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29 September 2017

Ms Ngaree Ah Kit MLA  
Chair  
Social Policy Scrutiny Committee  
Legislative Assembly of the Northern Territory

By email: SPSC@nt.gov.au

Dear Ms Ah Kit

**Re: Call for submissions – Independent Commissioner Against Corruption Bill**

Thank you for your letter of 31 August 2017 in which you invited me to provide my comments and feedback on the *Independent Commissioner Against Corruption Bill (NT)* (the Bill).

The comments which follow are general observations and I acknowledge that each State and Territory legislature will shape its integrity architecture to fit its own unique political and historical environment.

There are six topics which I shall address. There are a number of other matters that could be addressed but time does not presently allow me to do so and I shall confine myself to the more important matters.

**Jurisdiction**

The Bill establishes an Independent Commissioner Against Corruption (ICAC (NT)): Clause 17. The principal function for the ICAC (NT) is to identify and investigate improper conduct: Clause 18.

The ICAC (NT) has other functions including preventing detecting and responding to improper conduct; overseeing referral agencies; and protecting persons who have assisted or may assist in detecting, preventing, investigating or otherwise responding to improper conduct: Clause 18. However these other functions, whilst of course important, are subordinate to the principal function of identifying and investigating improper conduct.

The Bill structures the jurisdiction for the ICAC (NT) around investigation of five kinds of conduct which is described as “improper conduct”: corrupt conduct; misconduct; unsatisfactory conduct; anti-democratic conduct; and conduct constituting an offence against the Act: Clause 9.

They are quite different kinds of conduct and they vary of course in seriousness.

Each of those kinds of conduct are defined in a complex manner.

For example, “corrupt conduct” can be constituted by various kinds of conduct defined in four separate categories: Clause 10. It is not limited to criminal conduct: Clause 10(2) and 10(3).

One of those categories relates to conduct engaged in by a public officer which would commonly be regarded as a subcategory of misconduct by a public officer: clause 10(2).

Another is conduct engaged in by a public body, a minister, a parliamentarian or a local councillor which is connected to public affairs and that involves a "serious breach of trust" by that person or body: clause 10(3) of the Bill.

Yet another relates to conduct of particular types engaged in by a corporate or natural person which "could impair public confidence in public administration": clause 10(4) of the Bill.

The phrase "connected to public affairs" has its own relatively complex tripartite definition (clause 4), as does "breach of trust".

The other types of 'improper conduct' are also the subject of very complex definitions.

I assume this complex system for defining 'improper conduct' is designed to bring a very wide range of inappropriate conduct within the jurisdiction of the ICAC (NT) so that it might be identified and investigated in accordance with the powers to be given to the ICAC (NT) under the Bill.

The ICAC (NT) therefore would have very wide and diverse responsibilities because of the definition of 'improper conduct'.

The complexities created by these definitions may also have the unintended effect of discouraging and delaying the prompt reporting of improper conduct by public bodies and public officers, whether reporting voluntarily or pursuant to an obligation imposed under clause 22 of the Bill.

In South Australia, all inquiry agencies, public authorities and public officers are obliged to report conduct which they reasonably suspect involves corruption or serious or systemic misconduct or maladministration in public administration. Corruption in public administration in the *Independent Commissioner Against Corruption Act 2013 (SA)* (the ICAC Act (SA)) is defined by reference to criminal conduct: Section 5(i) ICAC Act (SA). Misconduct and maladministration are narrowly defined compared with the Bill. For example misconduct is limited in the main to conduct that would contravene a Code of Conduct that could give rise to a disciplinary process: Section 5(2) ICAC Act SA.

I had the statutory obligations to impose reporting obligations on inquiry agencies, public authorities and public officers to ensure all relevant suspicions are promptly brought to my attention: Section 20 ICAC Act (SA).

In large part I rely on reports from public officers pursuant to their statutory obligation to alert me to the matters that I should investigate.

In my experience, some public authorities and public officers have delayed reporting matters to the Office for Public Integrity (OPI), which is the body to which reports are to be made, in order to obtain legal advice as to whether a reporting obligation has arisen. I have commented previously on the undesirability of such a course being taken because in my experience matters may be more effectively investigated when a report is timely.

If the comparatively simple jurisdictional tests in the ICAC Act (SA) are capable of causing uncertainty and delay, I would expect the complex jurisdictional tests proposed by the Bill, and any reporting obligations which flow from clause 22 will cause even more significant uncertainty and delay.

This Committee might consider whether the complex and wide-ranging definition of 'improper conduct' in the Bill may have the unintentional consequence of delaying or hindering reports by public officers.

## **The Bill's compulsive powers are not scaled to the gravity of the matter being investigated**

In the ICAC Act (SA), the coercive powers given by the ICAC Act (SA) are only available to me for the purposes of an investigation into corruption in public administration. As I have said the definition of corruption in the ICAC Act (SA) means that the suspected conduct is criminal conduct that has been committed in the large part while a public officer is discharging the public officers' duties.

For example, warrants to search premises and to obtain evidence may only be issued by me or by a judge of the Supreme Court of South Australia for the purposes of an investigation into a potential issue of corruption in public administration.

My power to examine a witness on oath or affirmation is only available to me or my examiner for the purposes of an investigation into a potential issue of corruption in public administration. If I exercise the examination power the witness cannot decline to answer a question on the ground that the answer might tend to incriminate the witness. There is a similar provision in Schedule 2 of the ICAC Act (SA) to Clause 80 in the Bill.

The Bill provides for the exercise of intrusive coercive powers for any investigation into "improper conduct" which includes not only criminal conduct but also misconduct matters and even unsatisfactory conduct matters arising from negligence.

It is a significant step for powers that have traditionally been reserved for serious criminal investigations, and even powers that go beyond traditional criminal investigation powers such as the power to compulsorily examine a person, to be used or to be available for the investigation of a matter which is not criminal in nature and indeed might only be low level misconduct.

Under the Bill a justice of the peace who considers an application for a search warrant has a discretion to refuse an application but the Bill does not identify the circumstances in which the decision to refuse might arise: Clause 67. One test that might be considered is whether the exercise of the power is proportionate to the gravity of the matter under investigation.

I understand that Northern Territory has a number of justices of the peace which include judicial officers at various levels who are deemed to be justices of the peace by the *Justices of the Peace Act*.

Apart from the judicial officers legal qualifications are not a prerequisite for appointment as a justice of the peace.

As I have said this Bill allows very serious powers to be used for investigation into less serious matters. The exercise of serious powers that are available for the investigation of less serious matters will be considered by decision makers who may not have the legal knowledge and experience to exercise the discretion which arises in clause 67(3) of the Bill.

An application for a warrant might be made to a judicial officer, who is deemed to be a justice of the peace, but that is not a safeguard against a disproportionate use of power because the decision to whom the application should be brought rests wholly in the hands of the applicant.

The Committee might consider whether as a matter of policy the Bill gives sufficient weight and respect to the liberties of those potentially affected by the use of powers under the Bill and whether the most intrusive powers should be reserved for those matters where an abrogation of rights and liberties is warranted because of the seriousness of the matters being investigated.

## **The type of hearing dictates whether or not there will be a public report**

The ICAC (NT) has no power to prosecute under this Bill.

If the ICAC (NT) becomes aware or commences an investigation into a matter that involves criminal conduct the ICAC (NT) may either refer that matter to the Commissioner of Police or another law enforcement agency having jurisdiction to investigate the offence or if the ICAC (NT) has completed the investigation refer the matter to the Director Of Public Prosecutions (DPP) for prosecution if it is suspected that a criminal offence has been identified: Clause 25(5) and Clause 25(6).

Clause 50 applies "following an investigation". In that later Clause the ICAC (NT) may provide a brief of evidence to a law enforcement agency for the purpose of prosecuting a person for an offence: Clause 50(a). A law enforcement agency includes the DPP: Clause 4.

Clause 59 provides that for an examination or public inquiry the ICAC (NT) is not bound by rules of evidence.

The Bill provides that the ICAC (NT) may conduct hearings by requiring a person to attend for examination: clause 34 (incidentally there is a typo in clause 34(1). I think the word "for" has been omitted before the words "the ICAC").

Clause 35 requires the examination to be held in private.

Division 6 of Part 3 permits the ICAC (NT) to hold public enquiries. Those enquiries must be something other than an examination under clause 34.

A public inquiry cannot simply be an examination in public because that would contradict Clause 35.

It might be argued the public inquiry cannot be held for an investigation because Clause 34 provides a regime for an examination in an investigation.

The Bill however gives no help to ICAC (NT) as to when he or she should exercise the powers in Division 6.

However Clause 41 applies the mandatory provisions in Clause 34 as if a public inquiry were an examination.

There are no obligations imposed upon the ICAC (NT) in relation to a public enquiry except the obligation to accord natural justice to a person or body who might be the subject of adverse findings on the subject matter of the public enquiry: Clause 43.

This obligation reinforces the proposition that a public inquiry is not simply an examination in public. There is no obligation on ICAC (NT) when investigating improper conduct by conducting an examination in private to accord a person who is suspected of committing that improper conduct procedural fairness.

The manner in which the ICAC (NT) must accord natural justice is identified in clause 43(2).

There is an obligation imposed upon ICAC (NT) to make a public enquiry report if the ICAC holds a public enquiry: clause 51.

Again a protection is offered to persons who might be subject to adverse findings in clause 51(2) by requiring the ICAC (NT) to provide that person with natural justice.

Whilst the ICAC (NT) must make a report after holding a public inquiry the ICAC (NT) must not make a finding as to whether a person has committed or is committing or is about to commit an offence or a breach of discipline: Clause 51(4). That is consistent with the common law.

However that would suggest the ICAC (NT) can conduct a public enquiry into allegations of criminal conduct but cannot make findings in relation to those allegations. That creates a further tension with the examination provisions in Clause 34 'for an investigation'.

It follows that the most serious matters that might be the subject of a public enquiry are not matters upon which the ICAC (NT) can pass an opinion: Clause 51(4).

Because the ICAC (NT) cannot pass an opinion in relation to whether a person has committed a criminal offence or engaged in a breach of discipline the ICAC (NT) is not obliged to provide procedural fairness to that person because clause 51(3) is only engaged when a finding is to be made whether a person has engaged in proper conduct.

Therefore it follows that a person could be the subject of a public enquiry which enquires into whether or not that person has engaged in criminal conduct or committed a breach of discipline and be the subject of public allegations but have no right to be heard in relation to those allegations. All of that could occur in circumstances where ICAC (NT) is not bound by the rules of evidence: Clause 59.

The reputational harm that a person would suffer in those circumstances could be substantial and may be irreparable.

In my view where a body is primarily an investigative body it is not appropriate to conduct that investigation in public.

If however the body is constituted for the purpose of making a determination as to whether particular conduct other than criminal conduct has occurred then it would be appropriate in my opinion to allow that body to conduct its investigation and its hearings in public.

The distinction is critical and depends upon the function which is to be performed by the body. The distinction is not clear in this Bill.

### **Other Reports**

Apart from a public inquiry report the Bill provides in Division 7 of Part 3 that ICAC (NT) may also make a general report in relation to the matters mentioned in clause 47(1) which might address systemic issues that ICAC (NT) has identified in one or more public bodies in relation to improper conduct: clause 47(1)(b).

That general report must be made to a public body or public officer that the ICAC (NT) considers would be assisted by the report or the Speaker.

The ICAC (NT) may also make an investigation report on an investigation to a responsible authority for a public body or public officer whose conduct is the subject of the investigation.

If the ICAC (NT) proposes to make adverse findings in an investigation report the ICAC (NT) must provide the person or body who might suffer from an adverse finding procedural fairness.

The investigation report may be provided to the Speaker.

An investigation report could of course include a report on an investigation into conduct that is criminal conduct.

Because of the provisions of clause 49(2) it would mean that the person of interest in the investigation would need to be accorded procedural fairness.

That would seem to contradict the earlier provisions in the Bill and would be a most unusual result for an investigation into criminal conduct.

The police in investigating criminal conduct have no obligation to accord the suspect procedural fairness. Of course nor do they write reports.

The other unusual feature of clause 49 is that it apparently allows the ICAC (NT) to make a finding that a person has committed a criminal offence which would be contrary to the common law.

The ICAC (NT) may as an alternative to providing a general report or an investigation report provide a brief of evidence to a law enforcement agency for the purpose of investigating or prosecuting a person for an offence or to a public body or public officer for the purpose of investigating whether disciplinary action should be taken, or taking disciplinary action, against a public officer.

There seems to be no discrimination between the law enforcement agency which might investigate a matter that is referred by ICAC (NT) or a law enforcement agency prosecuting a person but because of the definition of law enforcement agency it would be supposed that ICAC (NT) would target the appropriate authority depending upon whether it is an investigation or prosecution.

I think the reports that may be made and have to be made in Division 7 of Part 3 may lead to confusion in the manner in which ICAC (NT) deals with investigations into criminal conduct.

In my opinion there should be a clear distinction between the way in which investigations into criminal conduct proceed and those investigations into other improper conduct such as misconduct or maladministration.

There is no attempt in this bill to distinguish between the different types of conduct.

### **Publication of Reports**

There is another difficulty in relation to the publication of reports.

Clause 58(2) provides that a report, which includes a public inquiry report and an investigation report must not contain any material that would not be admissible in civil criminal or disciplinary proceedings because of clause 81, unless the material is already in the public domain.

Clause 81 is engaged where a representation is made by a witness that would tend to incriminate that witness.

If the ICAC (NT) conducts a public inquiry and does not elect to take the evidence of a witness in private as may be done under clause 46 or make a direction prohibiting or restricting the publication of information that would enable a witness or person or body appearing to be identified, or contacted, or an order prohibiting or restricting the publication of evidence given at the inquiry, then the evidence of the witness will be made public.

In those circumstances the prohibition in clause 58 that a report must not contain any material that would not be admissible in civil, criminal or disciplinary proceedings because of section 81 unless the material was already in the public domain would not be engaged.

In other words if the ICAC (NT) proceeds to conduct a public inquiry in public then the ICAC (NT) may include in the ICAC (NT)'s public inquiry report the evidence of a witness which would otherwise be inadmissible because of the provisions of clause 81 of the Bill.

### **The legislative language used in the second limb of the direct use immunity may be productive of uncertainty and litigation**

Clause 80 of the Bill has the effect of abrogating the common law privilege against self-incrimination. At common law a person cannot be compelled to answer a question on oath if the answer to that question might tend to incriminate that person. Also at common law a person may remain silent when interrogated by a police officer.

So for example if the ICAC (NT) examined a person about a criminal matter in which that person was peripherally involved in order to obtain evidence or information about the actions of a person more centrally involved, the examinee would not be entitled to refuse to answer the question on the ground that the answer might incriminate the witness, except in two circumstances which I will outline.

The common law privilege would not be abrogated by the Bill and the witness would be entitled to decline to answer questions at an examination if the witness was "charged with ... an offence", or if the witness was "facing criminal proceedings ... for an offence": clause 80(2) of the Bill.

I think that it is well understood what "charged with ... an offence" means. There is a readily identifiable point in every criminal matter which proceeds to court where the person who has been under investigation is told by police that that person has been charged or the person is made the subject of charges on an information, indictment or complaint.

It is not so obvious what "facing criminal proceedings ... for an offence" means, and the phrase is not defined in the Bill. It must mean an event which precedes the person being charged because the Bill identifies that event. It is difficult to envisage the point at which a person may be facing criminal proceedings before that person is charged.

I consider that unless the phrase "facing criminal proceedings ... for an offence" is defined or removed it may bring uncertainty to the prosecution of some criminal matters arising out of investigations conducted by an ICAC (NT).

The Committee might consider whether the phrase "facing criminal proceedings ... for an offence" should be removed from the Bill or defined in a clear manner.

### **The whistleblower privileges are complex**

Part 6 of the Bill deals with whistleblower protection.

A protected person is defined by reference to a person taking protected action which is determined by reference to whether or not that person has made a protected communication: clause 91.

Any person who makes a report in accordance with that person's obligation under clause 22 makes a protected communication and therefore is a protected person.

That seems to be appropriate.

Those persons would either be public bodies or public officers because they are the persons who would be the subject of the directions provided for in clause 22(2).

However clause 92 also defines a protected communication to include any of the information contained in clause 92(2) which means that members of the public who make a report of the kind mentioned in clause 92(2) would be providing protected communications and would therefore be persons who have taken protected action.

I wonder whether the extent of the protection is too wide.

It is difficult to see how a member of the public would suffer discrimination or victimisation as a consequence of making a report to ICAC (NT).

The *Public Interest Disclosure Bill 2016* in South Australia limits whistleblower status to public officers except in circumstances where a report is made about environmental or health information.

I also wonder whether it is appropriate to empower the ICAC (NT) to make a declaration of the kind mentioned in clause 93(1). A declaration of the kind that is envisaged in clause 93 would ordinarily be made by a court rather than by an administrative decision maker which the ICAC (NT) is.

Clause 93(4) sets out the procedure that might be adopted where an application for such an declaration is made and clause 93(6) particularly provides that the rules of natural justice do not apply where compliance with the rules would be likely to reveal the identity of a protected person or otherwise put a protected person at increased risk of retaliation or involve a risk that the individual who took the action would suffer retaliation before the declaration is made.

For my part I think the power that is given to the ICAC (NT) in clause 93 ought to be reserved for the courts.

**Invitation to give evidence at a hearing**

I note that the Committee intends to hold public hearings for its inquiry in Darwin on Monday 9 October 2017. If the Committee wishes me to attend, and arrangements can be made, I will make myself available.

If I can be of any further assistance to the Committee, please do not hesitate to ask.

Yours faithfully

A handwritten signature in blue ink that reads "Bruce Lander". The signature is written in a cursive style with a large initial 'B'.

The Hon. Bruce Lander QC  
**INDEPENDENT COMMISSIONER AGAINST CORRUPTION**