclosed donations and donors is not simply done, and any uncertainty regarding definitions can provide grounds for disputes.

The Electoral Amendment Bill 2016 (Serial 155) excludes certain classes of prospective donors and their associates as defined by the Act. In its definition of associates, the Bill includes directors and the secretary of a corporation (including the spouse or de facto partner of the director or secretary), a corporate body that is a related body corporate (including a director or secretary of such a body corporate) or another corporation with control rights over the other body as defined.

From an administrative perspective, it would be helpful if the reading speech, parliamentary debate or explanatory memorandum could provide additional clarification, where possible, as to those being targeted. For example, additional guidance in interpreting 'regularly' in the definition describing a property developer as 'regularly making of development applications under the Planning Act' would be useful to administrators. Similarly, in their current form, the proposed amendments may be construed as to allow identified office holders of excluded corporate bodies to donate as individuals, or through other persons who might not be ordinarily considered at arms-length from a banned body corporate such as an employee/contractor, or a relative other than a spouse or partner. The treatment of other potential providers, or funding mechanisms such as Trusts, may also need specific attention.

Management Resources

Australian electoral agencies continue to be heavily scrutinised, and sometimes criticised, about their level of proactivity in pursuit of compliance. Public, legal and political expectations have not always been clear or consistent, especially in regard to the identification and treatment of perceived minor or immaterial transgressions. As a consequence, it is difficult to estimate the potential resource implications for the NTEC from this Bill until its introduction and ensuing debate relating to its passage is complete.

It is clear, however, that the introduction of prohibited donors in an array of forms will generate a substantial increase in the amount of data and corporate record cross-checking and auditing compared to that currently taking place. It will also require the creation of a new line of specialised investigatory work involving a systemic approach to the analysis of corporate structures and their key personnel.

The tools to facilitate the management and investigative requirements of an increasingly complex financial disclosure system are quite significant. Those States and the Commonwealth which have substantial responsibilities in this regard are supported by specialised software, dedicated staff and their own in-house investigatory and legal expertise.

Whilst the NTEC currently has the full range of electoral body responsibilities, its staff numbers are small and its role in practice dominated by the operational demands of running its enrolment, education and election programs, which include local government and Legislative Assembly elections and by-elections. It does not currently have investigatory resources of note, and the undertaking of a more complex and specialised role will have significant human resource and other

implications for the agency. The NTEC currently engages an accounting firm to conduct compliance reviews in respect to financial disclosure. These reviews primarily focus on assessing the accuracy and completeness of returns that have been lodged by parties, candidates, associated entities and donors. They are also conducted on the basis of current legislation and would not usually involve a significant degree of highly specialised investigatory or detailed forensic work that may be required in the pursuit of more complex or sophisticated circumvention of the law.

It is also unknown as to whether accounting firms are appropriately equipped and willing to undertake investigatory work of the nature that might be necessary to detect prohibited donors and the potential complexities of their operating arrangements. If outsourcing this function is neither possible nor practical, the NTEC would need to establish in-house resources to meet its compliance enforcement responsibilities. Regardless, additional resources would be required to extend the current arrangements.

Northern Territory Electoral Commission

**Compliance review with focus on Political Disclosure
Returns in relation to election contributions and annual
political party returns, as relevant, made by political
parties and their donors and related entities during the
2014/15 financial year.**

Prepared by:
Marco Cardellini, BDO (NT)



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1. EXECUTIVE SUMMARY

BDO (NT) performed a compliance review with a focus on political disclosure returns in relation to election contributions and annual political party returns, as relevant, made by political parties and their donors and related entities during the 2014/15 financial year.

The compliance review selected a sample of documents from across the following areas.

- Political Parties registered in the Northern Territory incorporating:

- Australian Labor Party (NT);
- Citizens Electoral Council (NT Division);
- Country Liberals;
- Palmer United Party NT;
- Shooters and Fishers Party (NT); and
- The Greens.

- Entities associated with Political Parties incorporating:

- NT ALP Investment Trust
- CLP Gifts and Legacies Pty Ltd; and
- Foundation 51 Pty Ltd.

- Individual Donors through the Donor Annual Returns.

The overall findings in relation to the compliance review are as follows:

- a. Not all individual donors are lodging Donor Annual Returns so as to comply with the requirement of Part 10 of the *Northern Territory Electoral Act*.
- b. One political party failed to lodge their political party annual return by the deadline date (being 16 weeks after the end of the financial year).
- c. There are still some concerns on the accuracy of political party and branch returns in representing the financial information/affairs of the political parties selected for review. However, we acknowledge that there have been improvements in the level of compliance when compared to the previous reporting years.
- d. Amended returns have to be lodged by both the Country Liberals (NT) and Australian Labor Party (NT).

The key recommendations for the overall finding above include the following:

- a. The Northern Territory Electoral Commission should conduct some education/awareness initiative to ensure that more people and organisations are versed in the provisions of the *Northern Territory Electoral Act* especially on the lodgement of requisite annual returns in a timely manner and whilst ensuring that the details included therein is complete and accurate.
- b. Ongoing compliance review should be scheduled for the returns of the year ending 30 June 2016 with the aim of ensuring that the issues arising from the current review have been addressed at all levels of stakeholders involved in the political disclosure process.
- c. In relation to the late lodgements and potential inaccurate and inadequate information provided by relevant stakeholders, the Northern Territory Electoral Commission should consider stricter application of the provisions of the *Northern Territory Electoral Act*.

MAIN REPORT

INTRODUCTION

1. BACKGROUND

The Northern Territory Electoral Commission (NTEC) is an independent government agency responsible for the impartial conduct of Northern Territory Legislative Assembly and local government (Council) elections.

Other functions include:

- Assistance with maintenance of electoral rolls;
- Provision of information and advice on election matters to the Minister, Cabinet, political parties, candidates and Territory authorities;
- Undertaking public awareness to educate and provide information to the public including school children on electoral matters;
- Researching electoral matters;
- Registration of political parties;
- Administration of financial disclosure by political parties, candidates and related entities; and
- Assistance towards redistribution of electoral boundaries.

The *Northern Territory Electoral Act* (NTEA) embodies the legislation which gives the NTEC its powers.

As noted above, one of the NTEC functions is to administer the disclosure of information following an election regarding political contributions and electoral expenditure above prescribed thresholds by:

- candidates in the election;
- broadcasters, publishers; and
- donors.

In addition to election event reporting, annual reporting requirements are placed on registered political parties, their associated entities and donors.

Such financial disclosure increases accountability, transparency and information in the public domain about the financial dealings of those involved in the electoral process. The onus is on the person disclosing to get it right.

The NTEA Part 10 sets out who should disclose, what should be disclosed, by when and how. It defines the terms used in the legislation and details offences under the legislation and the kind of records that should be maintained in order to comply with requirements. Unlike the *Commonwealth Electoral Act*, there are no provisions for public funding in the Northern Territory.

2. COMPLIANCE REVIEW OBJECTIVES

The specific objectives of the compliance review were to:

- a. Review the political parties, associated entities and donors for compliance with political disclosure returns in relation to election contributions and annual political party returns, as relevant, during 2014/15 financial year.
- b. Establish whether the disclosures are compliant with Part 10 of the NTEA.

3. METHODOLOGY

In conducting the review the following key tasks were performed:

1. Preparation of the review file incorporating political party annual returns, donor annual returns, associated entity returns, NTEA and the NTEC Disclosure Handbook.
2. Matching amounts of donation received by political parties to the amounts recorded in the individual donor returns.
3. For a sample of donor annual returns, reviewing the returns for compliance with the lodgement timelines.
4. Matching donation amounts to the corresponding amount in the political party returns on a sample of donor annual returns.
5. From the comprehensive list of Political Party & Branch Annual Returns lodged for the 2014/15 financial year, we generated a sample size appropriate to test the receipts and payments as disclosed in the political party annual returns.
 - a. The samples for detailed testing of donations/receipts were randomly selected from the list of receipts in the annual returns.
 - b. The samples for electoral expenditure were randomly selected from the general ledger details provided by the political parties.
6. Obtaining and verification of financial records and documentation covering the financial year ended 30 June 2015. The tests included:
 - a. By inspection, review of bank statements for the financial year ended 30 June 2015;
 - b. By inspection, reviewed the cash books and general ledger details covering the financial year ended 30 June 2015;
 - c. By inspection, reviewed the supporting documentation, including invoices, receipts, vouchers covering the financial year ended 30 June 2015.
7. Discussing the preliminary findings with the reviewed political parties, associated entities and Northern Territory Electoral Commissioner and his staff.

4. OVERALL CONCLUSION

There are still some concerns on the accuracy of political party and branch returns in representing the financial information/affairs of the political parties selected for review. However, we acknowledge that there have been improvements in the level of compliance when compared to the previous reporting years.

Based on our findings, there is a requirement to provide amended returns by both the Country Liberals Party (NT) and Australian Labor Party (NT).

In relation to donors, the level of compliance with the NTEA is still unsatisfactorily.

SPECIFIC OBJECTIVE 1

We obtained from NTEC a complete list of Donor Annual Returns lodged for the 2014/15 financial year. We determined a sample size deemed appropriate to adequately test the donor annual returns compliance with Part 10 of the NTEA.

Findings

In going through the donor annual returns, we noted the following points which indicate the level of compliance with Part 10 of the Northern Territory Electoral Act:

- 13% of the sampled donors did not lodge their donor annual returns by the deadline date.
- Two donations in the selected donor annual returns did not match with the figures recorded in the political party and branch returns. Variances noted amounted to \$18,000 and \$5,000.

In addition to the above process, we went through the political party and branch returns to ascertain the completeness of donor annual returns lodged. As a result of this review, we noted the following 20 donors who did not lodge their annual returns for the year ended 30 June 2015 as required under Part 10 of the NTEA:

	Name	Address	Amount Received
1	Ben Halliwell	11 Dolphin Ctr. Parap NT 0820	\$1,500
2	Darwin Airport Lodge	PO Box 2305 Parap NT 0804	\$10,000
3	Deckert Pty Ltd	Buckley & Stone L 1 Darwin NT 0800	\$1,500
4	Dhupuma Resources Pty Ltd	1 Briggs Street Darwin NT 0800	\$1,500
5	Dolly Pty Ltd	35 Macredie St, Nakara NT 0810	\$2,000
6	Eastarm Civil	GPO Box 3444 Darwin NT 0820	\$1,818
7	Halikos Group	PO Box 138 Berrimah NT 0828	\$3,636
8	Halikos Pty Ltd	GPO Box 1511 Darwin NT 0801	\$5,800
9	Joondanna Investments	7 Parckard Place Darwin NT 0800	\$3,000
10	Morandini Investments	GPO Box 1321 Darwin NT 0801	\$6,000
11	North West Constructions	GPO Box 1306 Darwin NT 0801	\$8,500
12	Ostojic Transport Pty Ltd	GPO 818 Darwin NT 0801	\$3,100
13	Quality Plumbing and Building	7 Brooker Street Winnellie NT 0820	\$5,000
14	Randazzo C&G Developments	GPO Box 2975 Darwin NT 0801	\$5,000
15	Randazzo Properties	GPO Box 551 Darwin NT 0801	\$5,454
16	Randazzo Pty Ltd	GPO Box 551 Darwin NT 0801	\$2,800
17	Salsa Holdings Pty Ltd	GPO Box 3942 Darwin NT 0801	\$10,000
18	Sydney Stirling	13 McArthur Ct Leanyer NT 0812	\$2,000
19	Trepang Services Pty Ltd	PO Box 2305 Parap NT 0804	\$10,000
20	Vince Jeisman	7 Grevillea Drive Alice Springs NT 0870	\$2,000

We noted that the political parties informed the above donors of their obligation to lodge a donor return. Follow up e-mails were sent by NTEC to remind the above donors of their outstanding obligations, however no responses had been received up to the date of concluding this report.

Recommendations

We acknowledge that NTEC has made efforts to reach out to the community so as to educate individuals and organisations about their responsibilities under the NTEA when donations above the \$1,500.00 threshold have been made to political parties. We encourage NTEC to continue with these efforts so as to ensure that their message remains visible in the public domain.

Political parties should continually be reminded of their responsibility under the Act to advise donors of the need to complete donor annual returns in instances where donations are above \$1,500.00. In addition, the political parties should also ensure that the office/home and e-mail addresses of the donors on their database are all up to date to ensure that the letters and e-mails being sent to donors reach them.

SPECIFIC OBJECTIVE 2

We obtained from NTEC a complete list of Political Party & Branch Annual Returns lodged for the 2014/15 financial year. We reviewed all political party and branch annual returns' overall compliance with Part 10 of the NTEA.

We generated a sample size deemed appropriate to test the receipts, payments and debts section of the political party and branch annual returns.

Findings

In going through the political party and branch annual returns, we noted the following points which indicate the level of compliance with Part 10 of the NTEA:

- With the exception of one political party, all political party annual returns were lodged within the due date of 16 weeks after the end of the financial year.
- 2 political parties who had either cancelled their registration or had been deregistered did not lodge their annual returns to cover for the period which they were active during the period under review.
- There were variances noted between the total receipts reported in the selected political party and branch annual returns and the total receipts recorded in the respective political parties' financial records.
- 46% of the receipts recorded in the sampled political party annual returns could not be cross checked to the donor annual returns as the relevant donors had not yet lodged their returns.
- With minor exceptions, all selected donations were traced to the respective political parties' bank accounts.
- With minor exceptions, all sampled donations were processed in the correct reporting periods. We noted that the dates the donations were credited into the political parties' bank accounts matched with the processed/recorded dates in the financial records.
- With minor exceptions, receipts were always issued for donations received from people and organisations.
- There were variances noted between the total payments reported in the selected political party annual returns and the total payments recorded in the respective political parties' financial records.
- With minor exceptions, all sampled electoral expenditure was supported by tax invoices and receipts.
- With minor exceptions, all sampled electoral expenditure was processed in the correct reporting period and they met the definition of "Electoral Expenditures".
- There were differences in the total debt figures disclosed in the political party annual returns to those which were recorded in the financial records of the of selected parties. The total value of underreported debt from the selected political parties was \$21,676.
- As a result of the variances and exceptions noted above, there are still some concerns on the accuracy of political party and branch returns in representing the financial information/affairs of the political parties selected for review. However, we acknowledge that there have been improvements in the level of compliance when compared to the previous reporting years.

In addition to the above process, we went through the political party annual returns to ascertain the completeness of information included in the annual returns lodged. As a result of this review, we noted that all sections of the political annual return were duly completed and contained information required under Part 10 of the NTEA.

Recommendations

NTEC should still conduct a follow up compliance review for the returns of the year ending 30 June 2016 with the aim of ensuring that the issues arising from the current review have been addressed at all levels of stakeholders involved in the political disclosure process.

In relation to the late lodgements and inaccurate and inadequate information provided by political parties, NTEC should consider stricter application of the provisions of the NTEA.

SPECIFIC OBJECTIVE 3

We reviewed all associated entity annual returns for the 2014/15 financial year to check for compliance with Part 10 of the NTEA.

Findings

In going through the associated entity annual returns, we noted the following points which indicate the level of compliance with Part 10 of the NTEA:

- One of the three associated entity returns which was tested was lodged after the deadline date of 20 weeks after the end of the financial year.
- With minor exceptions, all total receipts recorded in the associated entity returns agreed to the figures recorded in the financial records of the associated entities reviewed.
- With minor exceptions, all total payments recorded in the associated entity returns agreed to the figures recorded in the financial records of the associated entities reviewed.
- Total debt figures recorded in the associated entity returns agreed to the figures recorded in the financial records of the associated entities being reviewed.
- Details in the donor annual returns completed by the associated entities matched with the recipient political parties' annual returns.

Recommendations

In relation to the late lodgements, NTEC should consider stricter application of the provisions of the NTEA.

APPENDICES

Terms of Reference

Compliance review of political disclosure returns in relation to election contributions and annual political party returns, as relevant, made by political parties and their donors and related entities during the 2014/15 financial year.

Approach

1. Preparation of the review file incorporating political party annual returns, donor annual returns, associated entity returns, NTEA and the NTEC Disclosure Handbook.
2. Matching amounts of donation received by political parties to the amounts recorded in the individual donor returns.
3. For a sample of donor annual returns, reviewing the returns for compliance with the lodgement timelines.
4. Matching donation amounts to the corresponding amount in the political party returns on a sample of donor annual returns.
5. From the comprehensive list of Political Party & Branch Annual Returns lodged for the 2014/15 financial year, we generated a sample size appropriate to test the receipts and payments as disclosed in the political party annual returns.
 - a. The samples for detailed testing of donations/receipts were randomly selected from the list of receipts in the annual returns.
 - b. The samples for electoral expenditure were randomly selected from the general ledger details provided by the political parties.
6. Obtaining and verification of financial records and documentation covering the financial year ended 30 June 2015. The tests included:
 - a. By inspection, review of bank statements for the financial year ended 30 June 2015;
 - b. By inspection, reviewed the cash books and general ledger details covering the financial year ended 30 June 2015;
 - c. By inspection, reviewed the supporting documentation, including invoices, receipts, vouchers covering the financial year ended 30 June 2015.
7. Discussing the preliminary findings with the reviewed political parties, associated entities and NTEC and his staff.

7 April 2016

**NTBA Submission to
NT Anti-Corruption Integrity and Misconduct Commission Inquiry**

1. The NTBA is grateful for the opportunity to make a submission to this inquiry and does so by briefly addressing the issues raised in the letter of 14 December 2015.

The principles and provisions of ICAC and applicability of like legislation in other jurisdictions.

2. The NTBA is of the view that an ICAC-type body is required in the Northern Territory.
3. We share the concern of CLANT that the existing *Inquiries Act* leaves it to the government of the day to decide what matters are to be the subject of an inquiry. For the general public to have confidence in the integrity of the legislative and executive arms of government, the power to initiate and conduct an inquiry into corruption must be exercised by a body that is independent of the government of the day.
4. Anti-corruption bodies exist in all other jurisdictions and we would be naive to believe that our jurisdiction, notwithstanding its small size, is immune from corruption.
5. Recent events or allegations in the Northern Territory regarding Foundation 51, the former Police Commissioner, proposed investments by a Minister, and alleged rorting by travel agents, comprise the kinds of matters which an ICAC-type body might investigate, which confirms the need for such a body.
6. The proposed ICAC body be an Anti-Corruption Commission charged with the detection, exposure and prevention of corrupt conduct in public administration, rather than a Crime Commission, in light of the absence of

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organised crime on a widespread basis in the NT that might necessitate extreme powers to address.

The power to investigate allegations of corruption including against Ministers and MLAs.

7. It would be counter-productive to have an ICAC-type body and to exclude from its purview the highest levels of government. Such a body would be publicly perceived as powerless and/or a sham, since there is no reason to assume that the highest levels of government are not as vulnerable to corruption as the lower levels. The proposed ICAC body should have the power to investigate allegations of any member of society, including Ministers and members of the Legislative Assembly.

The power to conduct individual and systemic investigations as it sees fit.

8. For similar reasons, it would be a hollow ICAC body if it could only conduct inquiries at the direction of another party such the executive arm of government. The fact that the proposed ICAC body should have the power to investigate Ministers mandates that Ministers should not be able to dictate what matters the body can and cannot enquire into.
9. If the ICAC body identifies one or more individual instances that suggests that there is indeed a system-wide level of corruption it should have the power to choose whether or not to conduct a broader system-wide inquiry. Presumably the objects of the body would be to minimise corruption and systemic inquiries will be required on occasions to achieve this aim.

The appropriate trigger and relationship with other bodies.

10. The possibility of a multiplicity of investigations is a concern. The suggestion by CLANT that there be established a "single portal" which could then direct a complaint to a number of sources (including the Ombudsman, the Public Interest Disclosure Commissioner, etc) has merit. To avoid the additional cost of an additional government agency (the portal), this role could be given to the

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proposed ICAC body. Matters which the proposed ICAC body identifies as being best dealt with by other agencies could be so referred. Some care may have to be taken in drafting but hopefully the jurisdictional disputes that have developed in other jurisdictions (for example [South Australia](#)) can be avoided.

11. The NTBA suggests that “reasonable suspicion of corrupt conduct” would be an appropriate test for an investigation to commence.

Models from any other jurisdictions

12. Apart from the specific suggestions made above, the proposed ICAC body should also have the power to conduct hearings in public, and should do so as far as possible. The risk of show trials is no greater than that which exists in the criminal jurisdiction (i.e. very low). Naturally if a matter warranted consideration by a private inquiry on public interest or other proper grounds then the proposed ICAC body ought have the power to conduct an inquiry *in camera*.
13. To provide some oversight, an All-Party Parliamentary Committee should be established to oversee the anti-corruption commission/ICAC and deal with complaints against it.

The use of existing NT legislation or NT statutory authorities

14. There are a number of existing statutory bodies in the NT creating various mechanisms to deal with improper conduct under the *Inquiries Act*, *Ombudsman Act*, *Police Administration Act*, *Public Service Act* and other Acts relating to the functions of various Commissioners. However an ICAC body would exercise a special jurisdiction that should not be created or cobbled together under these existing legislation or existing statutory authorities. Corruption is an insidious threat to our community and economy and if we are to have a chance of addressing it then we need new and dedicated legislation and a bespoke agency to effect it. A detailed analysis of the areas covered

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by, and remaining gaps in, the existing legislation and statutory bodies is outside the scope of this submission.

Indicative costs

15. Experience from other jurisdictions has shown that ICAC bodies can be very expensive but this needs to be considered against the cost of not having such a body. It is vital that governments do all that is necessary to rid the Northern Territory of corruption. The CLANT submission addressed the concern of cost by suggesting a hybrid model where an NT body could receive complaints and conduct preliminary investigations but if a matter required further more detailed investigation then it could be referred to another jurisdiction.
16. Although the two stage model suggested by CLANT would ensure the independent and integrity of the process it may be unlikely that another jurisdiction would be willing to undertake an inquiry on the NT's behalf, or provide such a service for free.
17. An alternate funding solution could be simply to provide the body with sufficient but not extravagant funding such that it would have to be selective in prioritising matters of inquiry and choose only the most egregious breaches for inquiry.
18. Alternatively the new body could have funding for complaints and preliminary inquiries and publish prima facie findings, followed by a public request for further specific funding to conduct a full inquiry into a particular matter. If the government of the day was the subject of that inquiry, the public attention and request for funding would hopefully compel the government to make any necessary grant.



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Joint Submission

Anti-Corruption Integrity & Misconduct Commission Inquiry

**Ombudsman NT
Auditor-General
Commissioner of Police
Commissioner for Public Employment
Information Commissioner and
Commissioner for Public Interest Disclosures**

February 2016

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Executive Summary

This is a joint submission from five statutory officers closely involved with the administration and promotion of integrity in the Northern Territory public sector.

The submission aims to describe existing mechanisms for dealing with integrity issues and discuss a number of key points that should be considered in the course of the Inquiry.

Key points addressed in the submission are:

- There are extensive and adequate independent mechanisms in place for investigation of allegations of corrupt conduct on the part of public servants and police, including heads of departments and agencies.
- In particular, the Commissioner for Public Interest Disclosures (CPID) already undertakes the functions of an independent anti-corruption body with respect to the conduct of public servants and police.
- There are significant practical limits on independent investigation of allegations of corrupt conduct on the part of Members of the Legislative Assembly (MLAs), Ministers, and staff of politicians.
- The public interest and public expectations would be best served by having the conduct of MLAs, Ministers, and staff of politicians subject to investigation by an independent anti-corruption body in the same manner as public servants.
- This would include investigation based on a complaint from any member of the public or on the initiative of the anti-corruption body and a broad discretion to prepare reports for tabling in the Legislative Assembly.
- This outcome could be achieved by:
 - extending the powers and jurisdiction of the CPID by amending (and renaming) current legislation;
 - creating a broad-based new body that incorporates the existing functions of the CPID; or
 - creating a new body with a narrower focus that concentrates on the most serious and complex allegations of corrupt conduct and extending the powers of the CPID to deal with other matters.
- The head of the anti-corruption body should be recognised as an Officer of Parliament.
- Any legislative changes should maintain and enhance whistleblower protections.
- If the anti-corruption body requires additional investigative expertise or resources, these would normally be obtained through arrangement with the NT Police unless the circumstances of the case required otherwise.

- Effective promotion of integrity in the public sector can best be achieved through a range of measures, including provision of detailed guidance on appropriate conduct and comprehensive education and engagement of public sector officers.

Each of the statutory officers is happy to meet with the Commissioner at any time to clarify or elaborate on the points made in this submission or any other relevant matters.

Background

1. This is a joint submission prepared by the following statutory officers:
 - Ombudsman, Mr Peter Shoyer
 - Auditor General, Ms Julie Crisp
 - Commissioner of Police, Mr Reece Kershaw
 - Commissioner for Public Employment, Mr Craig Allen
 - Information Commissioner and Commissioner for Public Interest Disclosures, Ms Brenda Monaghan.
2. The submission has been prepared in response to requests from Commissioner Brian Martin for submissions to the NT Anti-Corruption Integrity and Misconduct Commission of Inquiry. The Inquiry was established under the *Inquiries Act* pursuant to the following resolution of the Northern Territory Legislative Assembly on 26 August 2015:
 1. *The Assembly supports the establishment of an Anti-Corruption Integrity and Misconduct Commission.*
 2. *That this Parliament resolves pursuant to s4A of the Inquiries Act, to appoint a person qualified to be a judge in the Supreme Court of the Northern Territory, to inquire into and report to the Administrator on the following matter:*

The establishment of an independent anti-corruption body in the Northern Territory, including but not limited to the following considerations:

- a. *The principles and provisions of ICAC and like legislation in other Australian jurisdictions and their applicability to the Northern Territory.*
- b. *The appropriate powers such a body should have including but not limited to:*
 - i. *The power to investigate allegations of corruption including against Ministers, Members of the Legislative Assembly and other public officials.*
 - ii. *The power to conduct investigations and inquiries into corrupt activities and system wide anti-corruption reforms as it sees fit.*
 - iii. *The appropriate trigger for an NT ICAC's jurisdiction and the relationship between this body and other NT bodies such as the Ombudsman.*
 - iv. *Models for any other jurisdictions.*
 - v. *The use of existing NT legislation or NT statutory authorities.*
 - vi. *The report will include indicative costs of establishing the various models they put forward.*

3. For the purposes of this submission, the authors will be described as the Extended Integrity Group. The Extended Integrity Group considered it appropriate to prepare a joint submission to the Inquiry given preparatory work previously undertaken by members of the Group at request of the NT Government.¹
4. The Extended Integrity Group notes that the resolution of the Legislative Assembly supports “the establishment of an Anti-Corruption Integrity and Misconduct Commission”. However, it also notes that the resolution envisages investigation of a number of potential models that might achieve the policy objectives behind the resolution.
5. This submission does not proceed on the basis that it is essential for a new body to be created. It discusses the need for new functions and powers and identifies a number of potential models for change, one of which is creation of a new body.
6. For convenience sake, the submission refers to the body that would exercise those functions and powers as “the anti-corruption body”.
7. Essentially, the Commissioner for Public Interest Disclosures (CPID) already performs the functions of an anti-corruption body in relation to public servants. The current powers and functions of CPID will therefore frequently be referred to as a departure point for discussion of necessary provisions.
8. The submission stresses the importance of taking into account the specific circumstances of the Northern Territory in development of a preferred model.

Strengthening anti-corruption measures

9. There are a broad range of measures that can be implemented to limit the potential for corrupt conduct by enhancing awareness, commitment, accountability and transparency in government.

¹ The Integrity and Accountability Officers Group comprises the Auditor-General, Commissioner for Public Employment, Commissioner for Information and Public Interest Disclosures and Ombudsman.

Members of the Group aim to share information on relevant integrity issues and developments, foster collaboration between public sector integrity bodies and inspire operational co-operation and consistency in communication, education and support in public sector organisations. Although there is no structured meeting timetable or agenda (nor is one required), members of the group maintain contact on a regular basis and meet on an occasional basis to discuss relevant issues.

In August 2015, the Northern Territory Government sought urgent input from this Group (with the addition of the Commissioner of Police) on legislative and other changes to improve and enhance the role, function and public perception of the Office of the Commissioner for Public Interest Disclosures.

Work was undertaken to prepare a paper but was not finalised prior to the resolution of the Legislative Assembly which led to the establishment of this Inquiry.

The members of the Extended Integrity Group have built on that initial work to prepare this submission to the Inquiry.

10. Ensuring that there is a robust, independent mechanism for investigating potentially corrupt activity is one such measure but it does not provide an answer in isolation.
11. Creating a new body or extending the powers of an existing body should not be seen as a panacea. The approach to minimising corruption must be multi-faceted and driven by strident commitment at the most senior levels.
12. This multi-faceted approach should include:
- increasing transparency regarding the actions and decision-making of an extended group of public officers and public bodies. This should include public reporting in areas of particular sensitivity from an integrity perspective, for instance areas related to travel, allowances, related party transactions and appointments, the use of certificates of exemption and detailed findings from probity reports;
 - regular statements and exemplary conduct at the most senior levels of government that displays strong commitment to ethical behaviour;
 - extending and improving documented guidance on the rights and wrongs of particular conduct in sensitive areas;
 - increasing the scope for independent appeal or review of important decisions;
 - education and engagement of public sector officers to ensure they are firmly committed to maintaining the highest levels of integrity and well equipped to identify and appropriately address potential integrity and corruption issues.
13. The importance of education and engagement is discussed further under the heading *Education and engagement on integrity issues*, at paragraphs 266-273 below.

Some issues that have been raised as justifying the establishment of a new body

14. There have been calls for the establishment of an all-encompassing independent anti-corruption body in the Northern Territory for some time. Before looking in detail at the current position, it is worth considering in brief some arguments that have been or might be raised as justifying establishment of such a body.

Lack of an independent body that can investigate corrupt conduct

15. There are currently a number of independent bodies, most prominently, the CPID and the Ombudsman which can and do investigate allegations of corrupt conduct of public servants (including Police). These complaints may be made by anyone and the Ombudsman may also commence an own motion investigation.
16. Those bodies do not have a broad power to initiate and investigate allegations against MLAs, Ministers and their staff. The need for an independent body to have such power is discussed further below.

Public uncertainty about the progress of investigations

17. Existing independent bodies conduct investigations in private, in some cases with the potential to prepare a published report on finalisation of investigations. Concerns have been raised by some about 'secrecy' or 'uncertainty' surrounding investigations and the need for the public to be kept up-to-date on progress of investigations.
18. There are good reasons for conducting investigations in private including the avoidance of disclosures that might prejudice an investigation or subsequent prosecution, the protection of disclosers and the protection of privacy and reputation where allegations may ultimately be found to be unjustified.

"In this town, you're innocent until you're investigated."

Syriana, movie, 2005

19. The absence of frequent public updates on investigations does not mean that investigations are not progressing. CPID, the Ombudsman and other independent bodies work closely to ensure that all allegations are dealt with appropriately and there is no unnecessary duplication of investigative effort.
20. This is not an issue that weighs in favour of the establishment of a new body. However, the need to find an appropriate balance between factors favouring private investigation and informing the public about the progress of investigations is discussed at paragraphs 158-167 below.

Potential for delay

21. Investigations into improper or corrupt conduct are frequently complex and resource-intensive. They involve careful investigation and consideration. They take time. While there is always room to improve performance on individual matters or with additional resources, there is no current indication that the times taken to finalise investigations involves undue delay.
22. Take for example, recent investigations into allegations against a former Police Commissioner and another officer. The Ombudsman and the Office of the CPID worked closely together to ensure that there was no unnecessary delay or duplication of effort in dealing with those matters.
23. The Office of the CPID received the relevant disclosure in January 2015 and completed its report on the substantive allegations by the end of February. The Ombudsman's report, which dealt with broader administrative issues arising from the allegations, was completed in May, immediately following finalisation of disciplinary proceedings against the other officer.
24. With regard to approaches to the Ombudsman about police conduct, of the 486 approaches finalised in 2014-15, 62% were finalised within 7 days and 92% within 28 days. 90% of other approaches to the Ombudsman were finalised within 7 days.

25. There is nothing to suggest that a new anti-corruption body would enhance performance in terms of timeliness.

Potential for apprehended bias – association with a person under investigation

26. The potential for apprehended bias due to an association with a person under investigation has also been raised by some, given the relatively small size of the Northern Territory community. There is always a prospect that such an issue may arise.

27. This is a challenge that is currently managed if and when it arises. There are various options in such cases, including where necessary, engaging appropriate resources from outside the jurisdiction.

28. There is nothing to suggest that a new anti-corruption body would be better placed to address this issue than existing bodies. Where there is a real or perceived need for external assistance, then some or all of the powers of the CPID are delegated. This has proved to be a simple and effective way to ensure that decisions made are not only independent but are seen to be independent.

Police investigating police

29. Most complaints against police conduct are currently investigated by police under the supervision of the Ombudsman. The CPID also has powers in relation to allegations of improper conduct by police.

30. Notwithstanding the existence of independent police complaints bodies in other jurisdictions, the reality is that the great bulk of routine complaints against police in all jurisdictions are dealt with by police in accordance with their day to day management and disciplinary processes.

31. The Ombudsman closely monitors investigation of more serious complaints and has the power to separately investigate any complaint if it is considered necessary.

32. An anti-corruption body would have to be resourced to an extremely generous level to take on all aspects of investigation of police complaints.

33. This issue is discussed further at paragraphs 179-193.

Existing mechanisms for investigation of allegations

34. There are already a number of independent bodies in the Northern Territory that have capacity to accept complaints and investigate allegations of conduct that may amount to corrupt conduct.

35. The broadest functions in that regard rest with:

- Commissioner for Public Interest Disclosures
- NT Police

- Ombudsman NT
- Auditor-General.

36. In addition there are a number of independent bodies where issues relating to alleged corrupt conduct may arise for investigation or consideration from time to time, including:

- Northern Territory Electoral Commission
- Children's Commissioner
- Anti-Discrimination Commissioner
- Courts and Tribunals
- Health and Community Services Complaints Commissioner.

37. Investigations into allegations of corrupt conduct may also be conducted or commissioned by the Commissioner for Public Employment and individual agency heads.

38. Functions of the main bodies are outlined below.

Commissioner for Public Interest Disclosures

39. The CPID has similar jurisdiction and powers under the *Public Interest Disclosure Act* (the PID Act) to many other anti-corruption bodies interstate in so far as allegations of improper conduct by public bodies or public officers are concerned.

40. In summary, the Northern Territory public bodies that can be investigated are principally government departments (including police) and local councils. Public officers who work in those bodies may also be investigated for improper conduct but not contract service providers. MLA's may only be investigated at the request of the Speaker. No referrals have been received from the Speaker to date.

41. Improper conduct that can be investigated includes allegations of corruption such as taking bribes, 'jobs for mates', fraud and stealing. Systemic issues such as substantial maladministration or substantial misuse of public funds or serious conduct causing a risk to public safety or the environment may also be investigated. Disagreements with government policy properly adopted, or complaints based solely or substantially on employment related and personal grievances cannot be investigated.

42. Currently, the CPID receives about 65 complaints of improper conduct a year. Of those approximately 25% are ultimately assessed as public interest disclosures requiring investigation.

43. Upon assessment, the discloser receives statutory protections including protections against reprisal actions (e.g. being sued or sacked because they are a "whistleblower").

44. Most matters are investigated by in-house CPID investigators or, when required, by consultants engaged to assist with specific investigations. Some matters are also referred to the Police Commissioner, the Ombudsman and other bodies for investigation. The referred complainants (disclosers) retain the legislative protections provided under the PID Act.
45. Currently the CPID can only investigate matters upon complaint (from anyone including anonymous complainants).
46. The process requires the investigation to be undertaken confidentially and the CPID has significant powers to obtain information and to question people. Although there is a legislative power to conduct hearings, the normal process is for information to be obtained through sworn interviews and documentary evidence. A witness cannot refuse to respond on the grounds of protection against self-incrimination but their evidence cannot be used against them in criminal or civil proceedings. Generally, they cannot rely on secrecy, public interest privilege or legal professional privilege. It is an offence to fail to provide information or answer questions as requested or to provide misleading information or omit relevant information. The CPID can also enter the premises of public bodies and seize information but does not have the power to utilise surveillance devices or telephone interception. If those powers were required, they would undoubtedly involve serious allegations of a criminal nature and would be referred to NT Police.
47. At the conclusion of an investigation, a report is provided to the 'responsible authority' who will generally be the relevant Minister or the Chief Executive. The report includes any responses from those whose conduct is the subject of adverse comment. It also includes recommendations to address the improper conduct found and to prevent a recurrence. A public report following an investigation may only be tabled if the CPID is not satisfied that the recommendations made have been complied with. The CPID has a limited discretion to make other reports but no general 'own motion' power to investigate matters. The public generally only hears about investigations through de-identified summaries contained in the Annual Report or in training sessions or through the local media if they have heard about the investigation through other sources.
48. Unlike the Ombudsman and the Auditor-General, the CPID does not have a broad ranging power to initiate investigations on 'own motion' or to report to Parliament even in relation to major investigations into corruption and substantial maladministration.
49. Whistleblower protection and support is considered of paramount importance to the CPID. It is often difficult to prove reprisal action and it is better to protect the whistleblower and other key witnesses by keeping their identity confidential if possible. If anonymity is not possible, then CPID works with the public body to prevent reprisal action occurring.

50. Public officer training about the work of CPID and about corruption prevention generally is also part of the core business of CPID. Online training is available through the CPID website and face to face training sessions are offered to all public bodies, particularly those who appear vulnerable to corruption.

NT Police

51. NT Police has the power to investigate any allegation of corrupt conduct that may amount to a criminal offence.

52. NT Police has established a Special References Unit as part of its Professional Standards Command which, among other things, investigates allegations that are politically sensitive or involve serious conflicts of interest. It regularly accepts formal and informal referrals from CPID of allegations of corruption for investigation.

Ombudsman

53. The Ombudsman NT investigates complaints about administrative actions of NT public authorities and local government councils and the conduct of police officers. With relevance to corrupt conduct, the Ombudsman can investigate and report on actions that are contrary to law, unreasonable, unjust, oppressive or improperly discriminatory conduct, and breaches of police discipline.

54. The Ombudsman can initiate an investigation on the basis of a complaint from a member of the public or on own motion.

55. The Ombudsman is required to conduct investigations in private. The Ombudsman has extensive powers to require production of evidence and information and require witnesses to attend oral hearings. Agencies cannot rely on secrecy provisions or privilege to refuse to provide documents or answer questions. There is no specified power for the Ombudsman to require answers from individuals that might incriminate them.

56. The Ombudsman has a broad discretion to present reports for tabling in the Legislative Assembly.

57. In 2014-15, the Ombudsman received 488 approaches about Police conduct and 2,279 other approaches.

58. Only a small proportion of the approaches received by the Ombudsman involve allegations of that might amount to corrupt conduct.

Auditor General

59. The office of the Auditor-General is a statutory office established under the *Audit Act*. The role of the Auditor-General can be viewed as a safeguard intended to maintain the financial integrity of the Northern Territory's parliamentary system of government. The role is independent of Executive Government. The Auditor-

General also has a role in undertaking a review of information, with limited exceptions, given by a public authority to the public by using money or other property of the Territory.

60. The Auditor General:

- audits the Public Account and other accounts taking into account recognised professional standards and practices;
- carries out audits that they have been directed to do by the Minister;
- conducts audits of performance management systems;
- conducts audits of Public Sector entities including Whole of Government accounts;
- can extend the functions legislated by the *Audit Act* to carry out, at the discretion of the Auditor-General, an audit of the accounts of an organisation in which the Territory, an Agency or a Territory controlled entity has an interest;
- reports to the Legislative Assembly on the audits mentioned above.

61. In addition, in accordance with the *Public Information Act*, the Auditor-General:

- must, on the written request of an Assembly member, conduct a review of particular public information to determine whether the *Public Information Act* is contravened;
- may, on the initiative of the Auditor-General, conduct such a review,

Limitations of existing mechanisms

62. Generally speaking, the existing mechanisms for complaint and investigation cover the field in relation to conduct of public sector officers, including Police and heads of departments.

63. Investigation of heads of department or agencies will always give rise to special challenges for investigating bodies but those challenges can be, and have been, effectively met.

64. There is, as noted above, limited coverage in terms of scrutiny of the conduct of politicians and their staff and a small number of senior independent office holders.

65. The conduct of a politician can be examined through a variety of referral or conferral mechanisms, namely by reference to the Parliamentary Privileges Committee, by reference from the Speaker to the CPID or by establishment of a separate inquiry, for example, under the *Inquiries Act*.

66. The above options are intimately connected with, and constrained by, political processes. They do not provide for investigation based solely on the complaint of a member of the public or on the motion of an independent agency. They are rarely invoked other than by the party in power against a political opponent.

67. For the CPID, the fundamental limitation is brought about by the way in which an allegation may be raised for investigation. Even if there is a referral by the Speaker to the CPID (there have been none yet), the ultimate outcome is a report provided to the Speaker. There is no power to make recommendations, for example, that conduct be referred for prosecution. The Speaker is not required to table or publish the report.
68. In the case of the Ombudsman, politicians and their staff are not 'public authorities' and the Ombudsman is precluded from investigating the deliberations of Executive Council or Cabinet and may not question the merits of a decision made by the Administrator, Executive Council or Cabinet or a decision made personally by a Minister.²
69. NT Police can initiate an investigation into conduct of a politician or political staffer that may amount to corrupt conduct if it would amount to a criminal offence. Clearly, Police have an important role to play here.
70. However, there are a number of practical limitations on the ability of Police to investigate all such allegations, including:
- the Police Force has an enormous number of competing demands on its resources;
 - the involvement of Police in the investigation of matters that are perceived as 'political' in nature on an ongoing basis is likely to put pressure on its ability to effectively carry out its other vital functions;
 - the Police Commissioner is ultimately subject to direction by the Police Minister (whether or not this power is exercised).
71. Existing mechanisms therefore function effectively to investigate the vast majority of corruption allegations against public servants and police.
72. The current system is limited in that there is currently no dedicated anti-corruption body with the power to initiate investigation of the conduct of politicians or political staffers based on public complaint or on own motion.³
73. It is also limited in that existing bodies do not have high level investigative powers discussed in paragraph 209 below (for example, surveillance devices and telecommunications interception powers) that may be required in the future to investigate allegations against very senior public officers or police.

² *Ombudsman Act*, section 15.

³ The Electoral Commission does have power to investigate particular conduct of politicians in relation to electoral processes but it has a very narrow scope. The Auditor-General also has power to review certain conduct under the *Public Information Act* but this is again limited in scope.

Whose conduct should be subject to investigation?

74. This submission proceeds on the basis that public servants whose conduct is currently subject to investigation should continue to be subject to scrutiny. The question of who should do this is discussed in the context of the preferred model. The discussion below relates to public officials where coverage is currently restricted.

MLAs, including Ministers

75. It may be argued that political conduct should be dealt with through the political process — that investigation should be by Parliament or a committee of Parliament and ultimately the test of the ballot box should be the determinant of political fortunes.

76. Clearly, there is a key role for Parliament and its committees in regulating the conduct of its members. This has been a closely guarded function for centuries. That role should continue.

77. However, limiting the right to raise an allegation to a politician (and usually to a member of the party in power) has almost invariably raised concerns about politicisation or at least the perception of politicisation of the process. That restriction cannot be said to enhance public trust and confidence that serious allegations relating to the corrupt conduct of politicians will be fully and fairly investigated.

78. In a modern context there are numerous examples in other jurisdictions of additional mechanisms put in place to independently investigate allegations of corrupt conduct on the part of Members of Parliament and Ministers.

79. A concern may be raised that such an anti-corruption power would provide a vehicle for political bickering and point scoring. To protect against this, strong provisions can be put in place to ensure that the anti-corruption body is in a position to assess and deal with or decline to deal with any allegation. Such measures are discussed later in this submission.

80. With an effective power to assess and decline complaints in place, there is no strong argument against allowing a complaint to be made by any member of the public.

81. It is submitted that an anti-corruption body should have the power to investigate allegations of corrupt conduct against MLAs and Ministers and that it have the power to do so on the basis of public complaint or on own motion.

Ministerial advisors, electorate officers and other staff.

82. Currently, the PID Act does not extend to the conduct of ministerial staffers, electorate officers or associated administrative staff.

83. Improper or corrupt conduct may arise in a number of settings. It may arise where an individual receives, controls or influences the disbursement of public funds. It may arise where a person is in a position to exert influence in the course of deliberations and decision-making by Ministers or other public officers.

84. Given the roles they play, the conduct of all staff of MLAs and Ministers should be subject to appropriate scrutiny through external investigation.

Other public officials currently excluded from investigation

85. The definition of 'public authority' in the *Ombudsman Act* is relatively broad with respect to senior public officials. However, there are specific exclusions in the Act with respect to the discharge of a number of judicial, tribunal, prosecutorial and legal advice functions that limit the capacity to investigate senior officers of this type.⁴

86. Section 7(2) of the PID Act excludes the following:

- (a) a Judge;*
- (b) the Master of the Supreme Court;*
- (c) a magistrate;*
- (d) a coroner;*
- (e) the DPP;*
- (f) the Auditor-General;*
- (g) the Ombudsman;*
- (h) the Electoral Commissioner;*
- (i) the Commissioner;*
- (j) an officer of the Assembly as defined in the Legislative Assembly (Powers and Privileges) Act;*
- (k) a member of the personal staff of a Judge or the Master of the Supreme Court, a magistrate or a coroner;*
- (l) a member of a board, commission, tribunal or other body, established under an Act, that has judicial or quasi-judicial functions in the performance of its deliberative functions.*

87. With the exception of officers of the Assembly, these officials may be divided into two groups — judicial and quasi-judicial officers and their personal staff; and other independent officers.

88. Currently, criminal conduct (including corrupt conduct) by such officers may be investigated by police. There are also existing mechanisms for review of the conduct of senior independent and judicial officers in legislation, in terms of appointment and through appeal mechanisms and other court processes.

⁴ *Ombudsman Act*, section 16.

89. It is arguable that, at least in relation to allegations of corrupt conduct, all public officials should be subject to a further mechanism for investigation and prosecution. If, for example, the allegation of corruption was between a senior police officer and a judicial officer, an alternative investigation and prosecution process would protect the public interest. Such an alternative would also give some legislative protection to the discloser and allow the anti-corruption body to consider what measures might prevent similar corruption in the future.
90. There are interstate precedents for including such officers as public officers whose conduct may be investigated in this manner. There are also potential issues in relation to maintaining the independence of such officers.
91. The potential for some limited application of the Act to these officers is discussed further below under *What conduct should be covered by the Act?* It would be appropriate to consult with these officers or relevant representatives before considering any action in this regard.
92. The Extended Integrity Group can see both benefits and significant resourcing implications in extending the anti-corruption body's powers to scrutinise this wider range of persons and bodies.

Contracted service providers

93. In an era of increasing outsourcing of government functions, it is important to consider whether the potential for investigation of allegations of corrupt conduct should extend to contract service providers who may be responsible for undertaking government functions, for example, in the running of a hospital, prison or a fines recovery scheme.
94. Contractual provisions can provide a measure of control. Another measure would be a legislated requirement that each Agency that has significant outsourcing agreements be required to audit and report results relating to contractual compliance and delivery by each outsourced contractor.
95. However, it is also arguable that public disclosure protection should be available in these situations and the anti-corruption body should be able to investigate integrity allegations involving private sector operators who are carrying out functions on behalf of the Northern Territory Government.

Members of the public who encourage or facilitate improper conduct.

96. The current definition of improper conduct in the PID Act focusses on investigation of the conduct of public officers. Frequently, public officers involved in improper conduct are motivated or encouraged by members of the public who seek to gain from the improper conduct.
97. In order to get to the source of corrupt conduct and attempted corrupt conduct, it is essential that the anti-corruption body be able to investigate the conduct of anyone who attempts to corrupt a public official. Currently allegations of corrupt conduct (e.g. a bribe) are investigated by Police. This should continue to be the

norm in most circumstances. If however, the alleged corruption is between a senior police officer and a member of the public, then investigation and prosecution by another body may be appropriate or necessary.

98. The availability of disclosure protections and of investigation by a body other than police might also encourage disclosers and witnesses to come forward. To facilitate such an investigation, consideration would need to be given to providing special investigation and prosecution powers for the anti-corruption body to ensure criminality is dealt with in such circumstances. This is discussed further below.

Potential models for an anti-corruption body for the Territory

99. There are a number of potential models that might be considered to strengthen anti-corruption powers, including:

- A new stand-alone body;
- Expanding and enhancing the role of an existing body/bodies;
- Outsourcing anti-corruption functions to a larger body in another jurisdiction.
- Establishing a special purpose body with extensive powers that only investigates the most serious or complex corruption allegations, on reference from an independent officer or group of independent officers.

100. While there is no stand-alone anti-corruption body at federal level, all Australian states have stand-alone bodies of one shape or another.

101. In fact, the disparity between Australian jurisdictions in the chosen models for anti-corruption bodies is itself worthy of note. They stray very far from 'one-size-fits-all'.

102. Although aspects of different models may be of value, none of the Australian models commends itself entirely as a suitable vehicle for adoption by the Northern Territory.

103. It is important to carefully consider the particular circumstances of the Northern Territory when identifying the preferred model. Relevant factors include:

- The Northern Territory is a significantly smaller jurisdiction. This means that resources are more limited.
- It also means that the potential number of instances of corrupt or other improper conduct is likely to be more limited in absolute terms, although a smaller jurisdiction is perhaps more likely to be susceptible to real and perceived issues relating to inadequate segregation of duties, multiple interests held by individuals and conflict of interests.
- As noted above, there are already a significant number of stand-alone complaints and integrity bodies that have jurisdiction to investigate improper conduct in the NT.

- A large jurisdiction may have the population and resource base to adequately support a wide range of specialist independent offices but replicating that approach in a much smaller jurisdiction can result in a number of small offices with limited resourcing and very narrow investigative and decision-making bases.
104. Any independent agency can only effectively perform its functions if it is adequately resourced to do so. It is of little benefit to develop an 'ideal' model in isolation from likely resource costs and then put a price tag on the model. The development of the model itself must take into account the likely demands on the agency or agencies and the available resources.
105. The resource base of the Territory is small compared to larger jurisdictions. There will always be competition between integrity and complaints bodies for limited funding. There are likely to be peaks when substantial resources are required. It is important that the recommended model is developed taking such matters into account and exhibiting a high degree of flexibility to meet demands as they arise.
106. Bearing in mind the existing institutions and the factors discussed above, the Extended Integrity Group is of the view that careful consideration should be undertaken before merely adding an entirely new body to the mix.

Enhanced and renamed CPID

107. While other independent bodies such as the Auditor-General and Ombudsman have powers to investigate the propriety of conduct as part of their functions, the prime focus of the CPID is to investigate disclosures of improper conduct. This definition is aimed at addressing serious criminal and ethical behaviour that, if found to be true, would justify a criminal prosecution or sacking. It also covers serious systemic issues. It currently investigates public sector organisations (principally government departments and local councils and their staff).
108. The Extended Integrity Group considers that extending and enhancing the powers of the CPID to more broadly respond to corruption issues would be a reasonable approach. This could involve renaming the CPID's position to place greater emphasis on anti-corruption aspects of its functions.

A new broad-based anti-corruption body

109. Alternatively, it could be achieved by establishing a new anti-corruption body which subsumes the existing functions of CPID.

A body that only investigates the most serious corruption allegations

110. A further option would be to establish a new anti-corruption body that only investigates the most serious or complex allegations of corruption, leaving the bulk of the matters to be dealt with by the CPID and other existing independent bodies.

111. The intention would be to maintain existing avenues for reporting and investigation for the great majority of matters while providing the option for referral to an eminent anti-corruption commissioner with access to comprehensive investigative powers in the most serious or challenging of cases. It can be seen as an alternative to a permanent standing anti-corruption body.
112. This body could be headed by a very senior legal officer (such as a retired judge or former anti-corruption commissioner) engaged on a retainer.
113. It might be called into action only occasionally when a serious or complex matter arises that cannot be dealt with effectively by existing mechanisms. It would have a full array of investigative powers including surveillance devices and telecommunications interception powers.
114. Given the specialist knowledge and resources required to utilise such powers, it is likely the body would conduct those operations under an arrangement with a police force (NT Police where possible) or another anti-corruption commission.
115. The body, when called into action, could be provided with investigative, logistical and administrative support by CPID.
116. The jurisdiction of the body could be enlivened by a reference from an existing independent officer (for example, the CPID or the Ombudsman) or alternatively from a group comprised of some or all members of the Extended Integrity Group.
117. Allocating the decision on whether to refer a matter for investigation to a group rather than an individual officer might give some added assurance that no single officer is making a decision that is likely to give rise to substantial commitment of public resources or to the potential for major public discussion and controversy.
118. Complaints would not initially be made to the anti-corruption body. Any member of the group who receives a complaint or becomes aware of a matter could raise the matter for consideration by the group. It could then, following consultation with the anti-corruption body, refer the matter to the anti-corruption body or decide that it is better dealt with by another body.
119. Referral to the anti-corruption body could be based on a specific criteria, for example, that:
- the allegation would, if proven, amount to 'very serious' or 'major' corruption;
 - there is, on its face, some substance to the allegation and it is in the public interest to pursue the allegation (for example, it is not fanciful, trivial or vexatious or the age or nature of the allegation means investigation is likely to be futile);
 - no other independent body is in a position to effectively investigate the allegation or the anti-corruption body is best placed to investigate it.

120. This approach would mean that matters that are now routinely handled by CPID or another independent body could continue down the normal path. However, when a matter of major significance or requiring high level investigative powers arose, it could, after due consideration, be referred to the anti-corruption body.
121. The anti-corruption body would be a standing appointment and could be constituted by someone from the Northern Territory or elsewhere or even, by prior arrangement, by an existing anti-corruption commissioner from interstate.
122. Given the intermittent but vitally important nature of the investigations of such a body, it would be important for there to be assurances of sufficient levels of funding for the body to conduct its functions. Ideally, there would be legislative recognition that adequate resources must be made available to enable the body to fully carry out its functions and that the appropriately incurred expenditure of the body will be met from Consolidated Revenue.
123. This option would still mean that the jurisdiction and resources of the CPID would need to be extended to cover any additional categories of public officers, for example, politicians and political staffers, but that there would be a clear option to refer the most serious or complex matters to a body with comprehensive investigative powers.
124. The bulk of this submission is framed in terms of the potential for a broad anti-corruption body established through either of the first two models. If this intermediate option were to be adopted, many of the comments in this submission relating to the anti-corruption body would have to be read as applicable to powers and jurisdiction of CPID in addition to, or in some cases instead of, the anti-corruption body.

What conduct should be covered by the Act?

125. The PID Act currently uses the term, 'improper conduct'. It encompasses two types of conduct. The first relates to conduct by a public body or public officer of a certain type that constitutes a criminal offence or reasonable grounds for dismissal.
126. The second does not require a criminal offence or grounds for dismissal but does require the conduct of a public officer or public body to meet a substantially high threshold. Examples of relevant improper conduct include substantial misuse or management of public resources, substantial risk to public health, safety or the environment or substantial maladministration that specifically, substantially and adversely affects someone's interests.
127. The *Independent Commissioner Against Corruption Act* (SA) defines three types of inappropriate conduct:
- Corruption
 - Misconduct
 - Maladministration.

128. The definition of 'improper conduct' in the PID Act broadly includes these three types of conduct but does not neatly differentiate between them.

129. For reasons discussed below, it may be useful to include a definition of each of these types of conduct within a broad definition of improper conduct.

Corrupt conduct, misconduct, maladministration

130. It is important to define 'corrupt conduct' separately. It emphasises that this is the predominant role of the anti-corruption body. It also allows for conduct subject to investigation to be extended to the conduct of those members of the public who try to corrupt public officers.

131. While South Australia confines corrupt conduct to conduct that would constitute an offence, this is not a necessary precondition. The definition of corrupt conduct in the *Independent Commission Against Corruption Act* (NSW) provides a good starting point.

132. 'Misconduct', as defined in the *Independent Commissioner Against Corruption Act* (SA) looks to conduct that may not involve corruption but may nonetheless involve a breach of a code of conduct or other misconduct. It fills the gap between corrupt conduct and maladministration, catching instances that involve a degree of moral turpitude rather than mere poor decision-making.

133. 'Maladministration' is chiefly focussed on poor decision-making and faulty processes within government. It is traditionally in the realm of Ombudsman investigations. It was included in the PID Act to ensure protection for individuals (often public servants) who make disclosures about poor administrative action and decision-making by public officials that involve the potential for a substantial negative impact.

Ministerial and MLA conduct

134. Traditionally, maladministration issues (the quality of decision-making) by Ministers has been subject to administrative review by the courts. In some cases, legislation has provided for appeal from Ministerial decisions or merits review by a tribunal but there has been no general right of review of ministerial decisions by an administrative body.

135. Scrutiny by the anti-corruption body of allegations of corruption on the part of MLAs, including Ministers, is contemplated in the resolution of the Legislative Assembly. However, including a jurisdiction to enable review of administrative decision-making of Ministers would be a considerable extension of power.

136. It is one thing for an independent officer to investigate whether a Ministerial decision is tarnished by corruption or misconduct but would be quite a different matter for the anti-corruption body to review a Ministerial decision on administrative grounds such as fairness or the reasonableness of the decision.

137. There is already in the PID Act a provision that excludes disclosure based solely on a disagreement with a policy that may properly be adopted, including a disagreement about amounts, purposes and priorities of expenditure.
138. However, it is arguable that a broader limitation would be needed on the power to investigate allegations that a Minister who is not motivated by some corrupt purpose has made a poor decision or otherwise done something that amounts to maladministration.
139. Ministers are high level officials who operate at the head of the executive arm of government. The factors that influence decision making in a political context can be incredibly broad. They frequently involve consideration of a wide range of public and private interests. This is not a criticism but an acknowledgement of the nature of political activity.
140. They operate in a political environment, as do MLAs. It is arguable that any question of poor decision-making (as opposed to corrupt conduct or misconduct) in that context should be left to be addressed by legal challenge in the courts, as specifically provided for in legislative appeal/review rights or as part of the political process.
141. There are two potential mechanisms for limiting investigative powers in relation to Ministers and MLAs:
- Limit application to matters that would involve a criminal offence;
 - Limit application to matters that would involve corrupt conduct (and possibly misconduct).
142. The Extended Integrity Group considers that the definition of 'improper conduct' should include a definition of corrupt conduct, and definitions of misconduct and maladministration.
143. While it does not express a strong view, the Extended Integrity Group considers that application of investigative powers to Ministers, MLAs and their staff should be limited to corrupt conduct and misconduct.

Independent officers

144. As noted above, it is arguable that investigative powers could be extended to judicial and independent officers who are currently excluded. However, any application would have to be limited to allegations of corrupt conduct or misconduct.
145. There are however, numerous issues that would have to be considered, including issues surrounding the independence of those officers and whether additional scrutiny would usefully add to the mechanisms already available.
146. It would be appropriate to consult with these officers or relevant representatives before considering any action in this regard.

ICAC v Cunneen

147. In *Independent Commission Against Corruption v Cunneen*⁵ the High Court held that the expression 'adversely affect' in NSW anti-corruption legislation refers to conduct that adversely affects or could adversely affect the probity of the exercise of an official function by a public official (that is, some lack of honesty or impartiality).
148. The Court held that the definition of 'corrupt conduct' does not extend to conduct that adversely affects or could adversely affect merely the efficacy of the exercise of an official function by a public official in the sense that the official could exercise the function in a different manner or make a different decision.
149. Put simply, ICAC could investigate an allegation that a person tried to corrupt a public official but not one that a person acting in a private capacity attempted to cheat or mislead a public official.
150. In formulating a proposed model, it would be appropriate to consider whether the decision in *Cunneen* warrants any amendment to the definition of 'corrupt conduct', 'improper conduct' or other provisions.

Officer of the Parliament and Own Motion Powers

151. The Extended Integrity Group submits that the head of the anti-corruption body (for convenience described as 'the Commissioner') should be recognised as an Officer of Parliament with 'own motion' powers to initiate and pursue investigations.
152. The Victorian Parliament has identified a number of key characteristics of an Officer of the Parliament:
- an officer of the Parliament provides a check on the use of power by the Executive;
 - an officer of the Parliament contributes to Parliament's core functions by scrutinising the operations of government and enhancing the accountability of the executive government to the Parliament;
 - an officer of the Parliament discharges functions which the Parliament could itself, if it so wished, carry out – and so should not carry out a judicial function;
 - Parliament is involved in the officer's appointment and dismissal;
 - a statutory parliamentary committee is responsible for budget approval and oversight of officers of Parliament.⁶

⁵ [2015] HCA 14.

⁶ *Report on a Legislative Framework for Independent Officers of Parliament* (Public Accounts and Estimates Committee of the Parliament of Victoria, February 2006) [http://www.parliament.vic.gov.au/images/stories/committees/paec/reports/55th/67th_report - independent officers.pdf](http://www.parliament.vic.gov.au/images/stories/committees/paec/reports/55th/67th_report_-_independent_officers.pdf) pp31-33.

153. The extent to which making the Commissioner an 'Officer of the Parliament' will improve the functioning and independence of the anti-corruption body depends more on the practical powers given than the title itself. For example:

- Whether the Commissioner has the power to produce a report for tabling in Parliament and a discretion to report and comment on matters of public interest relating to the Commissioner's Act;
- Whether the Commissioner has a discretionary power to expend resources on investigating a matter as appropriate, including expenditure above and beyond the regular allocated budget;
- Whether the Commissioner has own motion investigation powers; and
- The security and length of the term of the Commissioner.

154. Relevant factors are discussed below, using the current provisions relating to the CPID as a point of departure.

Reporting to Legislative Assembly

155. The CPID's legislative power to report to the Legislative Assembly about an investigation is currently restricted. Whilst there may be some limited power to report in other circumstances, the CPID is obliged to conduct investigations in private, and can only report to the Legislative Assembly after an investigation is complete, in the circumstance that a public body has failed to comply with recommendations.

156. It is important for the Commissioner to be able to produce a report for tabling in Parliament in appropriate circumstances. This does not mean that every investigation will result in a published report. There will however, be cases where the Commissioner considers it important to bring findings and recommendations to the attention of Parliament.

157. Section 153 of the *Ombudsman Act* provides one example of a broad provision of this nature.

Ability to Make Public Comment

158. Currently, the CPID's processes are highly confidential and public awareness of the CPID's activities is limited. One reason for this is the importance of protecting the identity of the discloser and other witnesses. Another is limiting the potential for a disclosure to prejudice an investigation. It also recognises the fact that publication of the mere fact of an investigation or providing only part of the story may severely impact on the privacy or reputation of a person or organisation in situations where an allegation is ultimately not sustained.

159. Legal advice received by the CPID suggests that the current discretion to give the Minister a report under section 49(1) 'on any matter arising in relation to a public interest disclosure' does not override the process for reporting following an investigation as set out in Part 3 Division 6 of the PID Act. This means there is limited opportunity for public comment regarding an investigation even if the CPID considers such comment to be in the public interest.

160. However, there will be cases where it is appropriate for the Commissioner to be able to make some limited public comment about the subject matter or progress of an investigation.

161. If it is thought necessary to provide legislative guidance to the Commissioner on considerations relevant to the preparation of reports and disclosure of information, two provisions in South Australian legislation may provide a useful starting point.

162. For example, one of the three primary objects of the *Independent Commissioner Against Corruption Act 2012* (SA) is:

to achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person's reputation (recognising that the balance may be weighted differently in relation to corruption in public administration as compared to misconduct or maladministration in public administration). (s.3(c))

163. Section 25 of that Act provides:

Public statements

The Commissioner may make a public statement in connection with a particular matter if, in the Commissioner's opinion, it is appropriate to do so in the public interest, having regard to the following:

(a) the benefits to an investigation or consideration of a matter under this Act that might be derived from making the statement;

(b) the risk of prejudicing the reputation of a person by making the statement;

(c) whether the statement is necessary in order to allay public concern or to prevent or minimise the risk of prejudice to the reputation of a person;

(d) if an allegation against a person has been made public and, in the opinion of the Commissioner following an investigation or consideration of a matter under this Act, the person is not implicated in corruption, misconduct or maladministration in public administration—whether the statement would redress prejudice caused to the reputation of the person as a result of the allegation having been made public;

(e) the risk of adversely affecting a potential prosecution;

(f) whether any person has requested that the Commissioner make the statement.

Public or private investigations

164. An associated issue is whether investigations should be undertaken in private or in public.

165. The factors discussed in paragraph 158 above favour investigations and hearings being undertaken in private, with the potential for the anti-corruption body to table a report for publication at the conclusion of an investigation.
166. However, there may also be cases where allegations are already subject to public notoriety and it is in the public interest to conduct hearings in public.
167. It is submitted that investigations should ordinarily take place in private but that the anti-corruption body should have a discretion to hold a public hearing if it is in the public interest to do so.

Own Motion Powers

168. The CPID currently has no 'own motion' power, meaning that issues of systemic misconduct or corruption that may be noted cannot necessarily be pursued without an actual disclosure, even if there is intelligence or public interest which would justify an investigation.
169. An 'own motion' power would give the Commissioner much greater discretion to frame and pursue investigations in the public interest.
170. A useful model for an own motion power is set out at section 14 of the *Ombudsman Act*:

Matters for investigation

(1) Subject to sections 15 and 16, the Ombudsman may investigate administrative action of a public authority or conduct of a police officer:

(a) on a complaint; or

(b) on the Ombudsman's own initiative.

(2) The Ombudsman may investigate administrative action despite a provision in any Act to the effect that the action is final or cannot be appealed against, challenged, reviewed, quashed or called in question.

Appointment and terms of appointment

171. There are several common features relating to the appointment of an Officer of the Parliament, including:
- Parliamentary involvement in appointment processes. For example, the NT Ombudsman can only be appointed following a recommendation of the Legislative Assembly (section 132 of the *Ombudsman Act*);
 - A lengthy term of appointment. In Victoria, the Auditor-General is appointed for 7 years and the Ombudsman for 10 years. In the Northern Territory, the Auditor-General is appointed for 5 years and the Ombudsman is appointed for a non-renewable term of 7 years. The CPID is currently appointed for 5 years.

- Parliamentary involvement in termination of appointment. For example, a two-thirds majority resolution of Parliament is required to dismiss the Ombudsman (section 141 of the *Ombudsman Act*).
- A guarantee that conditions will not be altered to detriment during the term of the officer (section 135 of the *Ombudsman Act*).

Financial control

172. Currently, all three Officers of Parliament (the Auditor General, the Ombudsman and the Electoral Commissioner) sit within the portfolio of the Chief Minister but are separate Agencies. They report on budgetary matters to the Estimates Committee of the Legislative Assembly and are more directly accountable to Parliament for their budget and expenditure.
173. By comparison, the CPID is not a separate Agency but is provided with a separate annual budget allocation that is channelled through the Department of the Attorney-General and Justice. A similar arrangement exists for other independent bodies such as the offices of the Anti-Discrimination Commissioner, the Children's Commissioner and the Health and Community Services Complaints Commissioner.
174. The difference in financial reporting between the two types of independent bodies is one of degree as there are extra accountabilities and workload in being an Agency. The former group is also more financially independent than the latter although all are subject to the same budgetary process. It would be appropriate for the Commissioner to be a separate Agency subject to the same arrangements as the current Officers of Parliament.
175. The Extended Integrity Group submits that to increase independence and the public perception of independence, the Commissioner should:
 - be regarded as an Officer of the Legislative Assembly;
 - report for oversight purposes to a committee of the Legislative Assembly, although this should not extend to discussing the detail of cases;
 - have a broad discretionary power to provide reports to Parliament and make comments about investigations and matters arising out of investigations, when the Commissioner takes the view that it is in the public interest to do so;
 - have a broad discretion to speak to the public, bodies, and individuals about the Commissioner's activities when the Commissioner takes the view it is in the public interest to do so;
 - be given own motion investigation powers;
 - be appointed for a term of at least 7 years and that there be a statutory role for the Legislative Assembly in appointment and dismissal;
 - have conditions of appointment protected for the duration of that term;
 - be a separate Agency within the Chief Minister's portfolio;

- report on budgetary matters to the Estimates Committee of the Legislative Assembly, in the same manner as other Officers of Parliament;
- have a discretion to expend resources to pursue an investigation above and beyond the Commissioner's annual budgetary allocation, where the public interest justifies the expenditure;
- have the power to publish reports even when Parliament is not sitting⁷.

Title of legislation and anti-corruption body

176. Suggested new titles for the anti-corruption body have included the Anti-Corruption and Public Interest Disclosure Commission and the Independent Anti-Corruption and Integrity Commission.
177. The Extended Integrity Group recognises that the meaning of the phrase 'Public Interest Disclosures' is not readily apparent to many people in the community. The words 'Anti-Corruption' and 'Integrity' describe the actual functions in more widely accessible language.
178. Beyond these comments, and the suggestion that brevity would be welcome, the Extended Integrity Group has no preference as to the precise formulation of the title of the constituent legislation or office.

Investigating police conduct

179. Independent oversight of complaints against police conduct is currently the primary responsibility of the Ombudsman. The *Ombudsman Act* contains detailed provisions relating to police complaints. The Ombudsman receives approximately 500 approaches each year relating to police conduct. A description of the Ombudsman's activities in that regard is attached (Attachment A).
180. CPID also has capacity to receive disclosures about Police conduct relating to improper conduct. A small number of such complaints are received and, where required, investigated by CPID each year.
181. Generally, however, members of the public complain to the Ombudsman or to Police about police conduct. Police must notify the Ombudsman about any complaint about police conduct received by Police from a member of the public. The same is true for complaints made by other police officers if the conduct alleged constitutes an offence punishable by imprisonment or is likely to bring the Police Force into disrepute or diminish public confidence in it.
182. The great majority of Ombudsman complaints are investigated or dealt with by the Professional Standards Command within NT Police, with oversight maintained by the Ombudsman.

⁷ See, for example, section 25AA of the Victorian *Ombudsman Act*.

183. Other jurisdictions have independent bodies that deal with police complaints, often as part of the jurisdiction of a wider crime and anti-corruption body.

184. In practical terms, routine complaints, which make up by far the majority of complaints, are handled by the police forces of respective jurisdictions as part of their day to day managerial and disciplinary processes.

185. In a recent report into police complaint systems in South Australia, the Independent Commissioner Against Corruption stated:

Having considered all of the information provided during the course of these reviews, and in light of my observations as the ICAC since September 2013, I do not consider there is any good reason to divest the Police Commissioner of the power to impose sanctions upon his or her own staff. Indeed in my opinion there is good reason to continue to provide the Police Commissioner with that power.

The Police Commissioner is the chief executive of the police force. Section 6 of the Police Act provides that the Police Commissioner is responsible for the control and management of SAPOL. In order to discharge that responsibility, the Police Commissioner must have the power to take such action as he or she considers necessary in order to maintain discipline and control. Divesting the Police Commissioner of the power to impose a sanction following a finding of misconduct is antithetical to the responsibility imposed upon the Commissioner under section 6 of the Police Act.⁸

186. There will always be concerns raised about 'police investigating police'. With that in mind, the NT Ombudsman maintains rigorous overview of more serious matters and retains the power to investigate separately if that is considered necessary.

187. The Ombudsman's Office is comprised of staff with a mix of legal, police and general administration backgrounds which enables the Office to effectively supervise, and where necessary undertake, investigations into police conduct. If it were to prove necessary, the Office could also call on external assistance to facilitate an investigation.

188. There is an undoubted resource challenge for a small independent body to undertake major investigations of senior Police conduct. However, that would be as true for a new anti-corruption body as it is for the Ombudsman.

⁸ The Commissioner went on to state that there should be a mechanism by which an independent body can scrutinise the sanctions imposed by the Police Commissioner, but in a way that does not directly impinge upon the Commissioner's discretion in exercising that power. He therefore recommended that the SA ICAC be empowered to conduct an audit of all sanctions imposed by the Police Commissioner on a yearly basis, and report to Parliament in relation to that audit. Independent Commissioner Against Corruption SA, *Review of Legislative Schemes: The Oversight and Management of Complaints about Police - The Receipt and Assessment of Complaints and Reports about Public Administration*, pages 45-46.

189. The Ombudsman considers that the current system of dealing with police complaints works effectively. The Ombudsman has not identified any material failings or flaws in the system.
190. Very few of the complaints about police conduct relate to allegations of corruption. The most frequent issues raised in 2014/15 related to:
- the attitude or behaviour of officers, for example, complaints of rudeness;
 - concerns about police investigations, most commonly relating to delay or inaction; and
 - use of force.
191. There is no compelling reason to transfer this function to another body. If the function is not transferred, it would be appropriate for the anti-corruption body to have power to investigate allegations of police conduct that amounts to corrupt conduct or misconduct.
192. This is not to say that the powers relating to investigation of police conduct cannot be enhanced. See for example, the comments of the Ombudsman on the privilege against self-incrimination at paragraphs 185-210 of his report into *Matters arising from allegations of inappropriate conduct by a former Commissioner of Police and another police officer*, May 2015.⁹
193. Members of the Extended Integrity Group can provide additional information on the potential for enhancing such powers if that is a matter of interest for the Inquiry.

'Whistleblower' protection

194. 'Whistleblower' encouragement and protection sits at the core of the current PID Act and the role of the CPID.
195. This must be emphatically maintained and emphasised as an essential function in any new model.
196. Whatever model and definitions are adopted, it will be vital to ensure that an appropriate disclosure in relation to any of the defined categories of improper conduct (including substantial maladministration by public sector officers) continues to qualify the discloser for protection.
197. Given that the 'whistleblower' protection functions have been in place for a number of years, it would be appropriate to review that function in the course of developing any legislative amendments necessary to implement changes the Inquiry may recommend.

⁹ http://www.ombudsman.nt.gov.au/sites/default/files/downloads/police_investigation_report_final_29_may_15.pdf

198. Matters that might be reviewed would include:

- whether current reprisal protections afforded to whistleblowers are adequate;
- the potential for greater guidance for agencies and agency heads involved in investigations, for example providing for the CPID or anti-corruption body to make Directions / Guidelines / Orders to direct public bodies to provide support for persons involved in investigations.

A one stop shop for complaints

199. With so many potential complaints bodies in play, an issue that may be raised is the potential for uncertainty as to where complainants should go to pursue an issue.

200. There can be uncertainty about who a potential complainant should contact with a complaint regarding corruption or maladministration. Indeed, the Ombudsman fields many calls each year in relation to matters that are not within jurisdiction. When this occurs the Office assists enquirers to identify and contact a body that can help them.

201. However, any move in the direction of a single complaints interface must bear in mind the likelihood that a step that could help people who are unsure where to go will create an additional administrative hurdle for people who know where they want to go. So, a person who knows they want to contact Body A may not be able to contact it directly but would be forced to contact the Complaints Interface which would need to register and assess the complaint before passing it on to Body A.

202. There can also be advantages in a person having choice in which body they approach to lodge a complaint. If they have concerns about a particular body for whatever reason (justified or not) having an option may mean the difference between corrupt conduct being disclosed or left undiscovered and unchecked.

203. The one stop shop issue was discussed in a recent review of various aspects of the South Australian integrity and complaints system by the Independent Commissioner Against Corruption when he was tasked to consider making the Office of Public Integrity (OPI) a one stop shop for complaints about public administration. Following consideration of submissions the Commissioner stated:

*You have asked me also to consider whether the making of complaints and reports to the Police Ombudsman, the Ombudsman and the OPI can be consolidated into a one-stop-shop. I have given this anxious consideration. In the end, while it is possible to make a single agency the only place for the receipt of complaints and reports about public administration, it is not an outcome that I recommend.*¹⁰

¹⁰ Independent Commissioner Against Corruption, *Review of Legislative Schemes*, page 50 http://icac.sa.gov.au/sites/default/files/Legislative_reviews_report.pdf

204. Various independent offices in the Territory continue to undertake steps to make it easier for people to identify the best body to help them. For example, the Office of the Ombudsman has recently revised its website and online complaints form with that as a key aim and produced an updated *Complaints and Enquiries Guide*¹¹ that provides contact details of relevance to a host of potential enquirers. All independent offices are more than willing to guide enquirers in the right direction.
205. It may also be suggested that having a one stop shop would address concerns about having two or more bodies capable of investigating complaints on the basis that there may be potential for duplication of effort.
206. There is currently significant potential for overlap of functions between any number of independent bodies. However, in line with common sense and legislative imperatives to avoid unnecessary duplication¹², this potential is already well managed through memoranda of understanding¹³, regular meetings of independent officer groups and regular one-on-one meetings and contact as required.
207. These practical steps are likely to achieve substantially more than introducing an additional layer of administration and limiting the flexibility of complaints processes.

Investigative Powers

208. The CPID already has substantial investigative powers, including to:
- enter and inspect premises of public bodies;
 - copy or take extracts of documents;
 - require documents and other things to be produced on request;
 - require any person (irrespective of whether that person is a public officer) to attend and give evidence on oath;
 - require questions to be answered even if they might incriminate the person;
 - compel a public officer at public premises to provide reasonable assistance when entering and inspecting public premises;
 - request assistance the CPID reasonably requires from a public body in order to conduct an investigation.

¹¹ http://www.ombudsman.nt.gov.au/sites/default/files/downloads/complaints_and_enquiries_guide_june_2015.pdf

¹² See for example, section 19 of the *Ombudsman Act*.

¹³ For examples, see Appendix A to the Ombudsman Annual Report 2013-14, pages 50-58.

209. The CPID does not have powers to:

- search private premises;
- seize objects at private or public premises (other than by requiring the person with possession or control of the object to produce it);
- search persons;
- compel assistance the CPID reasonably requires from a public body in order to conduct an investigation;
- conduct telecommunications interception;
- use surveillance devices; and
- conduct controlled operations.

Adequacy of existing powers

210. It is submitted that the anti-corruption body should have all the existing powers of the CPID, including the power to override the privilege against self-incrimination.
211. To date, investigations by the CPID have not been unduly hampered by the absence of the powers listed in the paragraph 209.
212. The CPID has been able to rely on an existing provision in the PID Act to seek assistance from NT Police (section 29). This assistance has been utilised when PID staff require police presence when conducting a search of the premises of a public body or when advice is sought on criminal matters. In such cases, the police officer remains answerable to the Police Commissioner. The CPID has also routinely referred criminal allegations for police investigation.
213. The CPID has, in addition, delegated powers to external experts where the case has called for it.
214. Reliance on existing powers in combination with the powers of NT Police to investigate criminal allegations has been effective to dispose of the matters that have arisen to date.
215. Even so, if the anti-corruption jurisdiction is broadened, it is more likely that cases will arise where the Commissioner should not or cannot rely on NT Police powers or investigations. For example, there may be cases where a senior police officer is involved or police do not have a suitably qualified resource available.
216. In such a case, the Commissioner might be able to delegate powers to an officer from another law enforcement or anti-corruption body but could only do so if the Commissioner has those more intrusive powers to delegate.

Implications of extended powers

- 217. Any grant of powers to the anti-corruption body beyond those currently held by CPID would require the engagement of staff or external support with a range of different skill sets.
- 218. If, for example, the anti-corruption body is given power to search private premises, it would need to obtain the services of persons with suitable training, expertise, and equipment for the (potentially) forcible entry of private premises.
- 219. Likewise, undertaking surveillance device and telecommunications interception functions requires a high level of expertise and entails substantial accountability compliance.
- 220. Given the expertise required, and the likely limited use for such intrusive powers, implementation of these powers would probably be achieved by a mix of appropriately skilled internal staff with experts and specialist officers (NT Police or otherwise) drawn in as necessary.
- 221. Whatever model is adopted, this would require additional resources.
- 222. It is submitted that the anti-corruption body should have the extended powers referred to in paragraph 209 above but it should be recognised that the usual recourse would be to NT Police.
- 223. It is submitted that the anti-corruption body should have the power to engage suitable persons (such as NT Police Officers, Australian Federal Police Officers or officers from an interstate integrity body) to act with the anti-corruption body's powers in order to carry out the relevant actions.

Legal considerations concerning the use of evidence

- 224. Where it is clear from the outset that a matter is likely to result in criminal prosecution, the investigation would usually be referred at an early stage to NT Police. However, in many cases, there may not initially be sufficient evidence (or sufficiently clear evidence) for such a referral. Criminality often emerges over the course of an investigation.
- 225. In this circumstance, the anti-corruption body will have gathered evidence that would be of use to a Police investigation or criminal prosecution. At the moment, there are three key impediments with using the CPID's evidence for these purposes.
- 226. The first issue is with establishing continuity of evidence. Section 57 of the PID Act provides that any person who acts in an official capacity under the PID Act cannot be called to give evidence about any matter coming to the person's knowledge while acting in that capacity. In practical terms, this means that if the anti-corruption body gathers evidence which is then passed to Police, then later at Court no one can legally establish where the evidence came from and it will be inadmissible.

227. The second issue is that the prohibition against giving evidence in section 57 means that the CPID cannot give evidence in support of an application for a warrant by Police to gather information. This can make it difficult to establish a sufficient basis for a warrant even when information exists that would make obtaining a warrant appropriate.
228. It is submitted that the anti-corruption body's constituent legislation should allow the anti-corruption body's staff to give evidence for the purpose of:
- proving continuity of an exhibit in a court proceeding; and
 - police obtaining a warrant.
229. The Extended Integrity Group believes these powers would be important to minimise duplication of evidence gathering while still ensuring that responsibility for a criminal investigation primarily rests with NT Police.
230. The third issue arises from the power to compel persons to give evidence despite the privilege against self-incrimination.
231. The High Court has recently decided that any information obtained in this way cannot be used against an accused, including using it as intelligence to obtain further evidence. Hence, if a person confessed to the anti-corruption body in a coercive interview where to find the bloody knife they used to commit a murder, and the anti-corruption body informed Police of this information, both the interview itself and the bloody knife that Police find as a result would be inadmissible at the trial for that person's murder. The High Court has held this to be a fundamental part of the Constitutional right to a fair trial, so it would not appear to be an issue that can be cured by legislative amendment.¹⁴
232. For this reason, this issue may best dealt with procedurally. The anti-corruption body could put in place clear internal controls to classify evidence obtained as a result of information supplied on abrogation of the privilege against self-incrimination to ensure this is not passed on to persons investigating the criminal matter to which it relates. If the information is of general value as intelligence, it may be possible to pass it on to Police or the Director of Public Prosecutions (DPP), provided 'Chinese walls' are put in place so as not to compromise investigators or prosecutors involved in the particular matter to which the admission relates.

Prosecution

233. Section 35 of the PID Act enables the CPID to refer to the DPP any suspected breach of the criminal law in the prescribed manner. In practice and in consideration of available resources, the DPP has, in the past, only accepted prosecution briefs from the NT Police.

¹⁴ *Lee v The Queen* [2014] HCA 20.

234. For these and other reasons, there may be circumstances in which it is seen as more appropriate to engage a specialist external prosecutor.
235. The Extended Integrity Group doubts that there would be sufficient demand to justify a standing appointment of a special prosecutor.
236. However, it does consider there is merit in having a clear legislative basis for the anti-corruption body to appoint a special prosecutor either generally or if the demands of a particular case require it.

Need for a range of mechanisms to deal with disclosures

237. It will be important for the anti-corruption body to focus on the more serious and systemic matters involving corrupt or improper conduct.
238. It is therefore essential that there be a range of alternative mechanisms to deal with disclosures that do not raise a substantive issue or are better dealt with elsewhere.
239. These alternatives should include a broad power to decline to investigate, power to refer disclosures to other integrity bodies and power to refer a matter for investigation to a public sector body that has responsibility for the person.

Power to decline to investigate

240. The PID Act currently requires the CPID to investigate a disclosure, subject to very limited grounds to decline, chiefly in the case of trivial and older matters.
241. If the anti-corruption body is to put its resources to best use, it is important that it have a broad power to decline less serious or unsubstantiated matters.
242. Additional grounds for refusal in other jurisdictions include:
- unjustifiable use of resources¹⁵; and
 - not in the public interest¹⁶.
243. In Tasmania, the legislation goes on to define relevant public interest factors to include the nature and seriousness of the misconduct, the availability of evidence, the likely degree of culpability, whether the misconduct could be of significant public concern, the available sanctions and whether the misconduct is indicative of entrenched or systemic behaviour.¹⁷

¹⁵ Crime and Corruption Act 2001 (Qld), s.46(g)(ii)(B), Integrity Commission Act 2009 (Tas), s.36(1)(e).

¹⁶ Crime and Corruption Act 2001 (Qld), s.46(g)(ii)(A), Integrity Commission Act 2009 (Tas), s.36(1)(f).

¹⁷ Integrity Commission Act 2009 (Tas), s.36(2).

244. Another approach is to include a broad discretion to decline with a clear direction that the anti-corruption body is to direct attention "to serious corrupt conduct and systemic conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct."¹⁸

245. A combination of existing powers with these alternatives would appear to provide a relatively broad yet sound basis for the anti-corruption body to determine not to investigate a matter. These should be clearly spelled out in the legislation.

Referral to NT Police

246. One option currently utilised by the CPID is referral of a matter that involves allegations of criminal conduct to NT Police. This option should also be open to the anti-corruption body.

247. With that in mind, the relevant provisions of the PID Act can be used as a base but should be reviewed to clarify and strengthen the powers of the anti-corruption body to enter into arrangements with the NT Police to undertake and provide assistance with the conduct of investigations.

248. In particular, the legislative and evidentiary processes for referral of disclosures by the anti-corruption body to police for criminal investigation should be reviewed as follows:

- to allow for the partial referral of the criminal aspect of a disclosure whilst retaining other aspects requiring investigation and reporting by the anti-corruption body;
- to enable referral back from police to the anti-corruption body of a disclosure if criminal prosecution is not considered appropriate but police consider an investigation by the anti-corruption body is preferred.
- to enable police to report to the anti-corruption body on the findings of their investigation including the provision of any evidence obtained by them that may assist the anti-corruption body in an investigation.
- to enable police to rely on evidence or intelligence obtained by the anti-corruption body in some circumstances such as the issue of a search warrant.

Referral to another body

249. Whatever the level of resourcing of the anti-corruption body, there will be times when it is unable to fully investigate a matter because of resource constraints or it simply considers another body is better placed to deal with the matter.

¹⁸ Independent Commission Against Corruption Act 1988 (NSW), s.10(2) and s.12A.

250. There are already numerous legislative provisions and practical arrangements in place between independent investigative bodies to facilitate discussion and referral. For example, the CPID has entered into a Memorandum of Understanding with the Ombudsman that covers such eventualities and they regularly meet to discuss the disposition of cases where their jurisdiction overlaps.

251. The anti-corruption body should have similar powers to consult with relevant complaints entities and refer complaints for investigation where appropriate.

Referral back to an agency (with monitoring)

252. There will be matters that are not of the highest priority to which the anti-corruption body cannot devote significant resources yet still deserve attention. The CPID has for some time worked with agency chief executives to appropriately deal with such matters, referring back to them matters that are appropriate for their investigation.

253. This has worked reasonably well but has been undertaken in the absence of a clear legislative framework or powers.

254. It would be appropriate to strengthen this approach with legislative backing, including a power for the anti-corruption body to require investigation and report within a certain period and to take back the investigation if it has not been satisfactorily progressed.

Engaging another law enforcement body

255. There will be times when neither the NT Police nor any other NT investigative body can appropriately undertake or assist with an investigation. For such cases (uncommon though they may be), it is important that the anti-corruption body have a clearly stated power to enter into arrangements with other investigators or bodies (including other law enforcement and anti-corruption agencies) to undertake or provide assistance with the conduct of investigations.

Advice and support for the anti-corruption body

256. The Extended Integrity Group considers there may be merit in establishing an advisory board comprising integrity officers who could provide a level of broad advice and support to the Commissioner.

257. In Tasmania, the Ombudsman and Auditor-General serve on the Board of the Tasmanian Integrity Commission and are involved in some formal decision-making. This formal role could be seen as problematic given the already considerable demands on their time.

258. In Western Australia there is an Integrity Co-ordinating Group (ICG) which *"promotes policy coherence and operational coordination in the ongoing work of Western Australia's core public sector integrity institutions. The ICG seeks to achieve operational cooperation and consistency through public awareness, workplace education, prevention, advice and investigation activities across a*

*range of integrity themes. ... The ICG is not established by any statute and is an informal administrative arrangement to enable member agencies to coordinate their activities, avoid duplication and overlap, and better promote integrity to the public sector. Each member remains bound by their own statutory powers and limitations.*¹⁹

- 259. The Extended Integrity Group does not foresee a board becoming closely involved in the work or decision-making of the anti-corruption body but rather providing a high level mechanism for discussion, advice and support.
- 260. Such a board would also be a valuable forum to consider and discuss issues and trends arising in the Northern Territory and act as a means to ensure that there is no unnecessary duplication of investigative activity and that issues are dealt with by the body best placed to do so.
- 261. Giving legislative recognition to such a board is worth consideration.

Advice to senior officers on integrity issues

- 262. One function that exists in other jurisdictions is having an independent officer who can provide integrity advice to individual politicians and senior executives within government. This advice is aimed at assisting the individual public officer to work through integrity issues and ensure that an ethical approach is taken. An example is the Queensland Integrity Commissioner.
- 263. It is very difficult to reconcile this advice function with a critical investigation function. There is a strong argument that the bodies performing these two functions be separate.
- 264. One option would be to have the anti-corruption body provide administrative support for a separately appointed ethical advisor or Integrity Commissioner. This ethical advisor might be a retired judge or prominent legal figure who acts on a sessional basis with administrative support from the anti-corruption body.
- 265. This support could be provided in a way that would maintain the independence of the anti-corruption body and the ethical advisor but provide a more cost effective model than two entirely separate bodies. Even so, this would add to the overall cost of the integrity model.

Education and engagement on integrity issues

- 266. In addition to detecting and dealing with corrupt conduct, it is vital that there be an emphasis on promoting ethical conduct.
- 267. One way to do this is by providing advice in individual cases, as discussed above.

¹⁹ ICG website: <https://icg.wa.gov.au/>.

268. Another is to provide documented guidance on appropriate conduct in particular situations in the form of rules, guidelines, policies and procedures.
269. However, any system will be at its most effective if public sector officers are individually engaged to an extent that they personally recognise and support the importance of behaving ethically as part of their everyday work and are well equipped to identify and appropriately deal with ethical issues as they arise.
270. This requires ongoing education about integrity issues and systems and participation in appropriate forums that promote awareness and discussion of integrity issues. Substantial resources must be committed to this end by all public sector agencies.
271. Educating people about the operation of the constituent Act and the anti-corruption body's processes would probably best be undertaken by the anti-corruption body.
272. Broader education and engagement on ethical conduct, integrity and anti-corruption matters for both public officers and members of the public could be undertaken and overseen by the anti-corruption body or by the ethical advisor, if there is one.
273. However, promoting ethical behaviour through education and engagement should always be seen as a core responsibility of every agency.

Additional guidance for political officers and staff

274. Operations in a political environment have traditionally been less regulated, and in some ways, less amenable to regulation. The factors that influence decision making in a political context can be very broad. They frequently involve consideration of a wide range of public and private interests. Perhaps partly due to this, formalised guidance on 'proper' conduct for political officers and staff has traditionally been more limited than in the public sector.
275. There will always be a class of activity that is clearly improper conduct, whether it is undertaken by political officers or otherwise. However, in a political context it is more likely considerable unchartered or 'grey' areas will arise.
276. The *Legislative Assembly (Members' Code of Conduct and Ethical Standards) Act 2008* establishes a Code of Conduct and Ethical Standards for Members of the Legislative Assembly. An alleged breach of the Code may be referred to the Privileges Committee to inquire into and report on it.
277. A Statement of Standards for Ministerial Staff from the Chief of Staff dated 12 June 2015 covers those ministerial staff employed under *the Northern Territory Contracts Act* and consultants. The statement contains a general set of principles to ensure honesty and integrity and appropriate conduct amongst staff members.

278. Finally, 'The underlying principles of Cabinet government and general expectations for cabinet business and meetings' are contained in the Cabinet Handbook (February 2015). It includes a Ministerial Code of Conduct (Appendix A), a Guideline for Cabinet Secretaries (Appendix B), Cabinet Confidentiality Practices (Appendix C) and Appointment Process (Appendix D),
279. In addition to any statutory changes, it is important for the NTG and Parliament to review existing codes, rules and guidelines applicable to politicians and their staff to ensure that they give as much guidance as possible on what is appropriate and improper conduct and appropriate sanctions.

Time limits and retrospectivity

280. Acceptance of historical complaints can create significant issues for agencies with new or expanded investigative powers. Complaints about old issues can build up rapidly, making it much more difficult to deal with new complaints in a timely manner, leading to backlogs and delay.
281. Dealing with complaints or disclosures from the distant past also presents formidable obstacles for investigators: memories fade, evidence is lost.
282. The CPID has a discretion to reject matters where there has been excessive delay, where investigation is unlikely to succeed because it is old or if already investigated.
283. The CPID did not experience a large number of 'old' complaints when the PID Act first came into force.
284. However, if scrutiny of the conduct of politicians is within the power of the anti-corruption body, there is more potential for 'tit-for-tat' allegations that stretch back into the past, perhaps to a time when the other party was in power.
285. The anti-corruption body is more likely to be called on to investigate similar conduct, both recent and past — so that members of both parties are being scrutinised at the same time. Or a past unrelated alleged indiscretion may be raised against a member of one party to counter a more recent allegation against a member of the other party.
286. There may be any number of reasons why the anti-corruption body considers it is appropriate to focus on more recent events but, in the absence of legislative guidance, it may be subject to pressure that political balance requires it to investigate both sides of politics equally even if that means harking back to events in the distant past.
287. The *Ombudsman Act* provides that a complaint must be made within one year of the aggrieved person becoming aware of the relevant action or conduct. However, the Ombudsman has a discretion to accept a complaint after the one year period if it is appropriate to do so in the public interest or because of special circumstances.

288. It is submitted that the Inquiry consider some temporal limitation on when an allegation can be raised, but that the anti-corruption body should have the power to investigate older matters if it considers it is in the public interest to do so.

Resources required

289. Whatever model is adopted will require adequate resourcing. This will entail new functions and therefore additional resource allocation.

290. However, it is not practical to speculate on additional resources required without some idea of the model or model under consideration by the Inquiry.

291. Members of the Extended Integrity Group would be happy to provide input in this regard at such time as the Commissioner has had an opportunity to form some preliminary views on the model or models under consideration.

292. In any event, forecasting numbers of disclosures and resources required to deal with them is problematic, as the initial years of operation of the PID Act proved. It is also true that even a small number of investigations can prove very resource intensive.

293. In reality, only time will tell. The Extended Integrity Group therefore suggests that there be provision for a review of resource requirements after 18-24 months from commencement to establish whether additional funding is required.

Attachment A – Description of current police complaints processes

(Extract from NT Ombudsman Annual Report 2014-15, pages 38-42)

Complaints against Police are addressed in detailed provisions of the *Ombudsman Act*. The Act requires the Commissioner of Police and the Ombudsman to notify each other, upon receipt of a complaint, and to provide details of the complaint. It provides a framework for the investigation of complaints against Police and defines the role of the NT Police Professional Standards Command (the PSC).

The provisions of the Act are supplemented by a detailed Police Complaints Agreement entered into between the Commissioner of Police and the Ombudsman under section 150 of the Act. The agreement, as in force at 30 June 2015, is set out at Appendix A of [the 2014-15 Annual] Report.

Once a complaint against Police is determined to be within jurisdiction, the complaint is assessed in consultation with the Commander PSC, according to the level of response considered necessary.

Careful consideration is given to the potential seriousness or importance of the complaint, whether it is appropriate for the Police to deal with the matter in the first instance, and the responsible allocation of resources. The classification of complaints is intended to be flexible and, if necessary, may be changed according to the results of enquiries/investigations to hand. The final decision on the classification of a complaint rests with the Ombudsman.

How Police approaches are dealt with

During 2014/15, my Office received 525 approaches relating to NT Police, Fire & Emergency Services. This was an increase from 446 in the previous year. Of those 525 approaches, 488 related in some way to police conduct, with the balance relating to general administration.

Different ways of dealing with approaches relating to Police conduct are discussed below.

Enquirer assistance and preliminary inquiries

Many issues raised with the Office can be addressed simply by the provision of information. A person may be making enquires about the scope of the Ombudsman's powers and processes or may be calling to seek information for a friend. They may be enquiring about an issue that is beyond the powers of the Ombudsman, for example, a court decision.

In other cases, NT Police can deal with minor matters as customer service inquiries that do not require classification as complaints.

In addition, there are matters where the Office will conduct preliminary inquiries with Police and determine that there is no basis on which to further pursue an enquiry or complaint. In some cases, preliminary inquiries may involve considerable work, for example, obtaining and assessing a preliminary response from the officers concerned along with copies of relevant documentation and CCTV footage or sound recordings.

The Ombudsman may decline to deal with a complaint under section 67 of the Act on a variety of grounds, including that the complaint is trivial or vexatious, that the complainant does not have a sufficient interest, that disciplinary procedures have commenced or charges have been laid against the officer in question, or that dealing with the complaint is not in the public interest.

The great bulk of approaches to the Office are finalised in the above ways without the need for a formal investigation.

Complaint Resolution Process

The Complaint Resolution Process (CRP) is an informal process undertaken by Police where early personal contact between Police officers and complainants may lead to a quick and effective resolution. A CRP may involve explaining to a person why a particular course of action was taken, the legal and practical considerations surrounding the incident or a simple apology.

Ideally the Police officer and the complainant should be satisfied with the outcome but this may not always be achievable. CRP is a means of dealing with common complaints about practice, procedures, attitudes and behaviours and is not intended to be an approach focused on fault-finding or punishment.

Complainants are informed by Police that they can approach my Office if they are not satisfied with the outcome of the process. Outcomes of CRPs are provided to my Office.

In 2014/15, 47 matters were dealt with by way of CRP (compared to 104 in the previous year).

More serious complaints

For complaints that are assessed as more serious, there are a number of options for action.

Method	Description
Ombudsman investigation	<p>The Ombudsman may decide to directly investigate any Police complaint if satisfied it:</p> <ul style="list-style-type: none"> ○ concerns the conduct of a Police Officer holding a rank equal or senior to the rank of PSC Commander; ○ concerns the conduct of a PSC member; or ○ is about the practices, procedures or policies of NT Police; or ○ should be investigated by the Ombudsman for any other reason. <p>The Ombudsman may decide that the investigation be undertaken in conjunction with a PSC member.</p> <p>The Ombudsman can also commence an 'own motion' investigation into the conduct of a police officer.</p> <p>In 2014/15, the Ombudsman initiated one own motion investigation into matters arising from allegations of inappropriate conduct by a former Commissioner of Police and another police officer (see Chapter 4 for more detail).</p>

Category 1 complaint investigation	<p>This category is for the most serious allegations, for example complaints:</p> <ul style="list-style-type: none"> ○ considered to be of a serious or urgent nature, e.g. major assault, use of fire-arm or other perceived weapon, etc.; ○ involving threats or harassment considered to be of a serious nature e.g. threat to kill, threat to endanger life, threat to unlawfully harass, etc; ○ likely to result in criminal or disciplinary proceedings; ○ raising a matter of public interest; or ○ likely to raise significant questions of Police practice or procedure. <p>Police investigate and provide a report which is assessed by this Office. The Ombudsman provides an assessment, and any recommendations, to the Commissioner. If the Commissioner agrees with the recommendations, the Ombudsman then advises the complainant of the relevant outcomes of the investigation.</p> <p>If the Commissioner and the Ombudsman are unable to agree on the outcomes and recommendations, the Ombudsman may provide a report for tabling in the Legislative Assembly.</p> <p>In 2014/15, two matters were assessed as Category 1 complaints (compared with 8 in the previous year).</p>
Category 2 complaint investigation	<p>These complaints are not at the level of Category 1 complaints but are nevertheless important enough to warrant comprehensive investigation.</p> <p>They are investigated and resolved directly by Police in the first instance. Police report on the investigation to the Ombudsman and the complainant. The Ombudsman reviews the investigation and the complainant can raise any ongoing concerns relating to the police response with Ombudsman.</p> <p>In 2014/15, 10 matters were assessed as Category 2 complaints (compared with 17 in the previous year).</p>
Deferral	<p>If court proceedings or disciplinary procedures have been or will be commenced in relation to police conduct, the <i>Ombudsman Act</i> allows for the Ombudsman to discontinue investigation pending the outcome of those proceedings or to decline to deal further with the matter (sections 107 and 67(1)).</p> <p>In practice, I will consider this option on application by NT Police. In order to adopt this approach, I need to be satisfied that the proceedings will encompass all the substantive issues raised by the particular complaint. If satisfied that is the case, I may then defer further investigation until completion of the proceedings.</p>

On completion of proceedings, NT Police advise my Office of the outcome and I consider whether any further action is necessary.

In 2014/15, I deferred four investigations pending the outcome of proceedings. Three of those cases resulted in criminal or disciplinary action. In the other case, proceedings have not yet been finalised.

There is provision for formal conciliation in the *Ombudsman Act*. Conciliation may only be undertaken by agreement between the parties. It is not intended to absolve police officers of any misconduct or action. The process is an alternative dispute resolution process which is directed at reducing the need for civil matters proceeding to the courts. In practice, matters that might be resolved by this process are often dealt with as CRPs.

Issues and Outcomes

Analysis of approaches to the Office relating to NT Police, Fire and Emergency Services in 2014/15 again shows that the most common issues raised related to:

- the attitude or behaviour of officers, for example, complaints of rudeness;
- concerns about police investigations, for example, relating to delay or inaction; and
- use of force.

However, it is one thing for an issue or concern to be raised but another for there to be a finding that a complaint has been sustained.

Sustained issues in Category 1 and 2 complaints

As indicated above, Category 1 and Category 2 investigations deal with more serious complaints. For those complaints, an investigation is undertaken and a report is prepared by a Police investigating officer. The report is reviewed firstly by senior Police and then by Ombudsman investigators.

There are a variety of potential outcomes from an investigation. A complaint may be found to be sustained. It may be found to be unsubstantiated because there is no evidence or unresolved because there is insufficient evidence. The action or conduct of Police may be found to be reasonable or not unreasonable in the circumstances. More detail about potential findings can be found in the Police Complaints Agreement at Appendix A to [the 2014-15 Annual] Report.

Nine Category 2 complaints finalised in the reporting period (and two serious matters that were deferred prior to being assigned a category) involved a finding that issues were sustained (either in terms of a finding by the investigating officer or the outcome of disciplinary or criminal proceedings).

How finalised	2012/13	2013/14	2014/15
Category 1 - sustained	10	3	0
Category 2 - sustained	6	5	8
Deferred in light of disciplinary action / charges	2	4	3
Total	18	12	11

The table below lists the number of cases involving sustained issues of each type described. In some cases, complaints involved more than one issue. In some, there was more than one officer involved.

Sustained Issue Type	Cases
Investigation – failure to undertake / inadequate / delay	4
Behaviour – abuse/rudeness/insensitivity	4
Arrest – unreasonable force	4
Interview – inappropriate or inadequate conduct	2
Practice / procedure – unreasonable	2
Arrest – unlawful / inappropriate arrest /detention	1
Custodial – personal safety / wellbeing – failure to monitor /safeguard	1

In addition to issues identified by complainants, investigating officers may identify ancillary matters in the course of an investigation. Often these involve failure to undertake a particular procedure or adequately complete relevant records.

Complaints may also give rise to ancillary issues regarding staff management and supervision where a complaint is substantiated against a more junior officer. In such cases, a supervisor may also be subject to appropriate guidance or action.

Actions taken in relation to officers arising out of complaints finalised in 2014/15 included cautions, counselling, good behaviour bonds, demotions, restrictions on performing higher duties, the requirement to undergo remedial training and managerial guidance under section 14C of the *Police Administration Act*.

To ACIMC Inquiries
G.P.O. Box 4396
Darwin
N.T. 0801

A.G. Piper



02/02/2016

Dear Sir

Enclosed is a newspaper article informing the public that Justice Martin is to set up an anti-corruption body, the article reads that justice Martin would seek the assistance of the Law Society, N.T. Police and the Criminal Lawyers Association, [REDACTED]

The article reads that the Territory is a step closer to "AN INDEPENDENT ANTI-CORRUPTION BODY" words that are not to be believed for any reason what so ever, the word independent only appears on paper and does not exist in reality, in reality the opposite to the word Independent is in control here in the Territory.

In the case of the Ombudsman any complaints against Government Authorities or Police the Ombudsman has and always will rule in favour of Government and Police, [REDACTED]

[REDACTED]

[REDACTED]

A handwritten signature in ink, appearing to be 'A.G. Piper'.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Territorians have no faith in any anti-corruption body that is going to be set up by Justice Martin, [REDACTED]

[REDACTED]

People like me will not be invited to any discussions regarding this matter and we will not have a voice ant any hearing before Justice Martin.

Signed

A handwritten signature in black ink, appearing to be 'J. P. [unclear]', written in a cursive style.

Martin to look at anti-corruption body options

THE Territory is a step closer to an independent anti-corruption body after the appointment of former NT Chief Justice Brian Martin to report on the best options for implementing one.

A bipartisan motion in Parliament heavily influenced by Labor and independent Gerry Wood called for the body to have the power to investigate allegations of corruption in-



cluding against Ministers, MLAs and other public officials.

The body would also have the power to conduct investigations and inquiries into corrupt activities.

Mr Martin (pictured) said he would seek assistance from organisations such as the Law Society NT, the NT Police, the

Criminal Lawyers Association and anyone else who wanted to launch a submission.

"Many people in the NT are clearly interested in this issue," he said. "Ultimately, the task is to recommend a body with the structure, powers and budget that best meets the particular needs of the NT."

Acting Chief Minister Willem Westra van Holthe said Mr Martin was extremely

qualified to tackle the task.

After months of denying the need for an anti-corruption body here, the CLP changed its mind after a series of travel-expense scandals exposed by the NT News.

Mr Martin is expected to release his report by mid-2016.

Submissions can be sent to ACIMC.Inquiry@nt.gov.au or to GPO Box 4396, Darwin NT, 0801, by February 12, 2016.

NTNE01Z01MA - V1

15/12/2015

Enclosed is a copy of an application for a Royal Commission into the C.L.P. Government when they were in power before.

[REDACTED]

[REDACTED]

[REDACTED]

The list goes on

To ACIMC
G.P.O. Box 4396
Darwin
N.T. 0801

A.G. Piper



03/02/2016

Dear Sir

Enclosed are copies of correspondence I sent to the Federal Attorney General and a copy of response which I received on 02/02/2015.

I have referred the matter to the N.T. Attorney General with the full knowledge that the response will be automatically in favour of the court with total disregards of the victim.



Signed

A handwritten signature in black ink, appearing to be 'A.G. Piper'.

Attorney-General
And Minister for Justice
GPO Box 3146
Darwin
N.T.0801

A.G. Piper



02/02/2016

Dear Sir

Enclosed are correspondence that I sent to the Federal Attorney General George Brandis, and the response I have received.

I now refer those matters to you for further investigation.

Signed

A handwritten signature in black ink, appearing to be 'A.G. Piper', written over the word 'Signed'.

POSTED 24/01/2015

Hon George Brandis
Attorney General
P.O. Box 6100
Senate
Parliament House
Canberra
ACT 2600

A.G. Piper



10/01/2016

Dear Sir

Enclosed is a copy of a newspaper article dated 23/12/2015 Northern Territory News, which I find suspicious, and I have sent a copy to the Royal Commission into child abuse.



How very convenient on this occasion that the victim was unable to go through the same ordeal again.

With the modern technology in place today one would have to be suspicious of the words "HUMAN ERROR" as used by the spokesman for the Supreme Court especially when it is a child sex offence case after the public have been informed that the audio system has a backup system.

Every time something like this happens the public get the same automatic response from the authorities "THAT PROVISSIONS HAVE BEEN PUT IN PLACE TO ENSURE THAT IT WILL NOT HAPPENAGAIN" those provisions were put in place years ago and should not have happened this time.

All well and good using the words "DEEPLY REGRETABLE" but if the Public Prosecutor was not getting the answers that he should then in the Interest of the victims' rights the Supreme Court Judge and the Public prosecutor should

A handwritten signature in black ink, appearing to be 'A.G. Piper'.

Have launched a criminal investigation to identify that the information that they were given regarding the tape recordings were as they say they were.

I enclose a copy of an e-mail from a man called [REDACTED] who worked in the area of transcripts in the Supreme Court.

Phone [REDACTED]

Mobil [REDACTED]

E-mail [REDACTED]

Signed

A handwritten signature in black ink, appearing to be 'H. P.' with a large flourish at the end.

Accused set free thanks to stuff-up

CHRISTOPHER WALSH

AN ALLEGED child sex offender walked free last June after the Director of Public Prosecutions and the Supreme Court in Darwin failed to properly record a young girl's testimony.

No explanation was offered but the DPP admitted "the system failed her".

The incident was highlighted in prosecutions boss Jack Karczewski's annual report, in which it was revealed that four "vulnerable witnesses" under the age of 18 – including the female complainant – gave testimony at a special sitting of the Supreme Court that was not recorded properly.

The testimony was to be used as evidence at a trial to alleviate the need for the victim to confront her accused abuser. However, the recording equipment only partially picked up the victim's testimony and completely missed the other children's evidence.

"As a result of these failures, the evidence of all four witnesses was inadmissible and

"This office is deeply regretful that this situation occurred"

the only way to rectify the matter and progress the trial was to require the complainant and each of the three witnesses to give evidence again," the report states.

Understandably, the victim "could not and would not subject herself to the ordeal again". The accused then walked with all charges dropped.

The DPP was quick to deflect blame for the stuff-up.

"The DPP has no role to play in recording evidence," a spokesman said, directing questions over the possibility of it happening again or previously to the court.

In his report, Mr Karczewski writes that his requests for answers from the court went

unfilled, "thus the explanation given to the complainant by this office as to why the system failed her was devoid of content".

A spokesman for the Supreme Court said the matter was "deeply regretful" and that steps had been taken to ensure it did not happen again.

"On this particular occasion the recording failed due to human error. This office is deeply regretful that this situation occurred," the spokesman said.

"The error came to light immediately at the end of the special hearing and was brought to the attention of the judge and the parties involved.

"The relevant procedures and staff training associated with such recordings have been reviewed internally. As a result of that review, additional safeguards have been put in place to ensure that the possibility of such an error occurring again is removed."

Questions to the DPP over whether the alleged sex offender had come before the courts since went unanswered.

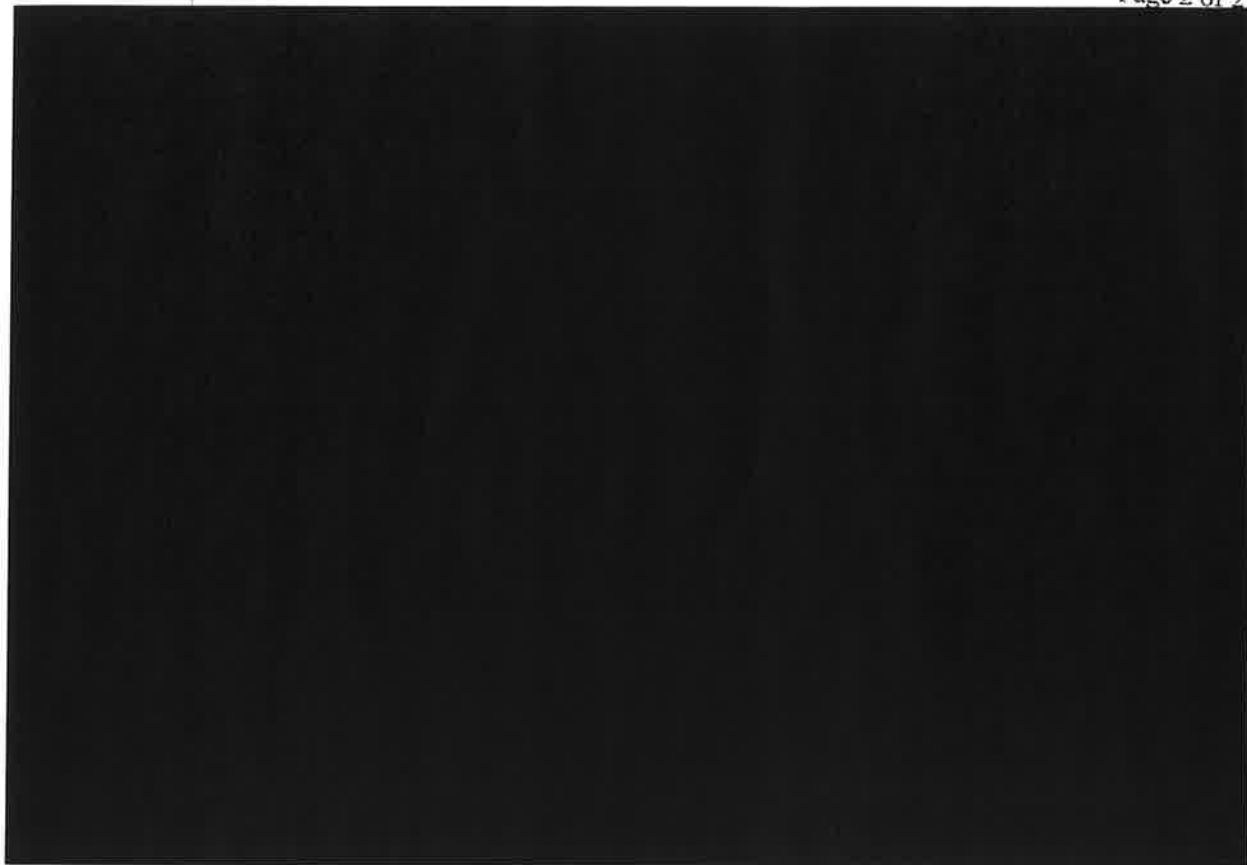
23/12/2015

Amateur Ethnobotanist

From: [REDACTED]
Date: Tuesday, July 15, 2014 10:44 AM
To: [REDACTED]
Subject: [REDACTED]



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7/16/2014



Australian Government
Attorney-General's Department

MC16-002298

02 February 2016

Mr Allan Piper
[REDACTED]

Dear Mr Piper

Thank you for your letter of 10 January 2016 to the Attorney-General, Senator the Hon George Brandis QC, about the accuracy of transcriptions in the Supreme Court of the Northern Territory. I have been asked to reply on behalf of the Attorney-General.

The Commonwealth Attorney-General has portfolio responsibility for the federal courts and the federal judiciary.

It appears from your letter that the matters of concern to you involve the Supreme Court of the Northern Territory. This court falls within the responsibilities of the Northern Territory Attorney-General and Minister for Justice, the Hon John Elferink MLA. If you have not already done so, you may wish to write to him at the following address:

Attorney-General and Minister for Justice
GPO Box 3146
DARWIN NT 0801
Email: <minister.elferink@nt.gov.au>

I regret that the Federal Attorney-General and the Federal Attorney-General's Department are unable to be of further assistance to you in this matter.

Yours sincerely

Susan Prunster
Director
Courts, Tribunals and Justice Policy Branch



KEZIA PURICK MLA
Member for **GOYDER**



4th February 2016

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Coolalinga NT 0839
PO Box 151 Coolalinga NT 0839
Tel: 08 8999 6556
Fax: 08 8983 3488
Email: electorate.goyder@nt.gov.au



www.facebook.com/KeziaPurickMLA

Mr Brian Martin QC

Commissioner

ACIMC

GPO Box 4396

Darwin NT 0801

Dear Mr Martin,

I provide comment to you as the Member for Goyder on the proposal to establish an independent commission or authority to enquire and report on corruption and misconduct of public officials, elected members and associated entities.

By way of back ground, I provide the following information about myself:

- Elected to the NT Legislative Assembly for the electorate of Goyder in 2008;
- Re-elected in 2012 - present;
- Elected speaker in 2012 - present;
- Resigned from the Government in July 2015;
- Membership on various parliamentary committees both as an Opposition Member and as a Government Member and now as an Independent Member; and
- Resident of the Northern Territory since 1959.

My comments to the items listed in your letter to me of 14th December 2015 are as follows.

I support the establishment of an independent (of Government) accountability, misconduct and anti-corruption commission.

I have no fixed view as to a final name of such an entity, however, its charter or scope of works and adequate resourcing will be what is important so that it works as efficiently and effectively as possible. I have put my view to the Chief Minister, Adam Giles, in this regard, and this is in the attached letter (Appendix A). I note that to date, no reply has been received.

The establishment of such a commission is important and necessary so that confidence in public institutions (and elected members of Parliament) can be strengthened and so those who seek to wrongfully exploit their position of power within the community are held accountable.

Undetected and unchecked corruption in the public sector can cause serious damage including:

- undermining public trust in government;
- wasting public resources and money;
- causing injustice through advantaging some at the expense of others;
- inefficiencies in operations; and
- reputational damage which makes it difficult to recruit and retain quality staff or obtain best value in tender processes. [Source NSWICAC]

I agree fully with this.

There are two main areas of concern that I will comment on. The first is associated with planning approvals, and the second is planning approvals and subsequent purchase of property by a minister of the Crown. And I provide comment on why the current “watch dog” type agencies are not suitable or the NT Police.

Under the NT Planning Scheme, a proponent submits an application to the Development Consent Authority (DCA) for assessment with one part of the process requiring public display of the application, public comment and a public meeting by the DCA where the proponent and members of the public can comment further on the application and/or ask questions. Following this action, the DCA then prepares a report for the Minister for Planning with comment and recommendations. The Minister receives the report and then makes a decision whether to agree with the DCA (yes or no) or to form another view such as delay the approval or seek more information.

This report is not public and can be gained only under Freedom of Information legislation.

The Minister does not have to make his decision known as to why he or she made the decision to approve or not approve an application. As has happened last year with the application for the Fred’s Pass Road development, the DCA did not approve of the application, and gave reasons. Yet, the Minister ignored the DCA’s recommendation and approved the application. Subsequent problems and issues have caused grief for nearby residents of Litchfield, as well as the Council.

While there is an assumption that the Minister will make a decision in good faith, and based on sound evidence, there are no assurances that this occurs. It is my view that the lack of transparency and openness leaves the Minister vulnerable, and the final approval processes open to undue and, perhaps, corrupt influences.

In the past, the final report did not present such a big issue, however, with larger projects being proposed, and higher levels of money being involved, the potential risks are not sustainable anymore and changes need to be made to ensure that the development approval processes do have the public trust.

Where there is this level of power invested in the Minister (due to no accountability) the only way to ensure that there is no corruption occurring, is to have an oversight body such as the one you have been tasked to inquire into.

The second part of my concern relates to where a planning minister is privy to information in relation to a development that involves unit or town houses, and he or she can purchase one at a discounted rate from the developer. I present a possible situation:

Developer X applies to build a block of town houses, and approval is granted by the Government via the planning minister.

The town houses are put on the market for \$500,000 each.

The planning minister purchases one of the town houses, the transfer title search states that the purchase price is \$500,000 and the stamp duty is paid on that amount.

The planning minister then borrows \$300,000 from the bank to purchase the town house, and pays no more, as far as the public records show. At settlement, it appears that the developer has forgone \$200,000, as part of a "deal".

The planning minister then goes onto purchase more properties from the same developer.

Again, while there is an assumption that ministers of the Crown act in good faith and honestly, where are the assurances to the community that this does actually take place? There is no legislation (such as freedom of information) that can allow the public or even members of parliament to get the "missing link" information.

Of relevance to your inquiry, there appears to be a relationship of some substance between the government and one of the Territory's largest developers, however, there is no avenue for inquiries to be made into these relationships and the effect on decisions being made by the government.

Over the last few months, there has been public commentary as to the applicability and suitability of the Public Disclosure Commissioner, the Ombudsman and/or the NT Police being relevant as to undertaking the job of investigating perceived or real misconduct and corruption. Ministers are generally outside the scope of such legislation, and given the relationships between government and some of the appointments to those positions themselves, an investigative body that it beyond reproach is necessary. The Northern Territory is a very small jurisdiction, and while I don't criticise the relationships that necessarily form so that business can be done, objectivity in decision-making can easily be lost.

In conclusion, I reiterate my support for a misconduct and anti-corruption body for the Northern Territory and either as part of that process the planning approval processes be reviewed or other recommendations made such that the potential for misconduct and or corruption is negated. As to the form it should take, one would think a Commissioner who has a record of upholding any previous office without fear or favour, together with a small investigative team would be ideal. In the current circumstances, I would NOT suggest that a co-opting style team be put together i.e. borrow from the Ombudsman's Office when extra staff are required. Ex-detectives from interstate jurisdictions are utilised in such bodies interstate, to maintain objectivity. That would be a preferable solution. Perhaps even consideration could be given to sharing staff with an interstate counter-part body if it is decided that permanent investigative staff would be too costly.

If you require further information, I would be pleased to provide it to you.

Yours sincerely

Hon. Kezia Purick MLA

Member for Goyder

4



KEZIA PURICK MLA
Member for **GOYDER**



14th August 2015

Hon Adam Giles MLA
Chief Minister
GPO Box 3146
Darwin NT 0801

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PO Box 151 Coolalinga NT 0839
Tel: 08 8999 6556
Fax: 08 8983 3488
Email: electorate.goyder@nt.gov.au



www.facebook.com/KeziaPurickMLA

Dear Chief Minister

RE: Independent Accountability, Misconduct and Anti-Corruption Commission

I am writing to confirm my public comments that I am in favour of the establishment of an independent accountability misconduct and anti corruption commission. I read with interest the comments made in the NT News by the Attorney General of the NT in justifying the Government not supporting such a body. However, the recent announcement from the Attorney General seems to contradict past comments, but I am of the view that the proposals as presented do not go far enough.

I fundamentally disagree with the argument that such bodies have only come into being in jurisdictions that had substantial corruption issues (as this is not the case in all jurisdictions) and I disagree with the notion of the suggested costs provided by yourself and others within the Government.

There are also a number of matters in the Territory that have come to light recently and I believe there are more yet to be found. Further I do not believe we have seen all materials in respect to the travel 'ports' issue that is before the courts and, as I understand it, is still under further investigation and for what has happened so far I would not be surprised if more people are found to have been involved.

I would like to advise that I will not be supportive of any referral of the matter to a parliamentary committee or of a part effort by enhancing the powers of other existing offices. I will be working with the other independent members of the Assembly to find, if possible, an agreed wording of a parliamentary motion calling on the government to bring forward legislation to establish such a body without further delay.

I understand Labor is considering bringing forward a motion on this matter, however if such a motion is not a serious motion that puts in place a firm timeline for legislation to be brought forward and for an independent and far reaching commission, then it will not attract my support.

The same is the case for any government motion.

Yours sincerely



Kezia Purick
Speaker and member for Goyder

CC.

Mr Michael Gunner, Leader of the Opposition
Mr Gerry Wood, Member for Nelson
Ms Robyn Lambley, Member for Araluen
Ms Alison Anderson, Member for Namatjira
Ms Larissa Lee, Member for Arnhem

} sent via
email 17/8/2015



Brian Martin AO QC

Convenor

Inquiry into the establishment of an anti-corruption body in the NT

GPO Box 4396

Darwin NT 0801

Submission to the Inquiry

Dear Mr Martin,

Please find enclosed my brief submission to your Inquiry. I wish you and your support staff all the best in this important process.

Regards,



Peter Strachan (aka Strachy)

3 January 2016

Submission to Inquiry into establishment of anti-corruption body

1) Introduction

The Inquiry is welcome and timely. History indicates that no jurisdiction is free from the risk of corruption. Logic suggests that an anti-corruption process is therefore an essential part of the justice framework.

The Northern Territory is particularly vulnerable to corruption because of our small population and its consequent reliance on networks and mates, combined with a strong reliance on government funding for economic and social activity.

2) Specific comments on the highlighted considerations

The power to investigate allegations of corruption including against Ministers, Members of the Legislative Assembly and other public officials

The Concise Macquarie Dictionary includes in its definitions of corruption the following: "perversion of integrity", "corrupt or dishonest proceedings" and "bribery". All three definitions are relevant for the focus of an NT anti-corruption body. It is recommended that the enacting legislation include NT Public Servants, local government elected members and their workforce. Given the evolving "corrupt or dishonest proceedings" within FIFA, the definition of public officials could also include sporting bodies.

It is also recommended that the Chair of the anti-corruption body, or whatever terminology describes the head honcho, be appointed by the Administrator and be accountable to him or her. The Minister for Justice could potentially have a massive conflict of interest and may wish, in those famous words attributed to Thomas Beckett: "Who will rid me of this troublesome priest?"

The power to conduct investigations and inquiries into corrupt activities and system-wide anti-corruption reforms as it sees fit

The freedom to investigate and inquire needs to be driven by the anti-corruption body. Inquiries which are perceived or actually politically motivated will not have the credibility or support of the general public.

The appropriate trigger for an NT ICAC jurisdiction and the relationship between this body and other Northern Territory bodies such as the Ombudsman

It is recommended that the triggers be referral from the NT Parliament, the Ombudsman or other NT entities, the general public and/or the anti-corruption body where a prima facie case warrants investigation.

Models from any other jurisdictions and indicative costs of establishing various models in the Northern Territory

Rather than restrict ourselves to Australian models only, it is recommended that the Inquiry consider overseas models. Even better practice may be on offer and it would be a shame to ignore it.

I willingly admit that I have no legal training but it would seem that the rules of evidence must be appropriate, so that any referral to the DPP is seamless and can be acted upon.

The anti-corruption body must have adequate, guaranteed, ongoing funding so that it can meet its obligations. An age-old strategy of governments of all persuasions is to starve the funding of bodies seen as critical or threatening.

The use of existing Northern Territory legislation or Northern Territory statutory authorities

I see the anti-corruption body as the peak body for all matters of corruption. The framers of the legislation will need to propose amendments to existing laws accordingly.

3] Conclusion

This Inquiry marks an important stage in the maturity of the NT. For too long the culture has been resistant to anything from down south. We have justifiably been called cowboys. Here is a wonderful opportunity to rectify the situation.

5 February 2016

Mr Brian Martin AO QC
Commissioner
Anti-Corruption Integrity & Misconduct
Commission Inquiry
GPO Box 4396
DARWIN NT 0801

Email: A_CIMC.Inquiry@nt.gov.au

Dear Commissioner

**LGANT SUBMISSION TO THE NT ANTI-CORRUPTION INTEGRITY & MISCONDUCT
COMMISSION INQUIRY**

Thank you for your letter of 15 December 2015 in which you invited LGANT to make a submission to the above Inquiry. This letter is that submission and was endorsed at a meeting of the LGANT Executive today.

LGANT supports the establishment of an independent anti-corruption body (herein after referred to as ICAC) in the Northern Territory provided:

1. the objectives of its establishment generally accord with those prescribed in the legislation of South Australia with it being favoured because it goes beyond matters of corruption and includes misconduct and maladministration in public administration
2. there is some rationalisation of the functions of the offices of the NT Ombudsman, the Commissioner for Public Interest Disclosures and a new ICAC.

With point 1 above, LGANT is of the view that the South Australian legislation allows for a wider scope of powers to not only investigate corruption but also to handle matters of maladministration and misconduct as well. In looking at the following reference on the NSW ICAC website (<https://www.icac.nsw.gov.au/about-corruption/what-is-corrupt-conduct>)

'Corrupt conduct by a public official involves a breach of public trust that can lead to inequality, wasted resources or public money and reputational damage'

one could argue that questions of inequality, wasted resources or public money and reputational damage all could occur without there necessarily being corrupt conduct. For this reason the wider scope of powers is supported.

Telephone: (08) 8944 9688
Fax: (08) 8941 2665
Website: www.lgant.asn.au

21 Parap Road, Parap, NT, 0820
PO Box 2017, Parap, NT, 0804

With point 2 above, there are a number of reasons for rationalising the functions of these agencies. They include:

- the Northern Territory is a small jurisdiction
- government resources are already stretched due in part because of the need to service the sixty or more towns outside of the major towns and cities
- the cost of administration is generally high
- the volume of complaints is hard to predict
- if three agencies are allowed to continue or be formed there is great potential for the public confused over their respective responsibilities
- all three agencies will have some degree of operational overlap given they:
 - will have functions that include receiving and investigating complaints from the public about public officials
 - perform (along the Department of Local Government and Community Services) investigative functions that are likely to be similar.

The South Australian model (<http://www.icac.sa.gov.au/content/what-make-complaint-or-report-about>) of having the ICAC as the filter for handling and referring complaints about public officials to agencies appears to be appropriate and would be worth considering for the Northern Territory.

Yours sincerely



Tony Tapsell
Chief Executive Officer

20 JAN 16

ANTI CORRUPTION, INTEGRITY
MISCONDUCT COMMISSION INQUIRY
GPO Box 4396
Darwin, NT 0801

IN SETTING UP THE BOARD OF THE
ENQUIRY, THERE SHOULD BE PEOPLE
APPOINTED OF ABOVE APPROACH IE.
NOT PEOPLE WHO ARE EX POLITICIANS OR
WHO ARE ALIGNED TO SPECIFIC PARTIES,
THERE SHOULD BE INDIGENOUS REPRESENTATION
ON THIS BOARD, THIS IF SET UP
PROPERLY WILL BE GREAT AS THERE ARE
MANY ISSUES THAT NEED TO BE
INVESTIGATED BOTH IN PAST AND PRESENT
I HOPE THIS SUBMISSION HELPS A LITTLE
IN THE FORMATION OF THE COMMISSION.

YOLC P. TURNER
P 2



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Office of the Clerk

Anti-Corruption Integrity and Misconduct Commission Inquiry: Submission to the Inquiry

Michael Tatham¹

Background

This submission does not contemplate the merits or otherwise of the establishment of an Independent Commission Against Corruption (ICAC) style body in the Northern Territory. That decision will be a matter for the Legislative Assembly of the Northern Territory to determine upon receipt of the final report of the Inquiry.

Pursuant to the Inquiry's Terms of Reference at item b. concerning 'appropriate powers' and b. (iii), regarding the relationship of an ICAC body with other institutions, it is submitted the powers of any ICAC body will impact directly upon the Legislative Assembly as a relevant institution. Therefore this submission focuses on models and consequences if an ICAC body is legislated for in the Northern Territory and how this might intersect with the Assembly itself.

This submission briefly examines;

1. Parliamentary Privilege: Relationship or interaction and potential conflict an ICAC body might have with the Legislative Assembly of the Northern Territory and
2. A Commissioner for Standards (The Australian Capital Territory Model)

Because the Inquiry will consider models including already established bodies such as the NSW Independent Commission Against Corruption, recent NSW ICAC/Parliament experience is instructive.

1. Parliamentary Privilege

The Westminster principles of parliamentary privilege must be taken into account when developing a model which contemplates examination of the words actions and documents of a Member of the Legislative Assembly of the Northern Territory. Further consideration must be given to the context within which those words, actions and documents were created and whether they are a 'proceeding of the Assembly'. Section 6 of the *Legislative Assembly (Powers and Privileges) Act* is specifically relevant.

The New South Wales *Independent Commission Against Corruption Act 1988*, provides extensive powers for the ICAC to conduct investigations.

¹ Clerk of the Legislative Assembly of the Northern Territory

That Commission has the power to obtain information by service of notice, obtain documents, enter premises, compulsory examination and cross-examination of witnesses, the protection of witnesses, and powers for the referral to other bodies.

Significantly, the NSW legislation at s.122 expressly preserves parliamentary privilege.

Arguably privilege is preserved in any event unless there is an express enactment to the contrary. Yet experience in NSW has shown that where the powers of the ICAC and the privileges of the parliament intersect there has been conflict.

This could be avoided in the Northern Territory by ensuring defined boundaries in any enacting legislation make it quite clear the extent of the powers of the ICAC body and the intention of the Assembly to either maintain or waive privilege.

In a paper presented by the President of the NSW Legislative Council, the Hon Don Harwin MLC, at the 2013 Australasian Study of Parliament Group (ASPG) Annual Conference *Oversight: Parliamentary Committees, Corruption Commissions and Parliamentary Statutory Officers*, the President noted the following:

The ICAC's constrained jurisdiction has also been a source of contention between the ICAC and the Parliament in the past. Of note, in 2004, relations between the Parliament and the ICAC were strained significantly when the ICAC executed a search warrant on the Parliament House office of the Hon Peter Breen, a cross-bench member of the Upper House.

During the execution of the warrant, officers of the ICAC seized a quantity of documents, as well as two computer hard drives and Mr Breen's laptop computer. It later became evident that, despite section 122, and assurances from the officers themselves that they would respect parliamentary privilege, at least one document seized was immune from removal by virtue of being protected by privilege.

In addition, some of the material seized was outside the authorisation of the warrant, notably Mr Breen's laptop and desktop computer hard drives, which it later transpired had been 'imaged' by the Independent Commission Against Corruption. Following investigations and recommendations by the Standing Committee on Parliamentary Privilege and Ethics at the time, the ICAC was forced to return to the President the material which was deemed by the House to be privileged.

The House subsequently authorised the release of the material back to Mr Breen. Following the events of 2004, the Legislative Council Privileges Committee investigated the issue of search warrants on a number of occasions².

It is noted that in NSW a *Memorandum of understanding on the execution of Search Warrants in the Parliament House Offices of Members of the New South Wales Parliament* has been in place since 2009 between the Presiding Officers and the ICAC Commissioner.

In the Australian Parliament, a similar MOU is in place with the Australian Federal Police. In the United Kingdom, the House of Commons MOU with the Metropolitan Police requires the Speaker's Counsel to be present upon the execution of a search warrant on a Member in order for counsel to assist and advise what is a proceeding of the parliament, and therefore may not be impeached in a court.

Notwithstanding numerous approaches made by the former Clerk of the Legislative Assembly of the Northern Territory, there is no similar MOU in place between the Assembly and the Northern Territory Police.

² The Hon Don Harwin MLC *The Parliament of New South Wales and the Independent Commission Against Corruption: Recent interactions on matters of privilege and future issues*. ASPG Conference Paper 2013.

While there has not been a recent execution of a search warrant on a Member of the Legislative Assembly and execution on the Parliamentary Precinct is prohibited without Speaker approval³, should one occur without an MOU in place (which should include the presence of a person with a sound understanding and knowledge of parliamentary privilege) there remains a risk of seizure of privileged material which is inadmissible. Without a suitable MOU in place, the Speaker would be well advised to uphold the prohibitions in s.8 of the *Powers and Privileges Act*.

Where an ICAC body seeks to investigate Members of the Assembly in relation to allegations of corrupt behaviour such as bribery or for misconduct or breaches of the Code of Conduct then the legislature must be mindful of how it will do so and where privilege may arise and could curtail such investigations.

The NSW Parliament has had to consider whether privilege applies to documents disclosed in a Member's return on their pecuniary interest register. Given that such documents are available for public inspection, it might be thought that they are able to be freely used in a brief of evidence for a prosecution.

Any doubt should be eliminated if an ICAC body is to be established in the Northern Territory.

In late 2012, the NSW Parliament waived privilege attaching to the Register of Disclosures by Members of the Legislative Council and the Register of Disclosures by Members of the Legislative Assembly to allow the ICAC to make use of either register for the purposes of any investigation or for the purposes of any finding or recommendation concerning the disclosure or non-disclosure of a matter in the registers.

Not much earlier in 2012⁴, the NSW ICAC had sought various interest disclosure returns prepared by Members of the Legislative Council pursuant to the NSW Parliament's interest disclosure regime.

It is worth noting that in the Northern Territory, the relevant legislation⁵ provides for the Committee of Interests to determine how the register is kept and its availability for inspection. Inspection in the Northern Territory is only by way of physically examining the returns on-site in the Office of the Clerk. Unlike in 2012 in NSW where the Clerk of the Legislative Council made copies available to the ICAC, under the existing arrangements in the Northern Territory, the Clerk has no authority to make copies available to any person.

When providing the returns under the requirements of s.22 of the NSW ICAC Act, the Clerk of the Legislative Council advised that privilege may attach to the returns. If a similar s.22 power were enacted in the Northern Territory there must be clarity about whether this would permit the Clerk to release Member pecuniary interest returns.

It is understood that the NSW ICAC itself did not believe that privilege attached to the Member's returns in the register. It is when the ICAC intended to consider the documents for a brief of evidence and hearings that the question of privilege arose.

What must be asked in the context of this Inquiry, and any contemplation of references made to a Member's pecuniary interest register return is; *could the Member's returns be a 'proceeding of the parliament' within the meaning of Article 9 of the Bill of Rights 1688 as enunciated in s.6 of the Northern Territory Legislative Assembly (Powers and Privileges) Act?*

³ S.8 Powers and Privileges Act

⁴ Legislation was passed expeditiously

⁵ *Legislative Assembly (Disclosure of Interests) Act 2008*. See particularly section 5(3)

It is worth noting that even after consulting a body of precedent in Australia and the UK both the Legislative Council Clerk and the NSW Crown Solicitor could not comprehensively conclude one way or the other.

However as President Harwin notes in his paper, the Crown Solicitor in NSW was *inclined to think that the arguments in favour of the view that the Register forms part of the 'proceedings in Parliament' outweighed the arguments against. The Crown Solicitor further advised that if it could not be conceded that privilege does not apply to members' returns in the Register, it was the responsibility of the President of the Legislative Council to seek to uphold the privileges of the House, including by intervening in the ICAC proceedings if necessary.*⁶

As a result, the *Independent Commission Against Corruption Amendment (Register of Disclosures by Members) Bill 2012* was enacted which inserted s.122 (2) into the Act.

In response to the above question posed in the context of the Northern Territory, it is submitted that given the existence and administration of the form of the Assembly Member's Register of Interests is a direct result of the proceedings of a committee of the Assembly and that pursuant to s.6(3) of the *Powers and Privileges Act* a court or tribunal shall not have evidence tendered or questions asked or statements, submission or comments made about proceedings of the Assembly for the purposes questioning or relying on the truth, motive, intention or good faith of anything forming part of these proceedings, then it is arguable that the Member's return cannot be questioned by any body other than the Assembly itself.

The *Legislative Assembly (Disclosure of Interests) Act* provides at s.6(2) for the Assembly to sanction a breach of the requirement of a Member to provide an accurate return as a contempt of the Assembly, and a contempt is to be dealt with under the *Legislative Assembly (Powers and Privileges) Act*.

Similarly a breach of the Code of Conduct under the *Legislative Assembly (Members Code of Conduct and Ethical Standards) Act* is able to be punished as a contempt, the penalties for which include imprisonment as per the *Powers and Privileges Act*. The role for the Assembly in policing itself is considered further below in the context of a Commissioner for Standards.

While the waiver of any privilege where disclosure of interest documents are concerned is most unlikely to impact upon the freedom of a Member to engage in unfettered speech, parliaments are generally loathe to restrict their privileges.

While the degree of privilege in the Northern Territory is somewhat more constrained than in the original colonies (now the six states of the Australian Federation) as they all enjoy the same privileges of the House of Commons as adopted at certain points in time in the 19th century, the Northern Territory Assembly has no more powers or privileges than the House of Representatives⁷ which has intentionally applied some limits by the enactment of the *Parliamentary Privileges Act 1987*.

The Assembly would no doubt wish to err on the side of caution before it significantly eroded parliamentary privilege in enabling legislation to establish an ICAC body in the Northern Territory.

It is a long-standing principle that courts do not inquire into statements a Member makes or documents a Member relies upon in the Assembly and there are good public interest reasons why this is so. The requirement of finding the correct balance will be a key factor if the establishment of an ICAC body proceeds.

⁶ Harwin ASPG paper at page 5

⁷ S.12 of the Northern Territory (Self Government) Act 1978 (Cth)

The developments relating to privilege and where an ICAC body intersects with the role of the parliament in policing itself and its Member's behaviour brings us to the second matter for consideration in this submission to the Inquiry.

This is the creation of an official position which has the role of advising on, and where required, enforcing Members (and Ministers') codes of conduct, thus providing an alternative to ICAC to fill the gap on matters which are important and serious to be addressed but do not require the so called 'nuclear option'⁸ of an ICAC inquiry.

The ICAC process is time consuming and often inconclusive leaving a shadow over people who are found to have been corrupt but are never prosecuted. Such an inquiry's findings of corruption are usually referred to the Director of Public Prosecutions and if the DPP finds a breach of the law has occurred then the courts with their different evidentiary rules have to consider the matters raised, resulting in years of lag between alleged incident and finalisation of a prosecution (if one occurs). A quicker and cheaper option is a possibility to either supplement or be the first stage of a progression to establishing an ICAC style body itself.

2. A Commissioner for Standards

The recent experience in NSW has disclosed a gap that has been addressed well in the Australian Capital Territory (ACT) with an arguably effective low cost option suitable for a small jurisdiction. The model concentrates more on Members than on the public service entities and bodies that a broader ranging ICAC body also covers.

The experience in the ACT is for a retired judge who is incidentally, but perhaps fortuitously, domiciled outside the jurisdiction, engaged on a retainer of approximately \$15 000 per annum to provide ad-hoc advice and be remunerated at a negotiated rate for longer periods of inquiry and advice.

When this matter was recently discussed with the Clerk of the ACT Assembly, Mr Tom Duncan, he indicated that anecdotal evidence suggests that it is considered to be beneficial for the Commissioner to not be located in the Territory. This means the Commissioner isn't a part of the daily social fabric in a small jurisdiction and is not attending functions and events or socialising where Members are present, thus avoiding any perception of conflict.

The Commissioner for Standards⁹ in the ACT was first appointed on resolution of the Assembly in October 2013 and the Commissioner's role is set out in the resolution as follows:

- (4) *The functions of the Commissioner are to:*
 - (a) *investigate specific matters referred to the Commissioner—*
 - (i) *by the Speaker in relation to complaints against Members; or*
 - (ii) *by the Deputy Speaker in relation to complaints against the Speaker; and*
 - (b) *report to the Standing Committee on Administration and Procedure.*
- (5) *Members of the public, members of the ACT Public Service and Members of the Assembly may make a complaint to the Speaker about a Member's compliance with the Members' Code of Conduct or the rules relating to the registration or declaration of interests.*

⁸ Dr Robert Waldersee, Executive Director of ICAC's corruption prevention division quoted in *The Mandarin: Standards Commissioner Flagged for ICACs Ministerial Gap* by Harley Dennett March 2015.

⁹ It should be noted that the ACT also has an Ethics and Integrity Adviser who is a different person with a different role.

- (6) *If the Speaker receives a complaint about a Member pursuant to paragraph (5) and the Speaker believes on reasonable grounds that—*
 - (a) *there is sufficient evidence as to justify investigating the matter; and*
 - (b) *the complaint is not frivolous, vexatious or only for political advantage;**the Speaker may refer the complaint to the Commissioner for investigation and report.*
- (7) *Members of the public, members of the ACT public service and Members of the Assembly may make a complaint to the Deputy Speaker about the Speaker's compliance with the Members' Code of Conduct or the rules relating to the registration or declaration of interests.*
- (8) *If the Deputy Speaker receives a complaint about the Speaker pursuant to paragraph (7) and the Deputy Speaker believes on reasonable grounds that—*
 - (a) *there is sufficient evidence to justify investigating the matter; and*
 - (b) *the complaint is not frivolous, vexatious or only for political advantage;**the Deputy Speaker may refer the complaint to the Commissioner for investigation and report.*
- (9) *In exercising the functions of Commissioner the following must be observed:*
 - (a) *The Commissioner must not make a report to the Committee if the Member or the Speaker about whom the complaint was made has agreed that he or she has failed to register or declare an interest if —*
 - (i) *in the Commissioner's opinion the interest involved is minor or the failure was inadvertent; and*
 - (ii) *the Member concerned has taken such action to rectify the failure as the Commissioner may have required within any procedure approved by the Committee for this purpose.*
 - (b) *The Commissioner must not make a report to the Committee unless the Commissioner has—*
 - (i) *given a copy of the proposed report to the Member or the Speaker who is the subject of the complaint under investigation;*
 - (ii) *the Member or the Speaker has had a reasonable time to provide comments on the proposed report; and*
 - (iii) *the Commissioner has considered any comments provided by the Member or the Speaker.*
 - (c) *The Commissioner must report by 31 August each year to the Speaker on the exercise of the functions of the Commissioner.*
- (10) *The Committee must review the operation of the Commissioner after two years following the initial appointment of the Commissioner and report to the Assembly in the first sitting period in 2016.*

The relevant documents concerning the Commissioner are available on the ACT Assembly website at <http://www.parliament.act.gov.au/members/commissioner-for-standards> this includes a set of Commissioner's Protocols and a guide on how to make a complaint.

The Clerk of the ACT Assembly has advised that the creation of the role has ensured that there is a capacity for Members of the Assembly to seek impartial and confidential advice about ethical matters, but there also exists an impartial and independent mechanism to deal with any breaches of the code of conduct that may arise¹⁰.

¹⁰ Discussion was undertaken on these matters during January and February 2016.

Such an approach could assist in the Northern Territory to counter any perceptions about Members and their roles in policing themselves under the legislation discussed previously in this submission.

Members of parliament are engaged citizens prosecuting their views and policy agendas. Conflicts may often be alleged or be present in fact, but so long as there is openness and disclosure then people should not be excluded from participation as Members and they should not fear taking part and being subject to scrutiny.

Concluding Comments

Should the Northern Territory enact legislation for an integrity commission it is suggested the matters raised in this submission be considered in more detail.

The more clarity and certainty built into the model, the less concern about interpretation of privilege and potential gaps.

Information, advice and education should also be a part of any model if it is to be implemented in the Northern Territory.

Expectations on Members will be increased and scrutiny heightened, particularly if a body is established which has to justify its existence to 'uncover' corruption. Members must be provided sufficient support to ensure compliance and adherence to all of the requirements imposed upon them.

Michael Tatham
3 February 2016.

Australian Capital Territory (ACT)

[1] The ACT does not have an anti-corruption or integrity commission. The integrity regime of the ACT relies primarily on:

- Ombudsman – established under the *Ombudsman Act 1989* (ACT), investigates complaints and carries out own motion investigations concerning ACT government agencies, including the Australian Federal Police in its community policing role. Also investigates complaints concerning ACT public education providers such as the Australian National University, Canberra Institute of Technology and University of Canberra. The Ombudsman has specific responsibilities under the *Freedom of Information Act (1989)* (ACT), the *Australian Federal Police Act 1979* (Cth) and the *Public Interest Disclosure Act 2012* (ACT).
- Auditor-General – responsible for the audit of all ACT public sector agencies with a view to promoting public accountability in the public administration of the ACT. Also conducts performance audits and has responsibilities under other legislation including the *Public Interest Disclosure Act 2012* (ACT).
- *Public Interest Disclosure Act 2012* (ACT) – provides a means for disclosure of information about “disclosable conduct” and for ensuring that such disclosures are properly investigated and dealt with. “Disclosable conduct” is defined in s8:

(1) For this Act, **disclosable conduct** means any of the following:

- (a) conduct of a person that could, if proved –
 - (i) be a criminal offence against a law in force in the ACT; or

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- (ii) give reasonable grounds for disciplinary action against the person;
- (b) action of a public sector entity or public official for a public sector entity that is any of the following:
 - (i) maladministration that adversely affects a person's interests in a substantial and specific way;
 - (ii) a substantial misuse of public funds;
 - (iii) a substantial and specific danger to public health or safety;
 - (iv) a substantial and specific danger to the environment.

The *Public Interest Disclosure Act 2012* (ACT) provides for disclosure to persons holding particular positions such as the Commissioner for Public Administration, the Auditor-General or the Ombudsman.

Provision is made for investigation by the head of the relevant public sector entity, the head of the service or the Ombudsman, but no powers of compulsion with respect to documents or oral evidence are conferred upon the investigator. The investigating entity may refer the disclosure to the police and must report the outcome of the investigation to the Commissioner for Public Administration. Provision is made for disciplinary action in appropriate circumstances. The Commissioner for Public Administration has oversight over the investigation of public interest disclosures. In reviewing an investigation or action taken by a public sector entity as a result of a disclosure, the Commissioner may request the provision of information, including protected information, from anyone, however, only a public sector entity or public official is required to comply with a request for information.

- Parliamentary Ethics and Integrity Adviser – appointed by the Speaker pursuant to a resolution of the ACT Legislative Assembly dated 10 April 2008 (amended 21 August 2008). On request by a member the Adviser advises “on ethical issues concerning the exercise of his or her

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role as a Member” and gives advice, other than legal advice, “consistent with any code of conduct or other guidelines adopted by the Assembly”. The Adviser is required to report annually to the Assembly.

- Commissioner for Standards – appointed by the Speaker pursuant to a resolution of the Assembly dated 31 October 2013. The role of the Commissioner is to investigate specific matters referred to the Commissioner by the Speaker “in relation to complaints against Members” or by the Deputy Speaker in relation to complaints against the Speaker. At the completion of an investigation, the Commissioner is required to report to the Standing Committee on Administration and Procedure, unless certain matters are satisfied.

Commonwealth

[1] The federal law has established a number of agencies that deal with corruption at the national level. These include:

- Australian Commission for Law Enforcement Integrity
- Australian Crime Commission
- Fraud and Anti-Corruption Centre within the Australian Federal Police
- Commonwealth Ombudsman
- Commonwealth Auditor-General.

Law Enforcement Integrity Commissioner

[2] The *Law Enforcement Integrity Commissioner Act 2006* (Cth) established the office of the Integrity Commissioner and the Australian Commission for Law Enforcement Integrity (ACLEI). Those bodies were established for the purpose of assisting in achieving the objects of the Act which are defined in s3 as follows:

- (a) to facilitate:
 - (i) the detection of corrupt conduct in law enforcement agencies; and
 - (ii) the investigation of corruption issues that relate to law enforcement agencies; and
- (b) to enable criminal offences to be prosecuted, and civil penalty proceedings to be brought following those investigations; and
- (c) to prevent corrupt conduct in law enforcement agencies; and
- (d) to maintain and improve the integrity of staff members of law enforcement agencies.

[3] As is apparent in s3, the objects centre on integrity and corruption in law enforcement agencies. The ACLEI website describes the role of the Integrity

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Commissioner as ensuring that “the indications and risks of corruption in law enforcement agencies are identified and addressed effectively”. The agencies are:

- The Australian Border Force
- The Australian Crime Commission
- The Australian Federal Police (including ACT Policing)
- The Australian Transaction Reports and Analysis Centre (AUSTRAC)
- The CrimTrac Agency
- Prescribed aspects of the Department of Agriculture and Water Resources
- The Department of Immigration and Border Protection, and
- The former National Crime Authority.

[4] In addition to identifying its role as supporting the Integrity Commissioner, the ACLEI website contains the following information concerning its role:

- ACLEI’s primary role is to investigate law enforcement-related corruption issues, giving priority to serious and systemic corruption.
- The Integrity Commissioner must consider the nature and scope of corruption revealed by investigations, and report annually on any patterns and trends in corruption in Australian Government law enforcement and other Government agencies which have law enforcement functions. Accordingly, ACLEI collects intelligence about corruption in support of the Integrity Commissioner’s functions.
- ACLEI also aims to understand corruption and prevent it. When, as a consequence of performing his or her functions, the Integrity Commissioner identifies laws of the Commonwealth or administrative practices of government agencies that might contribute to corrupt practices or prevent their early detection, he or she may make recommendation for these laws or practices to be changed.

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- [5] The Integrity Commissioner established under s14 is endowed with functions specified in s15:

The Integrity Commissioner has the following functions :

- (aa) to detect corrupt conduct in law enforcement agencies
- (a) to investigate and report on corruption issues;
- (b) to refer corruption issues, in appropriate circumstances, to a law enforcement agency for investigation;
- (c) to manage, oversee or review, in appropriate circumstances, the investigation of corruption issues by law enforcement agencies;
- (d) at the request of the Minister, to conduct public inquiries into:
 - (i) corruption issues; or
 - (ii) corruption generally in, or the integrity of staff members of, law enforcement agencies;
- (da) to prevent corrupt conduct in law enforcement agencies;
- (e) to collect, correlate, analyse and disseminate information and intelligence in relation to corruption generally in, or the integrity of staff members of, both:
 - (i) law enforcement agencies; and
 - (ii) other Commonwealth government agencies that have law enforcement functions;
- (f) on the Integrity Commissioner's own initiative, or on request by the Minister, to make reports and recommendations to the Minister in relation to any matter that concerns the need for or the desirability of legislative or administrative action on issues in relation to corruption generally in or the integrity of staff members of, law enforcement agencies;
- (g) any other function conferred on the Integrity Commissioner by other provisions of this Act or by another Act.

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Note: Paragraph (a)—the investigation of a corruption issue may be conducted in response to a referral or notification of the corruption issue to the Integrity Commissioner or on the Integrity Commissioner’s own initiative.

- [6] Section 16 directs that in carrying out its functions, the Integrity Commissioner “must” give priority to corruption issues that relate to “corrupt conduct that constitutes serious corruption or systemic corruption”.
- [7] The Act draws a distinction between corrupt conduct within a law enforcement agency and corrupt conduct by a current or former staff member of ACLEI. Further, the distinction continues with the definition of “corruption issue”. Sections 6-8 provide those definitions:

Meaning of *engages in corrupt conduct*

Staff members of law enforcement agencies

(1) For the purpose of this Act, a staff member of a law enforcement agency ***engages in corrupt conduct*** if the staff member, while a staff member of the agency, engages in:

- (a) conduct that involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of the agency; or
- (b) conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice; or
- (c) conduct that, having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind.

(2) If the law enforcement agency is one referred to in paragraph (d) of the definition of ***law enforcement agency***, the staff member ***engages in corrupt conduct*** only if the conduct relates to the performance of a law enforcement function of the agency.

Staff members of ACLEI

(3) For the purpose of this Act, a staff member of ACLEI ***engages in corrupt conduct*** if the staff member, while a staff member of ACLEI, engages in:

- (a) conduct that involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of ACLEI; or

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- (b) conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice; or
- (c) conduct that, having regard to the duties and powers of the staff member as a staff member of ACLEI, involves, or is engaged in for the purpose of, corruption of any other kind.

General provisions

(4) To avoid doubt:

- (a) the conduct referred to in subsection (1) may be conduct that was engaged in before the commencement of this Act; and
- (b) a staff member of a law enforcement agency or ACLEI ***engages in corrupt conduct*** even if the conduct engaged in by the staff member also involves or implicates someone who is not a staff member of a law enforcement agency or ACLEI.

(5) For the purposes of this section, conduct is taken to be engaged in for a purpose if it is engaged in for purposes that include that purpose.

Meaning of *corruption issue*

- (1) For the purposes of this Act, a ***corruption issue*** is an issue whether a person who is, or has been, a staff member of a law enforcement agency:
 - (a) has, or may have, engaged in corrupt conduct; or
 - (b) is, or may be, engaging in corrupt conduct; or
 - (c) will, or may at any time in the future, engage in corrupt conduct.
- (2) To avoid doubt, an allegation, or information, may raise a ***corruption issue*** even if the identity of the person is unknown, is uncertain or is not disclosed in the allegation or information.

Meaning of *ACLEI corruption issue*

- (1) For the purposes of this Act, an ***ACLEI corruption issue*** is an issue whether a person who is, or has been, a staff member of ACLEI:
 - (a) has, or may have, engaged in corrupt conduct; or

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- (b) is, or may be, engaging in corrupt conduct; or
- (c) will, or may at any time in the future, engage in corrupt conduct.

(2) To avoid doubt, an allegation, or information, may raise an *ACLEI corruption issue* even if the identity of the person is unknown, is uncertain or is not disclosed in the allegation or information.

[8] “Serious corruption”, “significant corruption issue” and “systemic corruption” are all defined in s5:

serious corruption means corrupt conduct engaged in by a staff member of a law enforcement agency that could result in the staff member being charged with an offence punishable, on conviction, by a term of imprisonment for 12 months or more.

significant corruption issue means:

- (a) a corruption issue relating to serious corruption or systemic corruption, unless the corruption issue relates to a law enforcement agency for which an agreement under subsection 17(1) is in force; or
- (b) a corruption issue that:
 - (i) relates to a law enforcement agency; and
 - (ii) is of a kind agreed under subsection 17(1) to be a significant corruption issue in relation to staff members of the agency; or
- (c) a corruption issue of a kind that is prescribed by the regulations for the purposes of this paragraph

systemic corruption means instances of corrupt conduct (which may or may not constitute serious corruption) that reveal a pattern of corrupt conduct in a law enforcement agency or in law enforcement agencies.

[9] The jurisdiction of the Integrity Commissioner with respect to corruption matters is limited to staff members (or former staff members) of a ‘law enforcement agency’, including the Australian Federal Police, the Australian Crime Commission, the Immigration and Border Protection Department, Austrac, CrimTrac, parts of the Agriculture Department, the former National

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Crime Authority and other prescribed Commonwealth enforcement agencies. In substance, the Act applies to any Commonwealth government agency that has a law enforcement function such as investigating whether offences have been committed against a law of the Commonwealth or preparing material necessary for prosecution for an offence against a law of the Commonwealth or bringing civil penalty proceedings against a person for a contravention of a law of the Commonwealth.

- [10] The Commissioner is able to receive allegations or information from any person including the Minister or head of a law enforcement agency, which may be investigated by the Commissioner. The Commissioner may also undertake an investigation on the Commissioner's own initiative.
- [11] Speaking generally, the Integrity Commissioner possesses broad powers to conduct enquiries either in private or in public and to compel the production of documents and information either in writing or through sworn testimony. While the principles and rules of legal professional privilege apply, a person is not excused from answering a question or producing a document or thing on the ground that doing so would tend to incriminate the person or expose the person to a penalty. However, the answer given or document or thing produced is not admissible in evidence against the person in a criminal proceeding, proceeding for the imposition or recovery of a penalty or a confiscation proceeding. Substantial penalties exist, including imprisonment, for non-compliance or obstruction (ss93 and 94) and failures to comply amount to contempt to be dealt with in the Federal Court or Supreme Court of a State or Territory (ss96A-96E).
- [12] Subject to specified restrictions, the Commissioner may, without warrant, enter premises occupied by a law enforcement agency and take copies of documents and seize items "relevant to an indictable offence" (s105). Search warrants for other types of premises may be obtained on application to a Judge of the Federal Court, Federal Circuit Court or State or Territory (ss107-109). The criteria for obtaining a warrant centres on reasonable grounds for retrieving

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“evidential material” that is or will be in the premises. “Evidential material” is defined in s5:

evidential material means:

(a) in relation to an investigation warrant – a thing that may be relevant to:

(i) a corruption investigation; or

(ii) a public inquiry; or

(b) in relation to an offence warrant – a thing relevant to an offence against a law of the Commonwealth.

- [13] Upon completion of an investigation the Commissioner is required to provide a report setting out findings with respect to the corruption issue, the evidence upon which the findings are based, any action the Commissioner has taken or proposes to take and any recommendations the Commissioner sees fit to make. The Commissioner reports to both houses of Parliament and is held to account by the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity.

Australian Crime Commission

- [14] The Australian Crime Commission, established under the *Australian Crime Commission Act 2002* (Cth) to combat serious and organised crime, has a role with respect to corruption of public sector officials and links to organised crime groups. For the purposes of the *Australian Crime Commission Act 2002* (Cth), serious and organised crime includes bribery and corruption of, or by, an officer of the Commonwealth or a State or a Territory. The Crime Commission possesses wide coercive powers which it is unnecessary to discuss.

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Fraud and Anti-Corruption Centre

- [15] Criminal or corrupt behaviour by Australian Government employees may also fall within the purview of the Fraud and Anti-Corruption Centre within the Australian Federal Police. A number of Commonwealth agencies participate. The Centre focuses on serious and complex fraud against the Commonwealth, corruption by Australian Government employees, foreign bribery and complex identity crime involving the manufacture and abuse of credentials. It is unnecessary to canvass the role of this Centre further.

Ombudsman

- [16] The *Ombudsman Act 1976* (Cth) provides for the appointment of a Commonwealth Ombudsman, a Defence Force Ombudsman, a Postal Industry Ombudsman, an Overseas Students Ombudsman and a Private Health Insurance Ombudsman. The Commonwealth Ombudsman is directed by s5 to investigate action relating to a matter of administration by a department or a prescribed authority in respect of which a complaint has been made to the Ombudsman. In addition the Ombudsman may investigate such action on the Ombudsman's own motion. However, relevant actions taken by a number of persons, including Ministers and judicial officers, cannot be investigated by the Ombudsman.
- [17] Although provision is made for the Ombudsman to exercise powers to require production of documents and the giving of oral evidence, exceptions are made with respect to a number of matters founded on questions of "public interest", including prejudice to the security, defence or international relations of the Commonwealth (for example s9(3)). It is unnecessary to discuss these details.
- [18] Sections 15-19 deal with reports by the Ombudsman, including reports to the department or prescribed authority concerned with the investigation and, in particular circumstances, to the Prime Minister and Parliament. It is unnecessary to discuss those provisions.

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- [19] In addition, it is unnecessary to discuss the role and powers of the other types of Ombudsman created by the Act.

Auditor-General

- [20] The Auditor-General is an independent officer of the Australian Parliament who provides auditing services to the Parliament and public sector entities. The Australian National Audit Office (ANAO) supports the Auditor-General and, for present purposes, it is sufficient to explain the role of the Auditor-General by citing the following passages from the website of the ANAO:

- The ANAO provides Parliament with “an independent assessment of selected areas of public administration and assurance about public sector financial reporting, administration, and accountability primarily by conducting performance audits, financial statement audits, and assurance reviews.”
- The ANAO performs “the financial statement audits of all Australian government-controlled entities and seek[s] to provide an objective assessment of areas where improvements can be made in public administration and service delivery.”
- The ANAO “seeks to identify and promulgate, for the benefit of the public sector generally, broad messages and lessons identified through [its] audit activities.”

New South Wales (NSW)

- [1] A number of bodies contribute to the integrity regime with respect to public administration in New South Wales, but the primary focus is upon the Independent Commission Against Corruption (ICAC) which was established by the *Independent Commission Against Corruption Act 1988* (NSW). The ICAC possesses significant investigative and coercive powers that, in recent times, have attracted a substantial degree of controversy and critical examination.
- [2] In addition to the ICAC, the following bodies perform relevant roles which, for present purposes, it is unnecessary to examine in detail:
- Public Service Commissioner – established under the *Government Sector Employment Act 2013* (NSW). The primary objectives of the Commissioner include promoting and maintaining integrity across the government sector. The Commissioner has the power to conduct inquiries concerning matters of administration and management of the government sector and agencies.
 - Ombudsman – established under the *Ombudsman Act 1974* (NSW) and deals with complaints and carries out own motion investigations concerning the conduct of New South Wales government agencies, including statutory authorities and local government councils. The Ombudsman also oversees police investigations concerning complaints about police and deals with complaints about organisations and individuals who provide community services. It is unnecessary to discuss other roles given to the Ombudsman.
 - Auditor-General – as in other jurisdictions, provides financial and performance audits of New South Wales government agencies. Under the *Public Interest Disclosures Act 1994* (NSW), the Auditor-General

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also examines allegations of serious and substantial waste of public money.

- Information and Privacy Commission – reviews agency decisions and complaints concerning freedom of information.
- Police Integrity Commission – investigates allegations of police misconduct.
- Healthcare Complaints Commission – investigates complaints about healthcare practitioners and organisations.
- Crime Commission – established in 1986, the *Crime Commission Act 2012* (NSW) identifies the principal objective of the Commission as reducing the incidence of organised and other serious crime. In substance, the Commission investigates serious criminal offences. It may hold hearings, but unless it is sitting for the purpose of informing the public regarding the general conduct of its operations, the hearings must be held in private.
- Parliamentary Ethics Adviser – appointed by the Speaker to advise any Member of Parliament, when requested by that Member, concerning ethical issues in the exercise of the Member’s role (including the use of entitlements and potential conflicts of interest). The advice provided is confidential.

ICAC

- [3] In the Second Reading Speech for the *Independent Commission Against Corruption Bill 1988*, the then Premier spoke of restoring the integrity and credibility of public administration and public institutions in New South Wales. He also stated that the Commission would not be a “crime commission” as its charter was not to “investigate crime generally”. The Premier identified the Commission as possessing a “very specific purpose”, namely, “to prevent corruption and enhance integrity in the public sector”.

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[4] Section 2A of the *Independent Commission Against Corruption Act 1988* (NSW) identifies the principal objects as follows:

- (a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:
 - (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and
 - (ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and
- (b) to confer on the Commission special powers to inquire into allegations of corruption.

[5] Section 13 of the Act sets out the principal functions of the ICAC. The substance of s13 is helpfully summarised by the Hon Murray Gleeson AC QC and Bruce McClintock QC (the Independent Panel) in their report of 30 July 2015¹⁴²:

Speaking generally, those [s13] functions are:

- to investigate any allegation, complaint or circumstance, that in the ICAC's opinion may imply that corrupt conduct, conduct liable to allow, encourage or cause the occurrence of corrupt conduct or conduct connected with corrupt conduct may have occurred, be occurring or be about to occur;
- to investigate any matter referred by Parliament;
- to communicate to appropriate authorities results of investigations;
- to carry out a range of educatory and advisory activities directed towards reduction and elimination of corrupt conduct.

(footnotes omitted).

[6] At the core of the ICAC's jurisdiction is its role in investigating corrupt conduct by, or affecting, a public official or impairing public confidence in

¹⁴² The Hon. M Gleeson AC and Mr B McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption*, (NSW Department of Premier and Cabinet, 2015).

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public administration. Sections 7-9 of the Act deal with “corrupt conduct”;

7. Corrupt conduct

- (1) For the purposes of this Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in section 8, but which is not excluded by section 9.
- (2) Conduct comprising a conspiracy or attempt to commit or engage in conduct that would be corrupt conduct under section 8 shall itself be regarded as corrupt conduct under section 8.
- (3) Conduct comprising such a conspiracy or attempt is not excluded by section 9 if, had the conspiracy or attempt been brought to fruition in further conduct, the further conduct could constitute or involve an offence or grounds referred to in that section.

8. General nature of corrupt conduct

- (1) Corrupt conduct is:
 - (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
 - (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
 - (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
 - (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.
- (2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

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- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
- (b) bribery,
- (c) blackmail,
- (d) obtaining or offering secret commissions,
- (e) fraud,
- (f) theft,
- (g) perverting the course of justice,
- (h) embezzlement,
- (i) election bribery,
- (j) election funding offences,
- (k) election fraud,
- (l) treating,
- (m) tax evasion
- (n) revenue evasion,
- (o) currency violations,
- (p) illegal drug dealings,
- (q) illegal gambling,
- (r) obtaining financial benefit by vice engaged in by others,
- (s) bankruptcy and company violations,
- (t) harbouring criminals,
- (u) forgery,
- (v) treason or other offences against the Sovereign,
- (w) homicide or violence,

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- (x) matters of the same or a similar nature to any listed above,
 - (y) any conspiracy or attempt in relation to any of the above.
- (2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters;
- (a) collusive tendering,
 - (b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,
 - (c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
 - (d) defrauding the public revenue,
 - (e) fraudulently obtaining or retaining employment or appointment as a public official.
- (3) Conduct may amount to corrupt conduct under subsection (1), (2) or (2A) even though it occurred before the commencement of that subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.
- (4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official. This subsection extends to a person seeking to become a public official even if the person fails to become a public official.
- (5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) or (2A) refer to:
- (a) matters arising in the State or matters arising under the law of the State, or

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- (b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.
- (6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting or expanding the scope of any other provision of this section.

9. Limitation on nature of corrupt conduct

- (1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:
 - (a) a criminal offence, or
 - (b) a disciplinary offence, or
 - (c) reasonable grounds for dismissing, dispensing with the services or otherwise terminating the services of a public official, or
 - (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament – a substantial breach of an applicable code of conduct.
- (2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.
- (3) For the purposes of this section:

applicable code of conduct means, in relation to:

- (a) a Minister of the Crown – a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or
- (b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown) – a code of conduct adopted for the purposes of this section by resolution of the House concerned.

criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

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- (4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.
- (5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.
- (6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the *Local Government Act 1993*, but does not include a reference to any other breach of such a requirement.

[7] It is readily apparent that the ICAC possesses a very broad reach with respect to relevant corrupt conduct. Pursuant to s13, the ICAC is empowered to investigate circumstances which, in the opinion of the ICAC, “imply” that corrupt conduct “may have occurred, may be occurring, or may be about to occur”. The ICAC is also empowered to investigate if the circumstances imply that conduct “liable to allow, encourage or cause the occurrence of corrupt conduct” may have occurred, be occurring or be about to occur. Attempts to engage in conduct that would amount to corrupt conduct also fall within the purview of the ICAC.

[8] As to investigating the action of a “public official”, s3 provides the definition:

public official means an individual having public official functions or acting in a public official capacity, and includes any of the following:

- (a) the Governor (whether or not acting with the advice of the Executive Council),
- (b) a person appointed to an office by the Governor,

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- (c) a Minister of the Crown, a member of the Executive Council or a Parliamentary Secretary,
- (d) a member of the Legislative Council or of the Legislative Assembly,
- (e) a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both,
- (e1) a person employed under the *Members of Parliament Staff Act 2013*,
- (f) a judge, a magistrate or the holder of any other judicial office (whether exercising judicial, ministerial or other functions),
- (g) a person employed in a Public Service agency or any other government sector agency within the meaning of the *Government Sector Employment Act 2013*,
- (h) an individual who constitutes or is a member of a public authority,
- (i) a person in the service of the Crown or of a public authority,
- (j) an individual entitled to be reimbursed expenses, from a fund of which an account mentioned in paragraph (d) of the definition of **public authority** is kept, of attending meetings or carrying out the business of any body constituted by an Act,
- (k) a member of the NSW Police Force,
- (k1) an accredited certifier within the meaning of the *Environmental Planning and Assessment Act 1979*,
- (l) the holder of an office declared by the regulations to be an office within this definition,
- (m) an employee of or any person otherwise engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.

[9] It is appropriate to note the broad reach of the ICAC which extends to investigating persons in positions of authority such as the Governor, Judicial Officers, Ministers of the Crown, and Parliamentary Officers.

[10] The ICAC may undertake investigations on its own initiative (s20) and it may hold compulsory examinations in private (s30) or by way of public inquiry

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(s31). An investigation may be commenced, continued or completed despite the existence of judicial proceedings (s18).

- [11] The coercive powers which may be exercised by the ICAC during an investigation are very wide. For example, the ICAC may summon a person to appear before the Commission for the purposes of a compulsory examination or public inquiry and to give evidence or produce documents or other things. If a person fails to comply with the summons, the Commissioner may issue a warrant for the arrest of the person. The power to issue a warrant extends to circumstances where the Commissioner is satisfied, by evidence on oath or affirmation, that it is probable that a person whose evidence “is desired and is necessary and relevant to an investigation” will not attend without being compelled to do so or is about to leave the State (s36).
- [12] The ICAC possesses the power to require a public authority or public official to produce a statement of information (s21) and the Commissioner may, at any time without a warrant, enter and inspect premises occupied or used by a public authority or public official in such capacity and inspect and take copies of documents in or on the premises (s23).
- [13] As to private premises, an officer of the ICAC may apply to the Commissioner or an ‘authorised officer’ for a search warrant “if the officer has reasonable grounds for believing that there is in or on any premises a document or other thing connected with any matter that is being investigated” (s40(4)). The Commissioner or authorised officer may issue a search warrant if that person thinks fit in the circumstances and if satisfied that there are “reasonable grounds for doing so” (s40).
- [14] In addition to search warrants, the Commissioner or an officer of the ICAC may seek the issue of warrants under the *Surveillance Devices Act 2007* (NSW) (s19) and the *Telecommunications (Interception and Access) Act 1979* (Cth). The Commissioner may approve operations that would otherwise be unlawful (ss5 and 6, *Law Enforcement (Controlled Operations) Act 1997* (NSW)) and

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may also approve the use of false identities under the *Law Enforcement and National (Assumed Identities) Act 2010* (NSW) (ss5 and 6).

- [15] Failure to comply with the summons to attend before the Commission, or to refuse to comply with a direction such as taking an oath or affirmation or answering a question, is determined by s98 to be a contempt of the Commission. Section 99 provides for the Commissioner to present to the Supreme Court a certificate in which the facts constituting the contempt are set out. The Supreme Court is required to inquire into the alleged contempt, including hearing witnesses and, if satisfied that the person is guilty of the contempt, may punish the person as if the person had committed the contempt in the Supreme Court.

- [16] Unlike proceedings in a court of law, witnesses are not entitled to decline to answer questions on the grounds that the answer might tend to incriminate the witness of an offence (s37). If a witness claims privilege from self-incrimination, but is required to produce a document or answer a question, although the evidence may be used and relied upon in the course of the investigation, it may not be used in proceedings against that person.

- [17] Another important aspect of the ICAC's jurisdiction and role is found in s13(2) which requires that the ICAC conduct its investigations with a view to determining whether corrupt conduct, or conduct liable to encourage the occurrence of corrupt conduct or conduct connected to corrupt conduct, has occurred, is occurring or is about to occur. The ICAC is empowered to make findings and form opinions, and may also provide information or a report to the minister responsible for a public authority. A matter may be referred to any other body for investigation or further action.

- [18] As to questions of oversight or accountability, Part 5A of the Act provides for the appointment by the Governor of an Inspector of the Independent Commission Against Corruption. In substance the Inspector is charged with the responsibility of auditing the operations of the ICAC and dealing with

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complaints concerning conduct of the Commission or officers of the Commission. The principal functions of the Inspector are set out in s57B:

Principal functions of Inspector

- (1) The principal functions of the Inspector are:
 - (a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and
 - (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and
 - (c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and
 - (d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.
- (2) The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Joint Committee or any public authority or public official.
- (3) The Inspector is not subject to the Commission in any respect.
- (4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:
 - (a) contrary to law, or
 - (b) unreasonable, unjust, oppressive or improperly discriminatory, or
 - (c) based wholly or partly on improper motives.
- (5) Without affecting the power of the Inspector to make a report under Part 8, the Inspector may, at any time:

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- (a) make a recommendation or report concerning any matter relating to the functions of the Inspector under this section that the Inspector considers may effectively be dealt with by recommendation or report under this section, and
- (b) provide the report or recommendation (or any relevant part of it) to the Commission, an officer of the Commission, a person who made a complaint or any other affected person.

[19] Section 57F provides that the Inspector has “power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the Inspector’s functions.” Specific powers of the Inspector to investigate “any aspect” of the ICAC operations or the conduct of officers of the Commission are found in ss57C and 57D:

57C Powers of Inspector

The Inspector:

- (a) may investigate any aspect of the Commission’s operations or any conduct of officers of the Commission, and
- (b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and
- (c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission’s operations or any conduct of officers of the Commission, and
- (d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission’s operations or any conduct of officers of the Commission, and
- (e) may investigate and assess complaints about the Commission or officers of the Commission, and
- (f) may refer matters relating to the Commission or officers of the Commission to other public authorities or public officials for consideration or action, and
- (g) may recommend disciplinary action or criminal prosecution against officers of the Commission.

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57D Inquiries

- (1) For the purposes of the Inspector's functions, the Inspector may make or hold inquiries.
- (2) For the purposes of any inquiry under this section, the Inspector has the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923* and that Act (section 13 excepted) applies to any witness summoned by or appearing before the Inspector in the same way as it applies to a witness summoned by or appearing before a commissioner.
- (3) A witness summoned by or appearing before the Inspector is to be paid such amount as the Inspector determines, but not exceeding the amount that would be payable to such a witness if he or she were a Crown witness subpoenaed by the Crown to give evidence.

[20] It appears that the extent of the Inspector's authority has recently been the subject of dispute between the Inspector and the ICAC Commissioner. My role does not require me to examine the details of that dispute.

[21] In addition to the Inspector, the operations of the ICAC are overseen by a joint committee of the New South Wales Parliament known as the Committee on the Independent Commission Against Corruption (Joint Committee). The functions of the Joint Committee are set out in s64:

64 Functions

- (1) The functions of the Joint Committee are as follows:
 - (a) to monitor and to review the exercise by the Commission and the Inspector of the Commission's and Inspector's functions,
 - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
 - (c) to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,

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- (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,
- (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

(2) Nothing in this Part authorises the Joint Committee:

- (a) to investigate a matter relating to particular conduct, or
- (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
- (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

[22] The Joint Committee has the power to “send” for persons, papers and records (s69(1)). The Committee is required to take evidence in public unless, for reasons of secrecy or confidentiality, the Committee determines to take evidence in private.

[23] In recent times issues appear to have arisen as to the extent of the powers of the Joint Committee. It is unnecessary to discuss that issue.

[24] The ICAC is a large organisation with over 100 permanent staff. Its total expenditure for 2014-15 financial year was in excess of \$25m.

Queensland

[1] As in New South Wales, a number of bodies contribute to the Queensland regime intended to ensure integrity in public administration. The primary body concerned with corruption in the public service is the Crime and Corruption Commission. Other relevant bodies are:

- Ombudsman – investigates complaints and carries out own motion investigations concerning conduct in Queensland public agencies, including local councils. Those excluded from the reach of the Ombudsman include Ministers of the Crown, Judicial Officers and the Auditor-General.
- *Public Interest Disclosure Act 2010* (Qld) – intended to facilitate public interest disclosures of wrongdoing in the public sector and to ensure such disclosures are properly assessed, investigated and dealt with. Chief Executive Officers of public sector entities are responsible for establishing “reasonable procedures” to ensure that disclosures made to the entity are properly assessed, investigated and dealt with (s28). It is also the responsibility of the Chief Executive Officer to ensure that appropriate action is taken in relation to any “wrongdoing” which is the subject of the disclosure. The Ombudsman is the oversight agency for the purposes of this Act.
- Integrity Commissioner – an independent Officer of the Queensland Parliament appointed under the *Integrity Act 2009* (Qld) responsible for providing advice to Ministers, Members of Parliament and senior public servants concerning ethics and integrity issues.
- Office of the Information Commissioner – an independent statutory body established under the *Right to Information Act 2009* (Qld) and the *Information Privacy Act 2009* (Qld) concerned with “access to

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government-held information” and “protecting people’s personal information held by the public sector” (*website of the office*).

- Public Sector Commission – the agency which oversees the public sector workforce, which oversight includes setting standards of practice.
- Auditor-General – as in other jurisdictions, the Auditor-General is an independent Officer of Parliament with responsibility, through auditing, or providing an independent assessment of financial management in the public sector. The Auditor-General reports to Parliament.

Crime and Misconduct Commission

[2] Individually, and in combination, these various bodies play a significant part in the integrity regime of Queensland. However, for present purposes, it is appropriate to concentrate upon the Crime and Corruption Commission which was established by the *Crime and Corruption Act 2001* (Qld). The “main purposes” of the Act are identified in s4:

- (a) to combat and reduce the incidence of major crime;
- (b) to reduce the incidence of corruption in the public sector.

[3] Section 5 of the Act identifies the means by which the purposes of the Act are to be achieved:

- (1) The Act’s purposes are to be achieved primarily by establishing a permanent commission to be called the Crime and Corruption Commission.
- (2) The commission is to have investigative powers, not ordinarily available to the police service, that will enable the commission to effectively investigate major crime and criminal organisations and their participants.
- (3) Also, the commission is to investigate cases of corrupt conduct, particularly more serious cases of corrupt conduct.

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- [4] Part 3 of Chapter 1 of the Act is described as a Part intended to “briefly outline responsibilities of relevant entities” under the Act:

Crime and Corruption Commission

The Crime and Corruption Commission has primary responsibility for the achievement of the Act’s purposes.

Crime Reference Committee

The Crime Reference Committee –

- (a) has responsibility for –
 - (i) referring major crime to the commission for investigation; and
 - (ii) authorising the commission to undertake specific intelligence operations; and
- (b) has a coordinating role for investigations into major crime conducted by the commission in cooperation with any other law enforcement agency.

Parliamentary Crime and Corruption Committee

The Parliamentary Crime and Corruption Committee is a standing committee of the Legislative Assembly with particular responsibility for monitoring and reviewing the commission’s performance.

Parliamentary Crime and Corruption Commissioner

The Parliamentary Crime and Corruption Commissioner is an officer of the Parliament who helps the Parliamentary Crime and Corruption Committee in the performance of its functions.

Public Interest Monitor

The Public Interest Monitor has a right of appearance before a court hearing an application by the commission for a surveillance warrant or covert search warrant and is entitled to test the appropriateness and validity of the application before the court.

- [5] The Crime and Corruption Commission’s function with respect to crime is set out in Part 2, Chapter 2 of the Act. In essence it is to investigate major crime referred to it by the Reference Committee and, subject to authorisation, to

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investigate incidents in which criminal organisations have engaged, or are planning to engage, that threaten or may threaten public safety.

- [6] The corruption function is governed by Part 3, Chapter 2 of the Act. Section 33 directs the Commission to ensure that a complaint or information about corruption is dealt with in an appropriate way. The Commission is directed by s35 to expeditiously assess complaints or information about corruption and either to investigate or refer the matter to an appropriate public official.
- [7] Further, the Commission is directed to perform a monitoring role with respect to police misconduct and corruption. In performing the corruption function, the Commission is directed to “focus on more serious cases of corrupt conduct in cases of systemic corrupt conduct within a unit of public administration.” (s35(3)).
- [8] The Act casts a wide net with respect to corrupt conduct. First, conduct includes neglect, failure, inaction, conspiracy to engage in conduct and attempt to engage in conduct.
- [9] Secondly, s15 provides the meaning of “corrupt” conduct:

Meaning of *corrupt* conduct

- (1) ***Corrupt Conduct*** means conduct of a person, regardless of whether the person holds or held an appointment, that –
- (a) adversely affects, or could adversely affect, directly or indirectly, the performance of functions or the exercise of powers of –
 - (i) a unit of public administration; or
 - (ii) a person holding an appointment; and
 - (b) results, or could result, directly or indirectly, in the performance of functions or the exercise of powers mentioned in paragraph (a) in a way that –
 - (i) is not honest or is not impartial; or
 - (ii) involves a breach of the trust placed in a person holding an appointment, either knowingly or recklessly; or

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- (iii) involves a misuse of information or material acquired in or in connection with the performance of functions or the exercise of powers of a person holding an appointment; and
 - (c) is engaged in for the purpose of providing a benefit to the person or another person or causing a detriment to another person; and
 - (d) would, if proved, be –
 - (i) a criminal offence; or
 - (ii) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or were the holder of an appointment.
- (2) Without limiting subsection (1), conduct that involves any of the following could be corrupt conduct under subsection (1) –
 - (a) abuse of public office;
 - (b) bribery, including bribery relating to an election;
 - (c) extortion;
 - (d) obtaining or offering a secret commission;
 - (e) fraud;
 - (f) stealing;
 - (g) forgery;
 - (h) perverting the course of justice;
 - (i) an offence relating to an electoral donation;
 - (j) loss of revenue of the State;
 - (k) sedition;
 - (l) homicide, serious assault or assault occasioning bodily harm or grievous bodily harm;

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(m) obtaining a financial benefit from procuring prostitution or from unlawful prostitution engaged in by another person;

(n) illegal drug trafficking;

(o) illegal gambling.

- [10] The Commission may investigate on referral, complaint or its own initiative. As in other jurisdictions, the Commission possesses wide coercive powers with respect to obtaining documents, information and oral evidence. The powers vary depending upon the nature of the investigation and it is unnecessary to canvass those powers in detail. They include obtaining search warrants and seeking an arrest warrant for any person who fails to appear when summoned. Unlike the situation in New South Wales, the Commission is required to apply for a warrant to a Magistrate or a Supreme Court Judge.
- [11] Sanctions exist for non-attendance when summoned or refusal to answer. In respect of a corruption investigation, the penalty for refusing to answer includes five years imprisonment. A witness is not entitled to remain silent or refuse to answer on the ground of self-incrimination, but is entitled to refuse to answer on the grounds of legal professional privilege, public interest immunity or parliamentary privilege (s192). If a witness claims privilege on the basis of self-incrimination, and is required to answer, the answer (or document or thing produced) is not admissible in evidence against the witness in any civil, criminal or administrative proceeding unless the exceptions in s197(3) apply which includes proceedings in respect of an offence against the *Crime and Corruption Act 2001* (Qld). Part 3, Chapter 4 of the Act contains contempt provisions.
- [12] As to whether any persons are exempt from investigation under the Act, the definition of corrupt conduct refers to the conduct of a person regardless of whether the person holds or held an “appointment”. Section 14 defines “appointment” as meaning “appointment in a unit of public administration”. The meaning of “unit of public administration” is found in s20 which includes a “State court, of whatever jurisdiction, and its registry and other administrative

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offices”. In this circuitous way it appears that judicial officers are not excluded from investigation. This view is confirmed by the absence of judicial officers from the list of entities and persons excluded from the definition of “unit of public administration” in s20(2).

- [13] Following completion of an investigation, if the Commission decides that “prosecution proceedings or disciplinary action should be considered”, the Commission “may report on the investigation to any of the following as appropriate” (s49(2)):
- (a) the director of public prosecutions, or other appropriate prosecuting authority, for the purposes of any prosecution proceedings the director or other authority considers warranted;
 - (b) the Chief Justice, if the report relates to conduct of a judge of, or other person holding judicial office in, the Supreme Court;
 - (c) the Chief Judge of the District Court, if the report relates to conduct of a District Court judge;
 - (d) the President of the Childrens Court, if the report relates to conduct of a person holding judicial office in the Childrens Court;
 - (e) the Chief Magistrate, if the report relates to conduct of a magistrate;
 - (f) the chief executive officer of a relevant unit of public administration, for the purpose of taking disciplinary action, if the report does not relate to the conduct of a judge, magistrate or other holder of judicial office.
- [14] If the Commission decides that prosecution for an offence under s57 of the Criminal Code “should be considered” (false evidence before the Legislative Assembly on a committee), the Commission “must” report to the Attorney-General (s49(3)).
- [15] Section 64 is a general provision providing that the Commission “may report in performing its functions”. If the Commission reports on a public hearing, the report must be given to the Speaker and tabled (s69).

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- [16] The Queensland legislation does not specifically empower the Commission to make a finding of corruption.
- [17] As to oversight of the Crime and Corruption Commission, s291 establishes a committee of the Legislative Assembly called the Parliamentary Crime and Corruption Committee. In addition to issuing guidelines to the Commission concerning the conduct and activities of the Commission, which must be tabled in the Legislative Assembly and which can be disallowed by resolution of the Assembly, the Committee has a significant role in monitoring and reviewing the activities and performance of the Commission. The functions and powers of the Committee in this regard are found in ss292-294:

292 Functions

The parliamentary committee has the following functions –

- (a) to monitor and review the performance of the commission's functions;
- (b) to report to the Legislative Assembly, commenting as it considers appropriate, on either of the following matters the committee considers should be brought to the Assembly's attention –
 - (i) matters relevant to the commission;
 - (ii) matters relevant to the performance of the commission's functions or the exercise of the commission's powers;
- (c) to examine the commission's annual report and its other reports and report to the Legislative Assembly on any matter appearing in or arising out of the reports;
- (d) to report on any matter relevant to the commission's functions that is referred to it by the Legislative Assembly;
- (e) to participate in the selection of commissioners and the removal from office of a commissioner as provided under this Act;
- (f) to review the activities of the commission by 30 June 2016, and by the end of each 5-year period following that day, and, for each review, to table in the Legislative Assembly a report about any further action that should be

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taken in relation to this Act or the functions, powers and operations of the commission;

- (g) to periodically review the structure of the commission, including the relationship between the types of commissioners and the roles, functions and powers of the commission, the chairman and the chief executive officer, and, for each review, to table in the Legislative Assembly a report about the review, including any recommendations about changes to the Act;
- (h) to issue guidelines and give directions to the commission as provided under this Act.

292 Powers

- (1) The parliamentary committee has power to call for persons, documents and other things.

Note –

See also the *Parliament of Queensland Act 2001*, chapter 3, part 1 for other powers of the committee to require attendance and production of documents or other things.

- (2) Also, the parliamentary committee has the power –
 - (a) necessary to enable the committee to properly perform its functions, including power to appoint persons having special knowledge or skill to help the committee perform its functions; and
 - (b) conferred on it by resolution of the Legislative Assembly with a view to the proper performance by the committee of its functions.
- (3) Further, the parliamentary committee or a person appointed, engaged or assigned to help the parliamentary committee may –
 - (a) inspect any non-operational record or thing in the commission's possession; and
 - (b) make copies or extracts of the record or thing for use in connection with the parliamentary committee's functions to which the record or thing is relevant.

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(4) In this section –

Non-operational record or thing does not include a record or thing that relates to an investigation by the commission that is not finalised.

294 Directions by parliamentary committee to undertake investigation

- (1) The parliamentary committee may, by notice, direct the commission to investigate a matter involving corruption stated in the notice.
- (2) A direction under subsection (1) is effective only if it is made with the bipartisan support of the parliamentary committee.
- (3) The commission must –
 - (a) investigate the matters stated in the direction diligently and in a way reasonably expected of a law enforcement agency; and
 - (b) report the results of its investigation to the committee.

[18] Not surprisingly, the Crime and Corruption Commission is a large organisation. It employs over 300 full-time staff and in the 2014-2015 financial year its total expenditure was a little over \$54.5m.

South Australia (SA)

[1] The South Australian integrity regime is centred upon the Independent Commissioner Against Corruption and the Office for Public Integrity. In addition, the following entities have significant roles:

- Ombudsman – investigates complaints and carries out own motion investigations concerning administrative acts of South Australian and local government agencies, manages freedom of information issues with respect to such agencies and conducts audits.
- Police Ombudsman – receives and investigates complaints about Police, audits compliance with specified legislation and reviews freedom of information determinations relating to Police.
- Commissioner for Public Sector Employment – oversees the public sector, including setting the public sector code of conduct. Possesses limited investigative powers.
- Auditor-General – audits the financial management of the Treasurer and public sector agencies. Also examines the local government sector and, on request, audits publicly-funded bodies.

Independent Commissioner Against Corruption and Office for Public Integrity

[2] The *Independent Commissioner Against Corruption Act 2012* (SA) established the Independent Commissioner Against Corruption (the Commissioner) and the Office for Public Integrity. The primary objects of the Act are set out in s3:

Primary objects

(1) The primary objects of this Act are -

- (a) to establish the Independent Commissioner Against Corruption with functions designed to further –

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- (i) the identification and investigation of corruption in public administration; and
 - (ii) the prevention or minimisation of corruption, misconduct and maladministration in public administration, including through referral of potential issues, education and evaluation of practices, policies and procedures; and
- (b) to establish the Office for Public Integrity to manage complaints about public administration with a view to –
- (i) the identification of corruption, misconduct and maladministration in public administration; and
 - (ii) ensuring that complaints about public administration are dealt with by the most appropriate person or body; and
- (c) to achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person’s reputation (recognising that the balance may be weighted differently in relation to corruption in public administration as compared to misconduct or maladministration in public administration).
- (2) While the Commissioner may perform functions under this Act in relation to any potential issue of corruption, misconduct or maladministration in public administration, it is intended that the primary object of the Commissioner be –
- (a) to investigate serious or systemic corruption in public administration; and
 - (b) to refer serious or systemic misconduct or maladministration in public administration to the relevant body, giving directions or guidance to the body or exercising the powers of the body as the Commissioner considers appropriate.

[3] It is immediately apparent that South Australia has created a system in which the Office for Public Integrity works in conjunction with the Commissioner and that the primary role of the Commissioner is to concentrate on “serious and systemic corruption in public administration”. Further, the Legislature sought expressly to strike a balance between the need for public exposure of

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corruption, misconduct and maladministration and avoiding “undue” prejudice to a person’s reputation.

- [4] The functions of the Independent Commissioner Against Corruption are defined in s7:

Functions

(1) There is to be an Independent Commissioner Against Corruption with the following functions:

- (a) to identify corruption in public administration and to –
 - (i) investigate and refer it for prosecution; or
 - (ii) refer it to a law enforcement agency for investigation and prosecution;
- (b) to assist inquiry agencies and public authorities to identify and deal with misconduct and maladministration in public administration;
- (c) to give directions or guidance to inquiry agencies and public authorities, and to exercise the powers of inquiry agencies in dealing with misconduct and maladministration in public administration, as the Commissioner considers appropriate;
- (d) to evaluate the practices, policies and procedures of inquiry agencies and public authorities with a view to advancing comprehensive and effective systems for preventing or minimising corruption, misconduct and maladministration in public administration;
- (e) to conduct or facilitate the conduct of educational programs designed to prevent or minimise corruption, misconduct and maladministration in public administration;
- (f) to perform other functions conferred on the Commissioner by this or any other Act.

(2) The Commissioner is not subject to the direction of any person in relation to any matter, including –

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- (a) the manner in which functions are carried out or powers exercised under this or any other Act; and
 - (b) the priority that the Commissioner gives to a particular matter in carrying out functions under this or any other Act.
- (3) The Attorney-General may request the Commissioner to review a legislative scheme related to public administration and to make recommendations to the Attorney-General for the amendment or repeal of the scheme.
- (4) The Commissioner is to perform his or her functions in a manner that –
- (a) is as open and accountable as is practicable, while recognising, in particular, that –
 - (i) examinations relating to corruption in public administration must be conducted in private; and
 - (ii) other Acts will govern processes connected with how misconduct and maladministration in public administration is dealt with; and
 - (b) deals as expeditiously as is practicable with allegations of corruption in public administration; and
 - (c) as far as is practicable, deals with any allegation against a Member of Parliament or member of a council established under the *Local Government Act 1999* before the expiry of his or her current term of office.
- (5) For the purposes of exercising his or her functions under subsection (1)(d) or (e), or for reviewing a legislative scheme under subsection (3), the Commissioner –
- (a) may conduct a public inquiry; and
 - (b) may regulate the conduct of the inquiry as the Commissioner thinks fit, (and, for the avoidance of doubt, the inquiry will not be a proceeding for the purposes of s55).

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- [5] The Office for Public Integrity is responsible to the Commissioner for the performance of its functions. Those functions are defined in s17:

Functions and objectives

There is to be an Office for Public Integrity with the following functions:

- (a) to receive and assess complaints about public administration from members of the public;
 - (b) to receive and assess reports about corruption, misconduct and maladministration in public administration from inquiry agencies, public authorities and public officers;
 - (c) to make recommendations as to whether and by whom complaints and reports should be investigated;
 - (d) to perform other functions assigned to the Office by the Commissioner.
- [6] Unlike other jurisdictions, a complaint or report is first made to the Office for Public Integrity and it is the responsibility of that office to assess the complaint or report and make recommendations to the Commissioner. In addition, the Commissioner, acting on the Commissioner's own initiative, may assess or require the Office to assess any other matter (s23(2)).
- [7] Section 23 requires an assessment of the complaint or report as to whether:
- (a) it raises a potential issue of corruption in public administration that could be the subject of a prosecution; or
 - (b) it raises a potential issue of misconduct or maladministration in public administration; or
 - (c) it raises some other issue that should be referred to an inquiry agency, public authority or public officer; or
 - (d) it is trivial, vexatious or frivolous, it has previously been dealt with by an inquiry agency or public authority and there is no reason to re-examine it or there is other good reason why no action should be taken in respect of it.

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- [8] If a matter is assessed as raising a potential issue of corruption in public administration that could be the subject of a prosecution, the matter must either be investigated by the Commissioner or referred to the police, Police Ombudsman or another law enforcement agency (s24(1)). If the matter is assessed as raising a potential issue of misconduct or maladministration in public administration, s24(2) directs that the matter be dealt with in one of the following ways:
- (a) the matter may be referred to an inquiry agency and, if the Commissioner considers it appropriate, the Commissioner may give directions or guidance to the agency in respect of the matter;
 - (ab) the Commissioner may exercise the powers of an inquiry agency in respect of the matter;
 - (b) the matter may be referred to the public authority concerned and, if the Commissioner considers it appropriate, the Commissioner may give directions or guidance to the authority in respect of the matter.
- [9] If a matter is assessed as raising other issues that should be dealt with by an inquiry agency, public authority or public officer, the matter must be referred to the particular agency, authority or officer. If a matter is assessed as trivial, vexatious or frivolous, no action need be taken.
- [10] As is apparent from this summary, the course of action to follow a complaint depends upon an assessment as to whether the complaint raises a potential issue of corruption, misconduct or maladministration in public administration. Those terms are defined in s5:

Corruption, misconduct and maladministration

(1) *Corruption in public administration* means conduct that constitutes –

- (a) an offence against Part 7 Division 4 (Offences relating to public officers) of the *Criminal Law Consolidation Act 1935*, which includes the following offences:
 - (i) bribery or corruption of public officers;

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- (ii) threats or reprisals against public officers;
 - (iii) abuse of public office;
 - (iv) demanding or requiring benefit on basis of public office;
 - (v) offences relating to appointment to public office; or
 - (b) an offence against the *Public Sector (Honesty and Accountability) Act 1995* or the *Public Corporations Act 1993*, or an attempt to commit such an offence; or
 - (c) any other offence (including an offence against Part 5 (Offences of dishonesty) of the *Criminal Law Consolidation Act 1935*) committed by a public officer while acting in his or her capacity as a public officer or by a former public officer and related to his or her former capacity as a public officer, or by a person before becoming a public officer and related to his or her capacity as a public officer, or an attempt to commit such an offence; or
 - (d) any of the following in relation to an offence referred to in a preceding paragraph:
 - (i) aiding, abetting, counselling or procuring the commission of the offence;
 - (ii) inducing, whether by threats or promises or otherwise, the commission of the offence;
 - (iii) being in any way, directly or indirectly, knowingly concerned in, or party to, the commission of the offence;
 - (iv) conspiring with others to effect the commission of the offence.
- (2) If the Commissioner suspects that an offence that is not corruption in public administration (an ***incidental offence***) may be directly or indirectly connected with, or may be a part of, a course of activity involving the commission of corruption in public administration (whether or not the Commissioner has identified the nature of that corruption), then the incidental offence is, for so long only as the Commissioner so suspects, taken for the purposes of this Act to be corruption in public administration.

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(3) ***Misconduct in public administration*** means –

- (a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or
- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.

(4) ***Maladministration in public administration*** –

- (a) means –
 - (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or
 - (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
- (b) includes conduct resulting from impropriety, incompetence or negligence; and
- (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

[11] The definition of corruption is centred upon offences committed by or in relation to public officers, and the definitions of misconduct and maladministration in public administration are centred upon the conduct of public officers. The definition of “public officer” is found in Schedule 1 (Appendix 1 to this Annexure). It is a lengthy definition and includes “all public sector employees” and persons performing contract work for a public authority or the Crown, together with persons such as the Governor, Members of Parliament, Judicial Officers, Police Officers and Members of Local Government bodies. The jurisdiction of the Commissioner, therefore, extends to those persons and all other persons who fit within Schedule 1.

[12] Speaking generally, in conducting an investigation into corruption, but not misconduct or maladministration in public administration, the Commissioner possesses relevant coercive powers which are found in Schedule 2 with respect

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to obtaining documents, summoning witnesses and taking evidence on oath or affirmation (ss4 and 5). In specified circumstances, an application may be made to a Judge of Supreme Court for a warrant to arrest a witness (s9).

- [13] The coercive powers are backed by sanctions for non-compliance which include imprisonment.
- [14] In addition to the powers found in Schedule 2, other powers are conferred by ss28-31 of the Act. These include a power invested in the Commissioner to issue a warrant authorising an investigator to enter and search a place occupied or used by an inquiry agency, public authority or public officer (s31(1)). An application may be made to a Supreme Court for a warrant to enter and search a private place or vehicle that is reasonably suspected of being, or having been, used for or in connection with a prescribed offence or in which it is reasonably suspected there may be records relating to a prescribed offence (s31(2)). The Act does not refer to obtaining warrants for the installation of surveillance devices, but this power is conferred by the *Surveillance Devices Act 2016* (SA).
- [15] Witnesses are required to answer all questions, but if the witness who is required to answer questions or produce a document or thing claims that the answer or production might tend to incriminate the person or make the person liable to a penalty, the answer, document or thing is not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty other than proceedings under the *Criminal Assets Confiscation Act 2005* (SA) or a proceeding relating to false evidence before the examiner (Schedule 2, s8(4)(5), *Independent Commissioner Against Corruption Act 2012* (SA)). Section 8 of the *Independent Commissioner Against Corruption Act 2012* (SA) does not affect the law relating to the legal professional privilege (s8(6)).
- [16] Investigations, including the hearing of evidence, “must” be conducted in private (s55(1)).

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- [17] On completion of an investigation, or at any time during an investigation, the Commissioner may refer a matter to a relevant law enforcement agency for further investigation and potential prosecution or refer a matter to a public authority for further investigation and potential disciplinary reaction against a public officer (s36(1)). Subject to specified exceptions, if a matter is referred to a public authority the Commissioner may give directions or guidance to that authority. Procedures exist for reporting to a responsible minister if the Commissioner is not satisfied that appropriate action has been taken. Different procedures are specified with respect to matters involving misconduct or maladministration (ss36A-38). Sections 40 and 41 confer power on the Commissioner to evaluate the practice, policies and procedures of an inquiry agency or public authority, in which circumstances the Commissioner is required to prepare a report of the evaluation and provide a copy to the President of the Legislative Council and the Speaker of the House of Assembly.
- [18] The South Australian legislation does not confer a power to make findings of corruption. In relation to corruption, the SA Commissioner's role focuses on the gathering of evidence for presentation to the DPP.
- [19] As to accountability, s45 directs that the Commissioner must prepare an annual report on the operations of the Commissioner and the Office. Copies of the report must be provided to the President and Speaker who are required to lay the report before their respective Houses. Section 47 requires the Commissioner to ensure that a copy of each annual report and any other public report prepared by the Commissioner is "promptly" delivered to the Crime and Public Integrity Policy Committee established under the *Parliamentary Committees Act 1991* (SA).
- [20] In addition, s46 directs that before the end of each financial year the Attorney-General must appoint a person to conduct a review of the operations of the Commissioner and the Office during the financial year. The person

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appointed must be eligible for appointment as the Commissioner. The person conducting the review is required to consider the following (s46(2)(a));

- (i) whether the powers under this Act were exercised in an appropriate manner and, in particular, whether undue prejudice to the reputation of any person was caused; and
- (ii) whether the practices and procedures of the Commissioner and the Office were effective and efficient; and
- (iii) whether the operations made an appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration in public administration...

[21] The person conducting the review may make recommendations as to changes that should be made to the Act or the practices or procedures of the Commissioner or the Office.

[22] The report prepared on the review must be presented to the Attorney-General who, within 12 sitting days after receipt of the report, must cause copies to be laid before each House of Parliament.

[23] The combined offices of the Commissioner and Office for Public Integrity employ approximately 40 staff. The total expenditure for the 2014-15 financial year was \$8.269m.

Appendix 1

Schedule 1 – Public officers, public authorities and responsible Ministers.

For the purposes of this Act, the table below lists public officers, the public authorities responsible for the officers and the Ministers responsible for the public authorities.

Public officers	Public authority	Minister
Governor	Attorney-General	Premier
a person appointed to an office by the Governor	Governor Attorney-General	Premier
a Member of the Legislative Council	Legislative Council	
an officer of the Legislative Council		
a person under the separate control of the President of the Legislative Council		
a Member of the House of Assembly	House of Assembly	
an officer of the House of Assembly		
a person under the separate control of the Speaker of the House of Assembly		
a member of the joint parliamentary service	Joint Parliamentary Service Committee	
the principal officer of a judicial body	Attorney-General	Premier
a judicial officer that constitutes a judicial body		
a judicial officer (other than a judicial officer who is the principal officer of a judicial body or who constitutes a judicial body)	the principal officer of the judicial body of which the judicial officer is a member Attorney-General	Premier
a member of the staff of the State Courts Administration Council	State Courts Administration Council	Attorney-General
a person who constitutes a statutory authority or who is a statutory office holder	the Minister responsible for the administration of the Act under which the statutory authority is constituted or the statutory office holder is appointed	Premier

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Public officers	Public authority	Minister
a person who is a member of the governing body of a statutory authority an officer or employee of a statutory authority or statutory office holder or a Public Service employee assigned to assist the statutory authority or statutory office holder	the statutory authority or statutory office holder	the Minister responsible for the administration of the Act constituting the statutory authority or statutory office holder
a member of a local government body an officer or employee of a local government body	the local government body	the Minister responsible for the administration of the <i>Local Government Act 1999</i>
the Local Government Association of South Australia	the Minister responsible for the administration of the <i>Local Government Act 1999</i>	Premier
a person who is a member of the governing body of the Local Government Association of South Australia an officer or employee of the Local Government Association of South Australia	the Local Government Association of South Australia	the Minister responsible for the administration of the <i>Local Government Act 1999</i>
the chief executive of an administrative unit of the Public Service	the Minister responsible for the administrative unit	Premier
a Public Service employee (other than a chief executive)	the chief executive of the administrative unit of the Public Service in which the employee is employed	the Minister responsible for the administrative unit
a police officer	Commissioner of Police	the Minister responsible for the administration of the <i>Police Act 1998</i>
a protective security officer appointed under the <i>Protective Security Act 2007</i>	Commissioner of Police	the Minister responsible for the administration of the <i>Protective Security Act 2007</i>
an officer or employee appointed by the employing authority under the <i>Education Act 1972</i>	the employing authority under the <i>Education Act 1972</i>	the Minister responsible for the administration of the <i>Education Act 1972</i>
a person appointed by the Premier under the <i>Public Sector Act 2009</i>	Premier	Attorney-General
a person appointed by the Minister under the <i>Public Sector Act 2009</i>	the Minister responsible for the administration of the <i>Public Sector Act 2009</i>	Premier

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Public officers	Public authority	Minister
any other public sector employee	the public sector agency that employs the employee	<p>if the public sector agency is the Premier, the Attorney-General</p> <p>if the public sector agency is a Minister other than the Premier, the Premier</p> <p>in any other case, the Minister responsible for the public sector agency or the Premier</p>
a person to whom a function or power of a public authority or a public officer is delegated in accordance with an Act	the public authority or the public authority responsible for the public officer (as the case requires)	<p>if the public authority is the Premier, the Attorney-General</p> <p>if the public authority is a Minister other than the Premier, the Premier</p> <p>in any other case, the Minister responsible for the public authority</p>
a person who is, in accordance with an Act, assisting a public officer in the enforcement of the Act	the public authority responsible for the public officer	the Minister responsible for the public authority
a person performing contract work for a public authority or the Crown	if the work is performed for a public authority, the public authority or, in any other case, the Premier	the Minister responsible for the public authority
a person declared by regulation to be a public officer	the person declared by regulation to be the public authority responsible for the public officer	the Minister declared by regulation to be responsible for the public authority and its public officers

Tasmania

- [1] The Tasmanian regime relies primarily upon the Integrity Commission. As in other jurisdictions, other bodies are also important contributors to the regime:
- Ombudsman – investigates complaints and carries out own motion investigations concerning the administration of the public sector and the treatment of prisoners. Jurisdiction also covers local government entities.
 - Parliamentary Standards Commissioner – established under the *Integrity Commission Act 2009* (Tas) to provide confidential advice to members of parliament concerning ethical issues, including the interpretation of relevant codes of conduct and guidelines.
 - Auditor-General – undertakes audits of the financial statements of State agencies and local government entities.

Integrity Commission

- [2] The Integrity Commission was established by the *Integrity Commission Act 2009* (Tas). The “object and objectives” of the Act are set out in s3:

Object and objectives

- (1) The object of this Act is to promote and enhance standards of ethical conduct by public officers by the establishment of an Integrity Commission.
- (2) The objectives of the Integrity Commission are to –
- (a) improve the standard of conduct, propriety and ethics in public authorities in Tasmania; and
 - (b) enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and
 - (c) enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

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[3] Section 3(3) speaks of how the Integrity Commission will endeavour to achieve the objectives:

(3) The Integrity Commission will endeavour to achieve these objectives by –

- (a) educating public officers and the public about integrity; and
- (b) assisting public authorities deal with misconduct; and
- (c) dealing with allegations of serious misconduct or misconduct by designated public officers; and
- (d) making findings and recommendations in relation to its investigations and inquiries.

[4] Underlying the role of the Integrity Commission is the concept of misconduct by public officers. “Misconduct” is defined in the following terms:

- (a) conduct, or an attempt to engage in conduct, of or by a public officer that is or involves –
 - (i) a breach of a code of conduct applicable to the public officer; or
 - (ii) the performance of the public officer’s functions or the exercise of the public officer’s powers, in a way that is dishonest or improper; or
 - (iii) a misuse of information or material acquired in or in connection with the performance of the public officer’s functions or exercise of the public officer’s powers; or
 - (iv) a misuse of public resources in connection with the performance of the public officer’s functions or the exercise of the public officer’s powers; or
- (b) conduct, or an attempt to engage in conduct, of or by any public officer that adversely affects, or could adversely affect, directly or indirectly, the honest and proper performance of functions or exercise of powers of another public officer –

but does not include conduct, or an attempt to engage in conduct, by a public officer in connection with a proceeding in Parliament...

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[5] As to the concept of “serious misconduct”, the definition in s4 is as follows:

Serious Misconduct means misconduct by any public officer that could, if proved, be –

- (a) a crime or an offence of a serious nature; or
- (b) misconduct providing reasonable grounds for terminating the public officer’s appointment.

[6] The Commission is concerned with the activities of persons who fall within the category of public officers. The definition is as follows:

public officer means a person who is a public authority or a person who holds any office, employment or position in a public authority whether the appointment to the office, employment or position is by way of selection or election or by any other manner, but does not include a person specified in section 5(2)...

[7] “Public Authorities” are defined in s5 in broad terms that encompass members of parliament and police officers:

Public authorities

(1) Subject to subsection (2), the following persons are public authorities for the purposes of this Act:

- (a) the Parliament of Tasmania and any person performing functions or exercising powers under the *Parliamentary Privilege Act 1898*;
- (b) a person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament whether in accordance with the *State Service Act 2000* or otherwise, except for a person performing functions or exercising powers under the *Parliamentary Privilege Act 1898*;
- (c) a State Service Agency;
- (d) the Police Service;
- (e) any person performing functions under the *Governor of Tasmania Act 1982*;
- (f) a Government Business Enterprise;
- (g) the Board of a Government Business Enterprise;
- (h) a State-owned company;

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- (i) the Board of a State-owned company;
- (ia) the University of Tasmania;
- (j) a body or authority, whether incorporated or not, whose members or a majority of whose members are appointed by the Governor or a Minister under the Act;
- (k) the holder of a statutory office;
- (l) a local authority;
- (m) a council-owned company;
- (n) any other prescribed body or authority, whether incorporated or not –
 - (i) to which any money is paid by way of appropriation from the Public Account; or
 - (ii) over which the Government or a Minister exercises control.

[8] Subsection (2) of s5 provides that the following persons are not public authorities for the purposes of the Act:

(2) The following persons are not public authorities for the purposes of this Act:

- (a) the Governor of Tasmania;
- (b) a judge of the Supreme Court;
- (c) the Associate Judge of the Supreme Court;
- (d) a magistrate of the Magistrates Court;
- (e) a court;
- (f) members of a tribunal;
- (g) members of the Tasmanian Industrial Commission;
- (h) the Integrity Commission;
- (i) any other prescribed person.

[9] In addition to an extensive education and training role, which includes developing “standards and codes of conduct to guide public officers in the

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conduct and performance of their duties” (s8(1)), the Commission is empowered to receive and investigate complaints about misconduct or to refer such complaints to the relevant public authority, Commissioner of Police or the Director of Public Prosecutions (s8(1)). The Commission may, on its own initiative, undertake an investigation “into any matter related to misconduct” and may gather evidence or ensure evidence is gathered for prosecution of persons for offences. If the Commission is satisfied that it is in the public interest and expedient to do so, it may recommend to the Premier that a Commission of Inquiry under the *Commissions of Inquiry Act 1995* (Tas) be established.

- [10] In the performance of its functions and the exercise of its powers, the Commission is not bound by the rules of evidence and is to perform its functions with “as little formality and technicality as possible” (s9(3)). In addition to specified powers, the Commission possesses “the power to do all things reasonably necessary or convenient to be done in connection with the performance of its functions” (s8(2)).
- [11] Part 6 of the Act provides for the appointment of investigators to conduct investigations. Investigators possess the common coercive powers concerning production of documents and information and the giving of oral evidence (ss47-52). These include the power, after obtaining written notice of authorisation from the Chief Executive Officer of the Commission, to enter any premises of a public authority or, after obtaining a warrant from a Magistrate, to enter private premises (ss50 and 51). The powers of the investigator while on premises to seize items and copy records are found in s52. If the investigation relates to a complaint of serious misconduct, s53 provides that with the approval of the Chief Executive Officer, an investigator may apply for a warrant under Part 2 of the *Police Powers (Surveillance Devices) Act 2006* (Tas) in connection with the use of surveillance devices.
- [12] On completion of an investigation the investigator is to prepare a report for the Chief Executive Officer who is to submit a report of the investigation to the

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Board of the Integrity Commission. The Board is established under s12 and is chaired by the Chief Commissioner. The role of the Board includes ensuring that the Chief Executive Officer and staff of the Commission “perform their functions and exercise their powers in accordance with sound public administration practice and principles of procedural fairness and the objectives” of the Act.

- [13] Following receipt of the report, the Board may dismiss the complaint or refer the complaint, report of investigation and information obtained in the conduct of the investigation to any one of various entities including the Commissioner of Police or DPP. In referring the matter to another entity, the Board may make a recommendation as to the appropriate action it considers should be taken in relation to the matter (s58(2)).
- [14] The Board is also empowered by s58 to determine that an inquiry be undertaken by an Integrity Tribunal. If the Board makes such a determination, the Chair of the Board is required to convene an Integrity Tribunal whose function is to “conduct an inquiry into a matter in respect of which the Board has determined under s58 that an inquiry be undertaken and make findings and determinations in respect of that matter” (ss60 and 61). The Tribunal is empowered to hold hearings and receive submissions or evidence and it possesses all the coercive powers which are common to these types of bodies and inquiries (ss69-74). These powers include, in the case of a complaint of serious misconduct, seeking a warrant in connection with matters of surveillance (s75).
- [15] At the conclusion of an inquiry, the Integrity Tribunal may (s78):
- dismiss the complaint;
 - find the misconduct or serious misconduct has occurred;
 - recommend to the Premier that a Commission of Inquiry be established;
 - “make such report as it considers appropriate in relation to the matter”.

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- [16] If the Integrity Tribunal determines that misconduct or serious misconduct has occurred, it may refer its determination to a number of entities including the Commissioner of Police or DPP (s78(3)).
- [17] Although the Tribunal may report its finding, and refer it to another body, it is not clear whether the Tribunal can make public a finding of serious misconduct, either directly or through the tabling of a report in Parliament.
- [18] As to protection of witnesses with respect to claims of privilege, s92 provides that in the different types of investigations to which I have referred, a witness may claim privilege and refuse to answer or produce a record, material or thing. In such circumstances, the person conducting the inquiry may withdraw the requirement or, if the requirement is not withdrawn, must issue a notice to comply with the requirement. The witness must either comply or apply to the Supreme Court for the court to determine the claim of privilege. The person conducting the investigation or inquiry must abide by the rule of the Supreme Court.
- [19] In the 2014-2015 financial year, the Integrity Commission employed a little over 14 staff and its expenditure was \$2.544m. In a media release of 7 August 2015, the retiring Chief Commissioner strongly criticised the government's decision "to make a significant reduction in the Commission's budget, notwithstanding a level of funding required for investigations". The Chief Commissioner described the legislative framework as "manifestly inadequate".

Victoria

[1] The Victorian integrity regime is centred on the Independent Broad-based Anti-corruption Commission. In addition, as in other jurisdictions, significant input is provided by:

- Ombudsman – investigates complaints and carries out own motion investigations concerning administrative actions of Victorian government departments and agencies, local government entities and statutory authorities.
- Auditor-General – audits and examines the management resources within the public sector.

Anti-Corruption Commission

[2] The Independent Broad-based Anti-corruption Commission (IBAC) was established by the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).¹⁴³ Section 8 of that Act identifies the objects of the act in the following terms:

The objects of this Act are to –

- (a) provide for the identification, investigation and exposure of –
 - (i) serious corrupt conduct; and
 - (ii) police personnel misconduct;
- (b) assist in the prevention of –
 - (i) corrupt conduct; and
 - (ii) police personnel misconduct;

¹⁴³ On 5 May 2016, the Victorian Parliament passed the Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015, which will make extensive amendments to the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

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- (c) facilitate the education of the public sector and the community about the detrimental effects of corrupt conduct and police personnel misconduct on public administration and the community and the ways in which corrupt conduct and police personnel misconduct can be prevented;
- (d) assist in improving the capacity of the public sector to prevent corrupt conduct and police personnel misconduct;
- (e) provide for the IBAC to assess police personnel conduct.

[3] Section 15(2) provides a broad description of the functions of the IBAC:

- (a) to identify, expose and investigate serious corrupt conduct;
- (b) to identify, expose and investigate police personnel misconduct;
- (c) to assess police personnel conduct.

[4] The IBAC is empowered to receive and investigate complaints concerning corrupt conduct and “police personnel conduct” (s15(3)). It may also refer such complaints to other persons or bodies for investigation or dismiss the complaints. Further, s15(5) specifies that the IBAC has education and prevention functions which are spelt out in s15(6).

[5] Section 60 empowers the IBAC to conduct an investigation “in accordance with its corrupt conduct investigative functions” upon receipt of a complaint or on its own motion. However, subsection (2) of s60 directs that the IBAC “must” not conduct an investigation “unless it is reasonably satisfied that the conduct is serious corrupt conduct”. Special provisions apply in the case of an investigation into the conduct of a judicial officer (ss61-63) and police personnel conduct (ss64 and 65).

[6] The legislative direction not to investigate unless reasonably satisfied that the conduct in question is “serious conduct” sets the foundation of the jurisdiction of the IBAC to exercise its powers and functions in respect of “corrupt” conduct that is “serious”. Section 4 provides the definition of “corrupt conduct”:

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Corrupt Conduct

(1) For the purposes of this Act, **corrupt conduct** means conduct –

- (a) of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body; or
- (b) of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body; or
- (c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust; or
- (d) of a public officer or a public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person; or
- (e) that could constitute a conspiracy or an attempt to engage in any conduct referred to in paragraph (a), (b), (c) or (d) –

being conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a relevant offence.

(2) Conduct may be **corrupt conduct** for the purposes of this Act if –

- (a) all or any part of the conduct occurs outside Victoria, including outside Australia; and
- (b) the conduct would be corrupt if it occurred in Victoria.

(3) This Act does not apply to any conduct of any person that can be considered by the Court of Disputed Returns in proceedings in relation to a petition under Part 8 of the *Electoral Act 2002*.

[7] “Relevant Offence” is defined in s3 as an indictable offence, perverting or attempting to pervert the course of justice or bribery of a public official.

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[8] As to “police personnel conduct”, the definition is found in s5:

police personnel conduct means –

(a) in relation to a public officer who is a police officer or protective services officer -

(i) an act or decision or the failure or refusal by the public officer to act or make a decision in the exercise, performance or discharge, or purported exercise, performance or discharge, whether within or outside Victoria, of a power, function or duty which the public officer has as, or by virtue of being, a police officer or protective services officer; or

(ii) conduct which constitutes an offence punishable by imprisonment; or

(iii) conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or

(iv) disgraceful or improper conduct (whether in the public officer’s official capacity or otherwise);

(b) in relation to a public officer who is a Victoria Police employee or police recruit -

(i) an act or decision or the failure or refusal by the public officer to act or make a decision in the exercise, performance or discharge, or purported exercise, performance or discharge, whether within or outside Victoria, of a power function or duty which the public officer has as, or by virtue of being, a Victoria Police employee or police recruit; or

(ii) conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it...

[9] The definition of “police personnel misconduct”, is found in s5(4) in the following terms:

police personnel misconduct means –

(a) in relation to a public officer who is a police officer or protective services officer -

(i) conduct which constitutes an offence punishable by imprisonment; or

(ii) conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or

(iii) disgraceful or improper conduct (whether in the public officer’s official capacity or otherwise);

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(b) in relation to a public officer who is a Victoria Police employee or police recruit, conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it.

[10] If the conduct in question is “serious corrupt conduct”, the IBAC is empowered to investigate such conduct “of any person”, including such conduct of a “public officer” or “public body”. Lengthy definitions of “public officer” and “public body” are found in s6(1), but s6(2) provides that the following are not a “public officer” or a “public body” for the purposes of the Act:

- The IBAC
- An IBAC officer
- A public interest monitor
- The Office of Special Investigations Monitor
- The Special Investigations Monitor appointed under s5 of the *Major Crime (Special Investigations Monitor) Act 2004* (Vic)
- The Victorian Inspectorate
- A Victorian Inspectorate Officer within the meaning s3 of the *Victorian Inspectorate Act 2011* (Vic)
- A judicial member of the courts council within the meaning of the *Court Services Victoria Act 2014* (Vic)
- A court.

[11] In addition to the general power to “do all things that are necessary or convenient to be done for or in connection with, or as incidental to, the achievement of the objects of [the] Act and the performance of its duties and functions” (s16), the IBAC possesses the wide-ranging coercive powers that are common to bodies of this type. As in other jurisdictions, these powers encompass compulsory production of information or material, including

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documents, and the summoning of witnesses who are required to give oral evidence on oath or affirmation (Parts 4 and 6 of the Act). The investigative powers include applying to a Judge of the Supreme Court for a search warrant with respect to premises, vehicle, vessel or aircraft, but the Act does not mention surveillance devices.

- [12] Leaving aside special provisions with respect to police personnel, privilege against self-incrimination is abrogated (s144). However, any answer, information, document or thing that might tend to incriminate the witness or make the witness liable to a penalty is not admissible in evidence against the person “before any court or person acting judicially” except in relation to specified proceedings including perjury and an offence against the Act (s144(2)). Provision is made for application to the Supreme Court for determination of a claim for privilege or application of secrecy requirement (ss146-148).
- [13] Upon completion of an investigation, the IBAC may refer the matter to various bodies, with or without recommendations or may provide a special report to each House of Parliament (ss162 and 164). Other options are also specified. It is clear from provisions concerning notice of “adverse findings” in reports that the IBAC has power to make and report “adverse findings”, but s162 directs that in a report to Parliament certain restrictions apply:
- (5) If the IBAC is aware of a criminal investigation or any criminal proceedings or other legal proceedings in relation to a matter or person to be included in a report under this section, the IBAC must not include in the report any information which would prejudice the criminal investigation, criminal proceedings or other legal proceedings.
 - (6) The IBAC must not include in a report under this section a statement as to –
 - (a) a finding or an opinion that a specified person is guilty of or has committed, is committing or is about to commit, any criminal offence or disciplinary offence; or
 - (b) a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence.

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(7) The IBAC must not include in a report under this section any information that would identify any person who is not the subject of any adverse comment or opinion unless the IBAC –

- (a) is satisfied that it is necessary or desirable to do so in the public interest; and
- (b) is satisfied that it will not cause unreasonable damage to the person's reputation, safety or wellbeing; and
- (c) states in the report that the person is not the subject of any adverse comment or opinion.

[14] The IBAC is required to provide an annual report each financial year pursuant to Part 7 of the *Financial Management Act 1994* (Vic). Section 165 of the IBAC Act (Vic) specifies matters that must be included in that report. It also specifies matters that must not be included.

[15] In the 2014-2015 financial year, the IBAC employed 106 staff and its expenditure was \$31.228m.

[16] The IBAC Act has been extensively reviewed¹⁴⁴. During the review it was suggested that the definition of “corrupt conduct” was too narrow because it is linked to criminal conduct and that corruption can occur in ways that do not involve committing a criminal offence¹⁴⁵. This is a view shared by the former Tasmanian Integrity Commissioner who has been quoted as saying that in his experience in Tasmania “serious misconduct could arise in circumstances where there was no breach of criminal law”. The former Commissioner cited serious conflicts of interest, close relationships with a contractor or providing preferential treatment to friends or relatives in employment as examples of serious misconduct which could be committed by senior members of the department without breaching the criminal law.

¹⁴⁴ Independent Broad-based Anti-Corruption [Parliamentary] Committee, *Strengthening Victoria's Key Anti-Corruption Agencies?*, (Parliament of Victoria, February 2016).

¹⁴⁵ On 5 May 2016, the Victorian Parliament passed the Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015, which will make extensive amendments to the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

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- [17] In the context of the Victorian review, the first report of the Parliamentary Committee noted that while most protected disclosures must be sent to the IBAC for assessment, if such a disclosure relates to a member of Parliament, the allegation must be referred to a presiding officer of Parliament, but the particular presiding officer is not obliged to refer the allegations to the IBAC.

Western Australia (WA)

- [1] The Western Australia regime is centred on the Corruption and Crime Commission. As in all jurisdictions, other entities also contribute significantly:
- Public Sector Commission – oversees the operations of the public sector and is able to investigate cases of minor misconduct.
 - The Ombudsman – investigates the administrative actions and practices of public authorities, including local government entities and universities.
 - Information Commissioner – primary role with respect to freedom of information issues.
 - Auditor-General – auditing finances and activities of the public sector.

Corruption and Crime Commission

- [2] The Corruption and Crime Commission was established by the *Corruption, Crime and Misconduct Act 2003* (WA). The main purposes of the Act are described in s7A as combatting and reducing the incidence of organised crime and improving the integrity of, and reducing the incidence of misconduct, in the public sector.
- [3] Section 7B states that the purposes of the Act are to be achieved “primarily” by establishing the Commission which is able to investigate cases of “serious misconduct”. In addition, s7B(2) states that the Commission is able to authorise the use of investigative powers “not ordinarily available” to the police for the purpose of effectively investigating particular cases of organised crime. Section 7B(5) states that the Public Sector Commissioner is able to investigate cases of “minor misconduct”.
- [4] The function of the Commission with respect to serious misconduct is set out in detail in s18 and other functions are described in the following sections. With respect to the serious misconduct function, the Commission is charged with

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responsibility of ensuring that an allegation or information concerning serious misconduct is dealt with in an appropriate way, including determining the course of action required and, if appropriate, investigating the allegation or information. Section 18 also spells out the duty of the Commission to make recommendations and provide reports on the outcome of investigations.

[5] The foundation of the Commission’s jurisdiction is “serious misconduct”. As to the meaning of “misconduct”, s4 provides the following definition:

Misconduct occurs if –

- (a) a public officer corruptly acts or corruptly fails to act in the performance of the functions of the public officer’s office or employment; or
- (b) a public officer corruptly takes advantage of the public officer’s office or employment as a public officer to obtain a benefit for himself or herself or for another person or to cause a detriment to any person; or
- (c) a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years’ imprisonment; or
- (d) a public officer engages in conduct that –
 - (i) adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public authority or public officer whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct; or
 - (ii) constitutes or involves the performance of his or her functions in a manner that is not honest or impartial; or
 - (iii) constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or
 - (iv) involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person,

and constitutes or could constitute –

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[(v) deleted]

- (vi) a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the *Public Sector Management Act 1994* (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct).

[6] The Western Australian legislation does not define “corruptly”.

[7] “Serious” misconduct is defined in s3 as meaning misconduct by a public officer of the kind described in s4(a), (b), or (c) or “police misconduct”. “Police misconduct” is defined in s3 as meaning misconduct by a member of the Police Force or an employee of the Police Department or a person seconded to perform functions and services for, or duties in the service of, the Police Department. The definition also includes “reviewable police action” which is defined as follows:

reviewable police action means any action taken by a member of the Police Force, an employee of the Police Department or a person seconded to perform functions and services for, or duties in the service of, the Police Department that –

- (a) is contrary to law; or
- (b) is unreasonable, unjust, oppressive or improperly discriminatory; or
- (c) is in accordance with a rule of law, or a provision of an enactment or a practice, that is or may be unreasonable, unjust, oppressive or improperly discriminatory; or
- (d) is taken in the exercise of a power or a discretion, and is so taken for an improper purpose or on irrelevant grounds, or on the taking into account of irrelevant considerations; or
- (e) is a decision that is made in the exercise of a power or a discretion and the reasons for the decision are not, but should be, given.

[8] As is apparent from the definition, leaving aside police misconduct, serious misconduct relates to the behaviour of a “public officer”. Section 3 prescribes that “public officer” has the meaning given by s1 of the Western Australian

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Criminal Code. It is a lengthy list which includes police officers, Members of Parliament, Ministers of the Crown, public sector employees, members of local government entities and “any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not.”

- [9] Notwithstanding the all-inclusive nature of the definition, s27 prohibits the Commission from receiving or initiating allegations about the Commissioner, the Parliamentary Inspector or an officer of the Parliamentary Inspector (s27). As to judicial officers, s27(3) prohibits the Commissioner from receiving or initiating an allegation about a person in their capacity as the holder of judicial office, unless the allegation relates to an offence under s121 of the Criminal Code (Appendix B of the *Criminal Code Act Compilation Act 1913 WA*) or “is of a kind that, if established, would constitute grounds for removal from judicial office”. Section 121 of the Criminal Code relates to an offence conveniently identified as judicial corruption.
- [10] In addition, when dealing with the conduct of the holder of a judicial office, the Commission is required to proceed having “proper regard” for preserving the independence of judicial officers and in accordance with conditions and procedures formulated in continuing consultation with the Chief Justice (s27(4), (5), *Corruption, Crime and Misconduct Act 2003 (WA)*).
- [11] The powers of the Commission in carrying out its functions and investigations are set out in Part 6 of the *Corruption, Crime and Misconduct Act 2003 (WA)* and include wide coercive powers that are common to bodies of this type. They include entering and searching premises of a public authority without a warrant and applying for a warrant from a Supreme Court Judge in respect of private premises.
- [12] In addition to powers related to the investigation of serious misconduct, the Commission is endowed with functions with respect to the Police Royal Commission and organised crime. In respect of organised crime, the Commission possesses powers that are described as “exceptional”. The

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relevant provisions are found in Part 4 of the Act. It is unnecessary to discuss these functions or powers.

- [13] As to witnesses, legal professional privilege and the privilege against self-incrimination are abrogated. As in other jurisdictions, a statement by a witness in answer to a question that the Commissioner requires the witness to answer is not admissible in criminal proceedings or proceedings in the imposition of a penalty other than contempt proceedings or proceedings for an offence against the Act or disciplinary action (ss144 and 145).
- [14] The Commission possesses broad powers of referral, recommendation and oversight. It may, at any time, prepare a report on a matter that has been a subject of an investigation and cause the report to be laid before each House of Parliament (s 84). A report to Parliament under s84 may include “statements as to any of the Commission’s assessments, opinions and recommendations” and as to reasons for these views (s84(3)). In this way the Commission’s findings become public.
- [15] An annual report to Parliament is required by s91 which specifies the matters to be included in the report.
- [16] Oversight of the operation of the Commission is provided through a Standing Committee of Parliament (s216A) and the Office of the Parliamentary Inspector of the Corruption and Crime Commission (Part 13 of the Act). The Parliamentary Inspector is an officer of Parliament and is responsible for assisting the Standing Committee in the performance of its functions (s188(4)).
- [17] The functions and powers of the Parliamentary Inspector are set out in ss195-198:

195 Functions

(1) The Parliamentary Inspector has the following functions –

(aa) to audit the operation of the Act;

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- (a) to audit the operations of the Commission for the purpose of monitoring compliance with the laws of the State;
 - (b) to deal with matters of misconduct on the part of the Commission, officers of the Commission and officers of the Parliamentary Inspector;
 - (cc) to audit any operation carried out pursuant to the powers conferred or made available by this Act;
 - (c) to assess the effectiveness and appropriateness of the Commission's procedures;
 - (d) to make recommendations to the Commission, independent agencies and appropriate authorities;
 - (e) to report and make recommendations to either House of Parliament and the Standing Committee;
 - (f) to perform any other function given to the Parliamentary Inspector under this or another Act.
- (2) The functions of the Parliamentary Inspector may be performed –
- (a) on the Parliamentary Inspector's own initiative; or
 - (b) at the request of the Minister; or
 - (c) in response to a matter reported to the Parliamentary Inspector; or
 - (d) in response to a reference by either House of Parliament, the Standing Committee or the Commission.
- (3) The Parliamentary Inspector may declare himself or herself unable to act in respect of a particular matter by reason of an actual or potential conflict of interest.
- (4) The Commission is not to exercise any of its powers in relation to the Parliamentary Inspector.

[Section 195, formerly section 40, amended by No. 78 of 2003 s. 18 and 27; renumbered as section 195 by No. 78 of 2003 s. 35(1).]

196 Powers

- (1) In this section –

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officers means –

- (a) officers of the Commission; or
 - (b) officers of the Parliamentary Inspector.
- (2) The Parliamentary Inspector has power to do all things necessary or convenient for the performance of the Parliamentary Inspector's functions.
- (3) Without limiting subsection (2), the Parliamentary Inspector –
- (a) may investigate any aspect of the Commission's operations or any conduct of officers; and
 - (b) is entitled to full access to the records of the Commission and to take or have copies made of any of them; and
 - (c) may require officers to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or the conduct of officers; and
 - (d) may require officers to attend before the Parliamentary Inspector to answer questions or produce documents or other things relating to the Commission's operations or the conduct of officers; and
 - (e) may consult, cooperate and exchange information with independent agencies, appropriate authorities and –
 - (i) the Commissioner of the Australian Federal Police;
 - (ii) the Commissioner of a Police Force of another State or Territory;
 - (iii) the CEO of the Australian Crime Commission established by the *Australian Crime Commission Act 2002* of the Commonwealth;
 - (iv) the Commissioner of Taxation holding office under the *Taxation Administration Act 1953* of the Commonwealth;
 - (v) the Director-General of Security holding office under the *Australian Security Intelligence Organisation Act 1979* of the Commonwealth;
 - (vi) the Director of the Australian Transaction Reports and Analysis Centre under the *Financial Transaction Reports Act 1988* of the Commonwealth;

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- (vii) any person, or authority or body of this State, the Commonwealth, another State or a Territory that is declared by the Minister to be a person, authority or body to which this paragraph applies;
 - and
 - (f) may refer matters relating to the Commission or officers to other agencies for consideration or action; and
 - (g) may recommend that consideration be given to disciplinary action against, or criminal prosecution of, officers.
- (4) The Commission is to notify the Parliamentary Inspector whenever it receives an allegation that concerns, or may concern, an officer of the Commission and at any time the Parliamentary Inspector may review the Commission's acts and proceedings with respect to its consideration of such an allegation.
- (5) Upon a review under subsection (4), the Parliamentary Inspector may notify the Commission that the matter is to be removed to the Parliamentary Inspector for consideration and determination.
- (6) On receipt of a notice under subsection (5), the Commission is to comply with its terms.
- (7) Upon a removal under subsection (5), the Parliamentary Inspector may –
- (a) annul the Commission's determination and substitute another; or
 - (b) make any decision the Parliamentary Inspector might otherwise have made had the Parliamentary Inspector exercised an original jurisdiction; or
 - (c) make any ancillary order, whether final or provisional, that is remedial or compensatory.
- (8) Where the Parliamentary Inspector proposes to act under subsection (7)(a), the Commission must be given a reasonable opportunity to show cause why its determination should not be annulled.
- (9) The Parliamentary Inspector must not undertake a review of a matter that arises from, or can be dealt with under, a jurisdiction created by, or that is subject to, the *Industrial Relations Act 1979*.

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[Section 196 inserted y No. 78 of 2003 s. 28.]

197 Inquiries

- (1) For the purpose of the Parliamentary Inspector's functions, the Parliamentary Inspector may make or hold an inquiry.
- (2) For the purposes of an inquiry under this section –
 - (a) the Parliamentary Inspector has the powers, protections and immunities of a Royal Commission and the Chairman of a Royal Commission under the *Royal Commissions Act 1968*; and
 - (b) the *Royal Commissions Act 1968* applies to any person summoned by or appearing before the Parliamentary Inspector in the same way as it applies to a person summoned by or appearing before a Commissioner under that Act.
- (3) Sections 7, 9 to 17, 18(2) to (11), 19(1), 19A to 22, 31(3), 32 and 33 of the *Royal Commissions Act 1968* have effect as if they were enacted in this Act with such modifications as are required and in terms made applicable to an inquiry under this section.
- (4) An inquiry held by the Parliamentary Inspector must not be open to the public.
- (5) Despite subsections (2) and (3), a public authority or public officer who is required under this section to answer questions, give evidence, produce records, things or information or make facilities available is not entitled to claim legal professional privilege as a reason for not complying with that requirement.

[Section 198 inserted by No. 78 of 2003 s. 28.]

- [18] The Parliamentary Inspector may at any time prepare a report and may cause the report to be laid before each House of Parliament (s199). Alternatively, the Parliamentary Inspector may make a report to the Standing Committee rather than laying a report before each House of Parliament (s201). In addition, the Parliamentary Inspector is required to provide an annual report to Parliament relating to the general activities of the Inspector.

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- [19] In this overview of the Western Australian Corruption and Crime Commission, I have concentrated upon investigations related to corruption in public administration. It is unnecessary to deal with other aspects of the Commission's role such as the Police Royal Commission and Organised Crime.
- [20] Given its extensive role, it is not surprising that the Western Australian Commission is a large organisation. In the 2014-2015 financial year, the Commission employed 143 staff and its expenditure was \$31.811m. This expenditure exceeds the New South Wales ICAC but is less than the Queensland Crime and Corruption Commission.

Annexure 13 – Appointing a Commissioner

Australian Anti-Corruption Commissions - Appointing a Commissioner

Jurisdiction	Required qualifications	Remuneration	Term
NSW ICAC	<p>A person must have served as, or is qualified for appointment as, a Judge of the Supreme Court of any State or Territory, the Federal Court or the High Court.*</p> <p>A person cannot hold any judicial office or be a member of any Australian Parliament.</p> <p style="text-align: center;">(Schedule 1)</p>	<p>Detailed in the Instrument of Appointment.</p> <p style="text-align: center;">(Schedule 1)</p>	<p>5 years.</p> <p>Can be reappointed.</p> <p style="text-align: center;">(Schedule 1)</p>
QLD Crime and Corruption Commission	<p>A person must have served as, or is qualified for appointment as, a Judge of the Supreme Court of any State or Territory, the High Court, or the Federal Court.*</p> <p>Must not be an ‘ineligible person’, as defined in Schedule 2, which includes a person who is a member of the Legislative Assembly or member of the judiciary.</p> <p style="text-align: center;">(Section 224)</p>	<p>Not specified – decided by the Governor in Council.</p> <p style="text-align: center;">(Section 232)</p>	<p>5 years.</p> <p>Can be reappointed, but cannot hold office for more than 10 years in total.</p> <p style="text-align: center;">(Section 231)</p>
SA ICAC	<p>A person must be a legal practitioner of at least 7 years’ standing or a former Judge of the High Court, Federal Court or the Supreme Court of any State or Territory.</p> <p>The person cannot be a judicial officer or a member of an Australian Parliament.</p> <p style="text-align: center;">(Section 8)</p>	<p>Detailed in the Instrument of Appointment.</p> <p>If a person is a judicial officer immediately before being appointed to be the Commissioner:</p> <ul style="list-style-type: none"> • the conditions of the appointment should not be less favourable to the person than the conditions of his or her judicial office (when viewed from an overall perspective); and • for the purposes 	<p>7 years.</p> <p>Can be reappointed, but cannot hold office for longer than 10 years in total.</p> <p style="text-align: center;">(Section 8)</p>

Annexure 13 – Appointing a Commissioner

Jurisdiction	Required qualifications	Remuneration	Term
		<p>of determining the person's entitlement to recreation leave, sick leave, long service leave or any other kind of leave under this or another Act, the appointment may, at the option of the person, be taken to be a continuation of his or her service as a judicial officer.</p> <p>(Section 8)</p>	
Tasmanian Integrity Commission	<p>A person must be an Australian lawyer with 7 years' standing as a legal practitioner, and must be under the age of 72.</p> <p>A person is not eligible if 5 years immediately prior to the proposed appointment they were a member of any Australian Parliament, a member of a council or a member of a political party (or a similar organisation).</p> <p>(Section 15)</p>	<p>Not specified – detailed in the Commissioner's instrument of appointment as a member of the Integrity Board.</p> <p>(Schedule 2)</p>	<p>5 years.</p> <p>Can be reappointed.</p> <p>(Schedule 2)</p>
VIC IBAC	<p>A person must have been, or is qualified for appointment as, a Judge of any State or Territory Supreme Court, the High Court or the Federal Court.*</p> <p>A person cannot be a member of any Australian Parliament.</p> <p>A person must cease to hold any judicial office upon appointment.</p> <p>(Section 20)</p>	<p>Determined by the instrument of appointment.</p> <p>If the Commissioner was immediately before his or her appointment a judge of the Supreme Court, his or her service as a Commissioner shall count as service in the office of judge of the Supreme Court for the purposes of entitlement to a pension under section 83 of the <i>Constitution Act 1975</i>.</p> <p>(Section 24)</p>	<p>5 years.</p> <p>Not eligible for reappointment.</p> <p>(Section 24)</p>

Annexure 13 – Appointing a Commissioner

Jurisdiction	Required qualifications	Remuneration	Term
WA Corruption and Crime Commissioner	<p>A person must have served as, or is qualified for appointment as, a Judge of the Supreme Court of any State or Territory, the High Court, or the Federal Court.*</p> <p>A person who is or has been a police officer is not eligible for appointment.</p> <p>A person must cease to hold any judicial office upon appointment.</p> <p>(Section 10)</p>	<p>The Commissioner is entitled to be paid remuneration and to receive allowances or reimbursement at the same rate as a puisne judge of the Supreme Court.</p> <p>The Commissioner is entitled to the same conditions to respect of leave of absence as a judge of the Supreme Court.</p> <p>(Schedule 2)</p>	<p>5 years.</p> <p>Can be reappointed once.</p> <p>(Schedule 2)</p>

* The qualifications for appointment as a Supreme Court Judge, High Court Judge or Federal Court Judge are as follows:

Position	Jurisdiction	Qualification
Supreme Court Judge	Northern Territory	10 years' experience as a legal practitioner
	Queensland	5 years' experience as a legal practitioner
	NSW	7 years' experience as a legal practitioner
	South Australia	10 years' experience as a legal practitioner (Puisne Judge)
		15 years' experience or previous judicial appointment (Chief Justice)
	Tasmania	5 years' experience as a legal practitioner
	Victoria	5 years' experience as a legal practitioner or previous judicial appointment
	Western Australia	8 years' experience as a legal practitioner
	ACT	5 years' experience as a legal practitioner
High Court Judge	High Court	5 years' experience as a legal practitioner or previous judicial appointment
Federal Court Judge	Federal Court	5 years' experience as a legal practitioner or previous judicial appointment

Annexure 14 – Search Warrant & Surveillance Powers (Table)

Search Warrant and Surveillance Powers

Jurisdiction	Can enter public offices without a search warrant from a court	Can issue own search warrants for private residences	Can apply to a judge for a search warrant	Must have reasonable grounds to apply for a search warrant	Can conduct surveillance	Can conduct telecommunication intercepts	Can use assumed identities
NSW ICAC	<p align="center">✓</p> <p>The Commissioner or an officer of the Commission authorised in writing by the Commissioner may, at any time, enter and inspect the premises of a public authority or official, inspect any document or other thing on the premises, and take copies of any document in or on the premises.</p> <p align="center">Section 23</p>	<p align="center">✓</p> <p>The Commissioner can issue search warrants.</p> <p align="center">Section 40</p>	<p align="center">✓</p> <p>A Commission officer can apply to the Commissioner or an 'authorised officer' for the issue of a search warrant.</p> <p align="center">Section 40</p> <p>An 'authorised officer' is defined in s3 and has the same meaning as it has in the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> (NSW)</p>	<p align="center">✓</p> <p>An authorised officer or the Commissioner may issue a search warrant if there are reasonable grounds for doing so.</p> <p align="center">Section 40</p>	<p align="center">✓</p> <p>The Commissioner or an officer of the Commission may seek the issue of a warrant under the <i>Surveillance Devices Act 2007</i> (NSW).</p> <p align="center">Section 19(2)</p>	<p align="center">✓</p> <p>The Commission has powers under the <i>Telecommunication (Interception and Access) (New South Wales) Act 1987</i> (NSW).</p>	<p align="center">✓</p> <p>The Commission has powers under the <i>Law Enforcement and National Security (Assumed Identities) Act 2010</i> (NSW).</p>
QLD Crime and Corruption Commission	<p align="center">✓</p> <p>The Chairman may authorise a Commission Officer to enter and search official premises, inspect any document or thing, seize and remove any document or thing, or make copies of any document.</p> <p align="center">Section 73(3)</p>	<p align="center">X</p>	<p align="center">✓</p> <p>A Commission Officer may apply for a search warrant to a magistrate or Supreme Court judge.</p> <p align="center">Section 86</p>	<p align="center">✓</p> <p>The search warrant issuer must be satisfied that there are reasonable grounds for suspecting evidence of the commission of major crime or corruption is at the place or is likely to be taken to the place within the next 72 hours.</p> <p align="center">Section 87</p>	<p align="center">✓</p> <p>An authorised officer may, with the Chairman's approval, apply to a Supreme Court judge for a warrant authorising the use of a surveillance device.</p> <p align="center">Section 121</p>	<p align="center">✓</p> <p>The Commission has powers under the <i>Telecommunications Intercept Act 2009</i> (Qld)</p>	<p align="center">✓</p> <p>A Commission Officer may apply to the Chairman to acquire or use an assumed identity.</p> <p align="center">Section 146S</p>

Annexure 14 – Search Warrant & Surveillance Powers (Table)

Jurisdiction	Can enter public offices without a search warrant from a court	Can issue own search warrants for private residencies	Can apply to a judge for a search warrant	Must have reasonable grounds to apply for a search warrant	Can conduct surveillance	Can conduct telecommunication intercepts	Can use assumed identities
SA ICAC	<p style="text-align: center;">✓</p> <p>An investigator can apply to the Commissioner for a search warrant to enter and search a place or vehicle occupied or used by an inquiry agency, public authority or public officer.</p> <p>Section 31(1)</p>	X	<p style="text-align: center;">✓</p> <p>An investigator may apply to a judge of the Supreme Court for a search warrant for a private place or vehicle.</p> <p>Section 31(2)</p>	<p style="text-align: center;">✓</p> <p>A warrant can only be issued if the Commissioner or the judge is satisfied that the warrant is reasonably required for the purposes of the investigation.</p> <p>Section 31 (3)</p>	<p style="text-align: center;">✓</p> <p>The Commission has powers under the <i>Listening and Surveillance Devices Act 1972</i> (SA).</p>	<p style="text-align: center;">✓</p> <p>The Commission has powers under the <i>Telecommunications (Interception) Act 2012</i> (SA).</p>	<p style="text-align: center;">✓</p> <p>The Commission has powers under the <i>Criminal Investigation (Covert Operations) Act 2009</i>.</p>
TAS Integrity Commission	<p style="text-align: center;">✓</p> <p>A investigator, or anyone assisting an investigator, can obtain written approval from the CEO to enter any premises of a public authority without a search warrant.</p> <p>Section 50</p>	X	<p style="text-align: center;">✓</p> <p>An investigator may apply to a magistrate for a warrant to enter premises.</p> <p>Section 51(1)</p>	<p style="text-align: center;">✓</p> <p>The magistrate may issue a search warrant if the investigator satisfies the magistrate that there are reasonable grounds to suspect that material relevant to the investigation is located at the premises.</p> <p>Section 51(2)</p>	<p style="text-align: center;">✓</p> <p>An investigator, with the approval of the CEO, may apply for a warrant under the <i>Police Powers (Surveillance Devices) Act 2006</i> (Tas).</p> <p>Section 53</p>	X	X
VIC IBAC	<p style="text-align: center;">✓</p> <p>An authorised officer can enter police personnel premises at any time, search those premises, and inspect or copy any document or other thing found at those premises.</p> <p>Section 86(1)</p> <p>The authorised officer also has the power to seize</p>	X	<p style="text-align: center;">✓</p> <p>An authorised officer may apply to a judge of the Supreme Court for a search warrant.</p> <p>Section 91</p>	<p style="text-align: center;">✓</p> <p>A judge of the Supreme Court can issue a warrant if they are satisfied that there are reasonable grounds to issue the warrant.</p> <p>Section 91(3)</p>	<p style="text-align: center;">✓</p> <p>The Commission has powers under the <i>Surveillance Device Act 1999</i> (Vic).</p>	<p style="text-align: center;">✓</p> <p>The Commission has powers under the <i>Telecommunications (Interception and Access) Act 1979</i> (Cth).</p>	<p style="text-align: center;">✓</p> <p>The Commission has powers under the <i>Crimes (Assumed Identities) Act 2004</i> (Vic).</p>

Annexure 14 – Search Warrant & Surveillance Powers (Table)

Jurisdiction	Can enter public offices without a search warrant from a court	Can issue own search warrants for private residencies	Can apply to a judge for a search warrant	Must have reasonable grounds to apply for a search warrant	Can conduct surveillance	Can conduct telecommunication intercepts	Can use assumed identities
	documents or things at police personnel premises. Section 87						
WA Corruption and Crime Commission	✓ An officer of the Commission authorised in writing by the Commission may, at any time without a warrant, enter and inspect any premises occupied by a public authority or officer, inspect any document or other thing on the premises, and take copies of any document on the premises. Section 100	✗	✓ An authorised person can apply to a Supreme Court judge for a search warrant. Section 101	✓ A judge of the Supreme Court can issue a search warrant if there are reasonable grounds for suspecting that there may be relevant material in or on particular premises. Section 101(2)	✓ The Commission has powers under the <i>Surveillance Devices Act 1998</i> (WA).	✓ The Commission has powers under the <i>Telecommunications (Interception and Access) Western Australia Act 1999</i> (WA)	✓ The Commissioner may grant an approval for the acquisition and use of an assumed identity by a police officer as if the police officer were an officer of the Commission. Sections 60-62, 103

MINISTERIAL CODE OF CONDUCT

PREAMBLE

These guidelines have been developed to assist Ministers to understand their ethical responsibilities and their obligations within the Westminster system of government and as Ministers generally.

Ministers are expected to behave according to the highest ethical standards in the performance of their duties. They hold a position of public confidence and trust, and have discretionary power which can have a significant impact on citizens of the Northern Territory. Ministers must therefore commit themselves to the highest ethical standards to maintain and strengthen the democratic traditions of our State and its Institutions.

Merely avoiding breaking the law will not always be enough to guarantee an acceptable standard of conduct. Ministers must not only act lawfully but also in a manner which withstands the closest public scrutiny and which has regard to prevailing community values and standards.

If a Minister engages in conduct which constitutes a breach of this Code, the Chief Minister shall decide upon an appropriate course of action.

1. WESTMINSTER CONVENTIONS – INDIVIDUAL AND COLLECTIVE RESPONSIBILITY

- 1.1 Ministers are answerable to the Legislative Assembly (and through the parliament to the people of the Northern Territory) for the administration of their portfolios, including in relation to the expenditure of public money, in keeping with accepted conventions of Westminster system parliaments. Ministers have individual and collective responsibilities. Individual responsibilities relate to their personal decisions and conduct and the management of their portfolios. Collective responsibilities relate to the decisions of the Cabinet.
- 1.2 The convention of collective responsibility is central to the Cabinet system of government. It is essentially that Cabinet decisions reflect collective conclusions and are binding on all Ministers as Government policy. Following on from this, all Ministers are expected to give their support in public debate to decisions of the Government, regardless of their personal view. This is the basis of the ethical and effective working of executive government within the Westminster system. Cabinet Ministers cannot dissociate themselves from, or repudiate, the decisions of their Cabinet colleagues unless they resign from Cabinet. It is the Chief Minister's role as Chair of Cabinet, where necessary, to enforce Cabinet solidarity.
- 1.3 Ministers should ensure that policy initiatives or expenditure commitments which require Cabinet authority are not announced in advance of Cabinet's consideration of the matter. In exceptional cases where prior Cabinet clearance is not possible, proposed announcements must be cleared with the Chief Minister and, if expenditure is involved, with the Treasurer before any announcement is made.
- 1.4 Administrative procedures have been adopted to support the convention of collective responsibility. All Ministers receive copies of Cabinet Submissions, memoranda, business lists, and forecasts so that they may be aware of the business coming to Cabinet, whether or not they are able to be present at any particular meeting. Similarly, Ministers receive a copy of all Cabinet Decisions (with the occasional

exception in the case of particularly sensitive Decisions) whether or not they were present at the meeting.

2. CABINET CONFIDENTIALITY

- 2.1 Collective responsibility is supported by the strict confidentiality attaching to Cabinet documents and to discussions in the Cabinet room.
- 2.2 Cabinet meetings are forums in which Ministers, while working towards a collective position, are able to discuss proposals and a variety of options and views with frankness and freedom. The openness and frankness of discussions in the Cabinet Room is protected by the strict observance of Cabinet confidentiality.
- 2.3 Effective Cabinet confidentiality requires the protection of Cabinet deliberations not only at the time an issue is current but also into the future, subject to the agreed processes for distribution and announcement of Cabinet outcomes.

3. CONFLICT OF INTEREST

- 3.1 **General** - Ministers are to advise the Chief Minister immediately of any private interests, pecuniary or non-pecuniary, held by themselves or members of their immediate family of which they are aware, which give rise to (or may potentially give rise to) a conflict with their public duties. Any other matter which may give rise to a conflict between duty and interest must also be declared. Ministers should adopt a broad interpretation of this requirement. Any conflict of interest between a Minister's private interest and their public duty which arises must be resolved promptly in favour of the public interest.
- 3.2 **Procedure for declaring interest** - Generally a declaration should be made in all cases where an interest exists which could not be said to be shared with the rest of the community or as a member of a broad class of persons. Where a conflict is declared in respect of a matter before Cabinet, it is open to the Cabinet meeting to excuse a Minister from the discussion due to a conflict of interest or vested interest, or agree explicitly to his/her taking part. If Ministers have any concern about a conflict or a potential conflict of interest in any area of their responsibilities, they should advise the Chief Minister.
- 3.3 **Lobby groups** - Ministers are to declare their involvement in lobby and stakeholder groups and other non-public organisations whose objectives may conflict with Government policy, or which may be seeking to influence Government policy.
- 3.4 **Directorships and associations** - Except with the written approval of the Chief Minister, Ministers will on taking up office as a Minister resign or decline directorships of public or private companies and businesses. Approval to retain a directorship of a private company or business will be granted only if the Chief Minister is satisfied that no conflict of interest exists or is likely to arise. Ministers will resign from all positions held in business or professional associations or trade unions on taking up office as a Minister. Ministers shall not act as a consultant or adviser to any company, business or other interest, whether paid or unpaid, or provide assistance to any such body, except as may be appropriate in their official capacity as a Minister.

- 3.5 **Shareholdings** – Ministers must divest themselves and otherwise relinquish control of all shares and similar interests in any for-profit company. It is not sufficient for Ministers to divest their holdings to their partners however Ministers and their partners may transfer control to an outside professional nominee, a blind trust or other trust (e.g. managed fund) providing the Minister, their partner or immediate family exercises no control on the operation of the nominee or trust. Note this provision does not apply to property investments merely held as property.

4. MINISTERIAL RESPONSIBILITY FOR PROPOSALS AND CABINET DECISIONS

- 4.1 Cabinet considers policy proposals that are brought before it by a sponsoring Minister. Proposals may be sponsored by more than one Minister however, in cases where several Ministers have a significant interest in the subject matter, it is generally preferable for responsibility to be allocated to one (or at most two) key Ministers and for the interests of the others to be taken into account through consultation as the submission is being prepared.
- 4.2 Ministers are expected to take full responsibility for the proposals they bring forward, even though detailed development or drafting may have been done on their behalf by officials.
- 4.3 Ministers are responsible for ensuring that appropriate action is taken on Cabinet Decisions affecting their portfolios. Progress on Cabinet Decision implementation will be monitored through the Department of the Chief Minister and regular reports provided to Cabinet.

5. LEGAL ASSISTANCE FOR MINISTERS

- 5.1 It is a convention of government that Ministers should be indemnified by the Crown for any actions taken against them for things done or decisions made in the course of their Ministerial duties. The Crown normally gives such an indemnity to all its servants, and Ministers are servants of the Crown.
- 5.2 A Minister's entitlement to an indemnity is not absolute. There is generally a requirement that the Minister was acting in good faith, and this is a matter which would be taken into account in determining whether or not to extend an indemnity.
- 5.3 The Territory may, in certain circumstances, provide assistance to Ministers who consider they have been defamed in the course of their duties. In deciding whether to provide such assistance, the following principles shall be taken into account –
- a) Assistance is not to be provided for the personal benefit of Ministers, and
 - b) All proceedings by the Minister in question will be conducted with the utmost integrity together with regard to the public interest.
- 5.4 Ministers who consider they have been defamed in the course of their Ministerial duties may make application for legal assistance (in the form of costs) from the Territory Government. Applications for legal assistance shall be submitted to Cabinet for consideration.

6. RESPONSIBILITIES UNDER LEGISLATION

Ministers must be familiar with key legislation including the *Northern Territory (Self-Government) Act* (Cth), the *Legislative Assembly (Code of Conduct and Ethical Standards) Act*, and the *Legislative Assembly (Disclosure of Interests) Act*. Ministers are also to ensure they have a thorough understanding of the legislation for which they have portfolio responsibility.

7. ETHICAL PRINCIPLES FOR MINISTERS

- 7.1 **Integrity** – Ministers must act according to the highest standards of personal integrity and probity, and uphold the Northern Territory's system of responsible government.
- 7.2 **Honesty** - Ministers must act honestly at all times and be truthful in their statements.
- 7.3 **Diligence** – Ministers must be diligent to the performance of their duties and fulfil their obligations to the highest standards.
- 7.4 **Transparency** – Ministers must make their decisions and actions as open to scrutiny as is possible consistent with the conventions of responsible government.
- 7.5 **Accountability** – Ministers are accountable for their own behaviour and the decisions and actions of their staff. They are accountable, within accepted Westminster conventions, for their portfolios and agencies.
- 7.6 **Fairness** – Ministers must act fairly, and apply the principles of natural justice and observe relevant standards of procedural fairness in their decision-making. Their decisions should be unaffected by bias or irrelevant considerations.
- 7.7 **Respect** – Ministers must display respect for all people in their conduct. Ministers must treat others fairly, with sensitivity to their rights, entitlements and obligations. Ministers must not dishonestly or recklessly attack the reputation of any other person, including under parliamentary privilege.
- 7.8 **Responsibility** – Ministers must use the powers of office responsibly and in the interests of the people of the Northern Territory.
- 7.9 **Respect for the law and the administration of justice** – Ministers must respect and uphold the laws of the Northern Territory and of the Commonwealth as they relate to the Territory.

8. DURING TERM OF APPOINTMENT

- 8.1 **Change in circumstances** – Ministers must inform the Chief Minister of any changes in their personal circumstances as they arise, in particular, the loss or gain of any interests relevant to issues before Cabinet, or being a party of legal proceedings or other investigations.
- 8.2 **Respect for Parliament** – Ministers must not wilfully mislead parliament. If an error is identified, a Minister must correct the record as soon as possible. Ministers must ensure that their personal conduct does not bring the Legislative Assembly, the Government, or their position into disrepute, or adversely affect public confidence in the integrity of the Northern Territory's system of government.

- 8.3 **Administrative resources** – Ministers must use administrative resources appropriately and not permit public resources to be wasted or used in an improper manner.
- 8.4 **NT Public Sector** – Ministers must respect the impartiality of the public service and recognise and respect the role and functions of the NT Public Sector as set out in the *Public Sector Employment and Management Act* General Principles and Code of Conduct.
- 8.5 **Ministerial Staff** – Ministers must abide by their moral and legal obligations as an employer in dealing with their staff. Ministers must ensure staff are aware of their ethical and administrative obligations generally, and as set out in the *Statement of Standards for Ministerial Staff*.
- 8.6 **Lobbying** – Ministers must handle lobbying by business and other parties carefully and ensure their personal interests do not clash with or override their public duties.
- 8.7 **Gifts and benefits** – Ministers must not solicit, encourage or accept gifts, benefits or favours either for themselves or for another person in connection with performing or not performing their official duties as a Minister. Ministers may accept customary official gifts, tokens of appreciation and similar formal gestures, including some hospitality and entertainment at the discretion of the Chief Minister. The Government's Gift Policy for Ministers provides more detailed guidance on this matter.
- 8.8 **Improper advantage** – Ministers are not to use their position improperly to gain a direct or indirect personal advantage for themselves, or any other person or entity, not enjoyed by the general public. Ministers are not to use information obtained in the course of their official duties so as to gain a direct or indirect personal advantage for themselves or improperly for any other person or entity not enjoyed by the general public.
- 8.9 **Claims for entitlements** – Ministers must be scrupulous in ensuring the legitimacy and accuracy of any claim for the payment of any Ministerial, parliamentary or other allowance.

9. POST-MINISTERIAL EMPLOYMENT

- 9.1 **Return of public property/papers** – On leaving office, Ministers must return all government documents and resources that were provided to assist in fulfilling their duties as a Minister.
- 9.2 **Information obtained in the course of official duties** – Ministers must not disclose information obtained in the course of their official duties on leaving office. Any information that is not in the public domain must not be used to their own or another's advantage. Ministers must also be mindful of obligations created under privacy legislation in relation to personal information.
- 9.3 **Future employment and conflicts** – Ministers in the NT Government are likely to hold multiple portfolios covering a very broad range of responsibilities including in areas which would, elsewhere in Australia, be municipal responsibilities. On leaving office, Ministers should be conscious of the potential for allegations of conflict of interest or controversy to arise in the event that they take up other employment in an area over which they have held ministerial responsibility.

In particular, former Ministers should consider the likelihood of there being an appearance of their gaining personal financial or other benefits from knowledge gained while they were a Minister, or opportunities for criticism of their misusing contacts made in that role for their personal gain. The extent to which the proposed employer has a contractual or other financial relationship with the NT Government will be a relevant consideration in former Ministers reaching a decision on an appropriate course of action. In deciding to accept a particular offer of post-ministerial employment, former Ministers should be mindful of their standing in the community, and continuing responsibility to uphold public confidence in the Northern Territory's system of government.

